CITATION: 2089322 Ontario Corporation v. DesRoches, 2023 ONSC 1681
COURT FILE NO.: CV-07-201
DATE: 2023-03-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
2089322 Ontario Corporation	)	Nicholas Macos and Christina El-Azzi, for the Applicants
Applicant	)	
– and –	)	
	)	Christopher J. Sparling, for the Respondent, Luc DesRoches
Luc W. DesRoches and Rezmart Gas and Tobacco	)	
Respondents	)	
	)	**HEARD in Parry Sound:**
	)	September 27-28, 2021; October 4-5, 2021;
	)	November 1-2, 2021; December 2-3, 2021;
	)	April 26, 2022

DECISION ON APPLICATION

CULLIN, J.

Overview

[1] In or about February 2006, 2089322 Ontario Corporation (the "applicant") signed a written agreement (the "JVA") with Luc DesRoches, Nicole DesRoches, and Rezmart Gas and Tobacco to facilitate the establishment, operation, and management of a convenience store and gas bar ("Rezmart") on the Wasauksing First Nation ("WFN") reserve.

[2] The JVA has been an unhappy arrangement from its early days. The applicant takes the position that the JVA is a binding and enforceable joint venture agreement. Luc DesRoches (the "respondent") disagrees. These differences culminated in this application, in which the applicant seeks a determination of its rights under the JVA.

[3] Presently, the application involves the applicant and the respondent. Rezmart is a sole proprietorship owned by Luc DesRoches. The application was dismissed as against Nicole DesRoches pursuant to the Endorsement of Justice Koke dated April 27, 2018; that decision was not appealed by the applicant or the respondent.

[4] As this application has progressed, an issue has arisen regarding the authenticity of the respondent's initials on some pages of the JVA. An issue has also arisen regarding the impact of s.28 of the *Indian Act*, R.S.C. 1985 c.I-5 on the JVA's enforceability. These are the issues which the court has been asked to resolve at this stage of the parties' application.

Summary of the Facts

[5] I will restrict myself to a summary review of the chronology affecting the JVA. Further details will be discussed as necessary in addressing particular issues.

[6] Wasausink Lands Inc. ("WLI") is a not-for-profit corporation which operates in the Parry Sound region. Its mandate is to foster the economic development of the members of WFN. Historically, WLI provided start-up loans to WFN members and working capital loans to existing WFN businesses.

[7] In August 2005, the respondent approached WLI seeking their support to open Rezmart, a gas station and convenience store which was to be located on the WFN reserve (the "Reserve"). He initially requested a personal business loan from WLI, which they denied because: (1) it was a larger sum than they had historically advanced to individual borrowers; and (2) the respondent was unknown to the members of WLI's Board of Directors.

[8] While WLI denied the loan request, they did propose an alternate funding arrangement. They advised the respondent that they were prepared to enter into a joint venture agreement with him. This arrangement, they said, would permit them to have input into the development of Rezmart and the management of its finances. The respondent agreed to explore this option and negotiations ensued involving the respondent, his sister Nicole DesRoches, and members of the WLI Board of Directors. WLI was assisted by Richard Lightbown, a business consultant.

[9] On or about September 17, 2005, WLI and the respondent signed a Letter of Intent (the "LOI") which described the construction of Rezmart, the assistance that WLI would provide to support the construction, and the intention of the parties to enter into a joint venture agreement.

[10] It is undisputed that WLI fulfilled its obligations pursuant to the LOI.

[11] In November 2005, the parties produced and signed a Terms and Conditions document, dated November 15, 2005 (the "T&C"), which was intended to form the framework for the JVA. The T&C was signed by Russell Tabobandung and Leslie Tabobandung on behalf of WLI and by Luc DesRoches and Nicole DesRoches ("the DesRoches"). It provided that WLI and the DesRoches agreed to execute a joint venture agreement prior to completing their respective investments into Rezmart.

[12] After the execution of the T&C, a management committee was formed to oversee the Rezmart project. The committee consisted of Russell Tabobandung and Leslie Tabobandung on behalf of WLI and the DesRoches. In December 2005, WLI appointed Marlene Monroe to act as its controller for the project. During the months that followed, WLI and the DesRoches participated in management committee meetings to review progress, to negotiate the terms of the JVA, and to allocate funds for the project.

[13] Also in furtherance of the T&C, a business chequing account was opened for Rezmart at Scotiabank in Parry Sound. Marlene Monroe and the respondent attended at Scotiabank to sign the documents to open the account.

[14] A draft joint venture agreement was prepared by Brian Iler, a lawyer acting on behalf of WLI. He encouraged WLI to use a subsidiary numbered company to protect its interests; the applicant, 2089322 Ontario Corporation, was subsequently incorporated.

[15] Sometime after December 19, 2005, the management committee met to sign the JVA. There is debate about where and when that meeting took place. During the meeting, the term "manager" at paragraphs 2.1(i) and 6.3(d) of the JVA was changed to "operator" at the request of the respondent and with the consent of the applicant; those changes were initialled. It is undisputed that, at some point that day, the respondents added the words, "Without Prejudice U.C.C. 1-207" beside their signatures at the end of the document. That amended document shall hereafter be referred to as JVA1.

[16] What occurred after the parties signed JVA1 is also in dispute. It is the applicant's position that, after the meeting, JVA1 was provided to Brian Iler, who advised them that the "Without Prejudice" notation needed to be redacted from the document. The applicant alleges that it contacted the DesRoches and advised them that they were required to return to the WLI office for this purpose; only the respondent attended. The applicant alleges that the respondent redacted the words, "Without Prejudice U.C.C. 1-207" from JVA1 and initialled next to the redaction. It also alleges that he initialled page 1 of the document, next to the handwritten date of February 3, 2006. The redacted document shall hereafter be referred to as JVA2.

[17] The respondent denies that he redacted or initialled JVA2. It is his position that JVA1 represents the agreement between the parties.

Procedural History

[18] The Notice of Application in this matter was issued on July 27, 2007. The applicant sought a determination of the parties' rights under the JVA, as well as an interim and permanent injunction pertaining to the possession, operation, and control of Rezmart. The JVA filed as evidence in the Application Record was JVA1.

[19] At the initial return date of the application on August 2, 2007, the DesRoches sought an adjournment to retain counsel. The endorsement indicates that they were alleging defaults of the JVA by the applicant, as well as concerns about process under the *Indian Act*. The adjournment was granted, and the DesRoches were ordered to provide disclosure regarding the finances and operations of Rezmart.

[20] The litigation became dormant. It was revived on May 19, 2017, when the applicant filed a Notice of Change of Lawyer and a Supplementary Application Record.

[21] On June 19, 2017, the matter appeared before Justice Koke. It was noted that the DesRoches had not complied with the previous order for financial disclosure; a further disclosure order was made.

[22] On March 12, 2018, the matter appeared before Justice Cornell for a hearing of the application. The day before the hearing, the DesRoches filed affidavit evidence for the first time responding to the application. In their evidence, they alleged that the JVA was entered into under protest, which they confirmed by adding the "Without Prejudice" notation when they signed JVA1. Neither made any reference to JVA2. The hearing did not proceed.

[23] On April 19, 2018, the matter appeared before Justice Koke for a hearing. Immediately prior to that hearing, the applicant filed a copy of JVA2 as evidence. Justice Koke accepted JVA2 as the final version of the JVA and he made orders including the following: that the JVA was not enforceable against Nicole DesRoches and that the application against her was dismissed; that the JVA was enforceable against the respondent; that an interim injunction was granted restraining the respondent from remaining in possession and control of Rezmart; and, that the applicant was granted interim possession and control of Rezmart.

[24] On May 25, 2018 the respondent brought a motion seeking to stay the interim injunction. This request was denied by Justice Koke, who instead granted relief with respect to the interim transition of Rezmart to the applicant.

[25] On October 1, 2018, the matter appeared before Justice Koke for a further hearing. The respondent argued that the interim injunction should be suspended pending a forensic examination of JVA2 because the redactions to JVA2 had occurred without his knowledge or consent. The applicant opposed the respondent's motion and asked the court to grant an order permitting the disposition of Rezmart either by winding up or sale. The applicant also requested that the court impose a penalty in response to the respondent's contempt.

[26] Justice Koke denied the respondent's motion to suspend the interim injunction pending a forensic examination of JVA2. He found that JVA2 had not been fraudulently altered. The applicant was permitted to proceed with either the sale or the winding up of Rezmart and the respondent was required to pay $6,000 into court as a penalty for his contempt.

[27] The respondent appealed Justice Koke's Order of October 1, 2018. On May 2, 2019, the Court of Appeal set aside Justice Koke's order, except for the penalty for contempt and the costs of the motion. The Court of Appeal ordered that the applicant shall continue to have interim possession of Rezmart, and that the respondent is permitted to challenge the authenticity of JVA2, as well as its enforceability in light of s. 28 of the *Indian Act*: see *2089322 Ontario Corporation v. Des Roches,* 2019 ONCA 355.

Issues to be Determined

[28] The issues to be determined in this hearing are:

Issue One:	Who bears the onus to prove or disprove the authenticity of JVA2?
Issue Two:	Which document is the authentic, original JVA between the parties – JVA1 or JVA2?
Issue Three:	What is the impact of s. 28 of the *Indian Act* on the enforceability of the JVA?

Analysis

Issue One: Who bears the onus to prove or disprove the authenticity of JVA2?

[29] Each party argues that the other bears the onus to satisfy the court of their respective positions regarding JVA2. Both agree that the burden of proof is the civil burden of proof; that is, proof on a balance of probabilities.

[30] The applicant argues that, since the respondent has raised the spectre of fraud and forgery, the court should require him not only to prove that allegation, but to prove it with a high degree of probability. In support of its position, the applicant relies upon the decision in *Hill v. Hill*, 2012 ONSC 5855, at para. 32, where Wilcox J. observed:

> Regarding the Respondent's allegations that the receipts are fraudulent, the onus is on him to prove that, clearly and distinctly. (Wilson v. Suburban Estates Co. 1913 CarswellOnt 400, 24 O.W.R. 825, 40 W.N. at 1488 Ontario Supreme Court (High Court of Justice). In civil cases, where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect, the court will require a high degree of probability. (Continental Insurance Co. v. Dalton Cartage Co. [1982] 1 S.C.R. 164.) As indicated, the court finds that the Respondent has failed to meet this standard.

[31] *Hill* was an application to enforce an agreement between a son and his deceased mother. The estate trustee alleged that receipts verifying payments made by the son under the agreement were fraudulent. The record before the court included evidence of a neighbour of the deceased who had witnessed her signing receipts, as well as an expert handwriting analyst who supported their authenticity. At para. 31 of the decision, Wilcox J. noted:

> The existence of the Agreement itself is not an issue. The receipts, the report of the CFS, the affidavit of Sharon West and the lack of evidence to the contrary, in addition to the evidence of the Applicant, are satisfactory proof that the Applicant paid $81,000 under the Agreement's buyout provision, and would have made the final $9,000 payment had the Respondent accepted it.

[32] In my view, the decision in *Hill* does not support an argument that the onus rests solely on the party alleging fraud or forgery. It is clear that, before looking to the estate trustee to prove fraud, the court was first satisfied that the receipts (among other things) were “satisfactory proof” of payment. In other words the son, as the party relying upon the receipts, also bore a threshold evidentiary burden.

[33] The respondent provided no case law in support of his position that the burden of proof rests solely with the applicant. In argument, he attempted to distance himself from the allegation of forgery (and, in my view, its associated burden of proof) by submitting that he had, “not accused

anyone". Instead, he submitted, there is a "necessary inference" of forgery if the court accepts the respondent's evidence that he did not initial JVA2.

[34] Respectfully, this is not an accurate summary of the position advanced by the respondent. Although the respondent did not name a culprit in his evidence, he explicitly stated both in his oral and affidavit evidence, that his initials were "forged" on JVA2. During the cross-examination of Marlene Monroe, the respondent's counsel suggested that Ms. Monroe or Richard Lightbown had redacted JVA2. It is difficult to imagine that the burden of proof would rest solely upon the applicant to disprove such serious allegations of misconduct.

[35] In *Somerville National Leasing and Rentals Ltd. v. Vassileva*, 2019 ONSC 2693 at paras. 11-12, Faieta J. endorsed the following approach in the face of an allegation of forgery:

> [11] The following legal principles apply in determining whether the defendant signed the Lease:
>
> - "… [T]here is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.": *C. (R.) v. McDougall*, 2008 SCC 53, para. 40. Thus, where it is alleged that the defendant's signature on an instrument has been forged, the plaintiff must prove on the balance of probabilities that the defendant signed the instrument;
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> - A signature on an unattested document may be proved by:
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> - The writer;
>
> - A witness who saw the document being signed;
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> - An admission of the party against whom the document is tendered;
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> - A witness who has a general knowledge of the writing of the person whose signature or handwriting is sought to be proved;
>
> - A comparison of the disputed document with other documents proved to the satisfaction of the judge to be genuine: *R. v. Abdi*, 1997 CanLII 4448 (ON CA), [1997] O.J. No. 2651 (C.A.), paras. 22-25; *Batt v. Hilscher*, (1994), 1994 CanLII 9240 (AB KB), 19 Alta. L.R. (3d) 144, paras. 19-20;

> - Expert evidence pursuant to section 57 of the *Evidence Act*, R.S.O. 1990, chap. E.23, s. 57;
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> - Judicial notice of official signatures; and
>
> - Where a purported signature is deemed by statute to be the actual signature.
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> See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Fourth Edition, LexisNexis Canada Inc., 2014, para. 18.114.
>
> [12] A court may draw a negative inference when a party has failed to call expert evidence to prove or rebut forgery: *Lomas v. DiCecca* (1978), 1978 CanLII 1628 (ON SC), 20 O.R. (2d) 605 paras. 17-18. [Citations in original.]

[36] A similar approach was endorsed in *Toronto-Dominion Bank v. P.M.J. Holdings Limited et al.*, 2019 ONSC 7297, at para. 26, where the court found that a party seeking to rely upon a document had a burden to establish, "the *prima facie* authenticity of the document" before the court would embark upon an inquiry about the veracity of the signatures on that document.

[37] I find that the onus to prove the authenticity of JVA2 rests with the applicant as the party relying upon the document. I agree with the court in *P.M.J. Holdings Limited et al.* that the evidentiary threshold to be met by the applicant in proving authenticity is relatively low, and that it is only required to demonstrate *prima facie* authenticity.

[38] If the court is satisfied that the applicant has discharged its onus on a balance of probabilities, the burden then shifts to the respondent to prove forgery on a balance of probabilities. I find that the evidentiary threshold to be met by the respondent is relatively high, and that he is required to demonstrate fraud or forgery to a high degree of probability.

Issue Two: Which document is the authentic, original JVA between the parties - JVA1 or JVA2?

The Evidence

[39] The court heard from Marlene Monroe and Graham Osprey on behalf of the applicant and Luc DesRoches, Nicole Smith, and Mark Gaudreau on behalf of the respondent. Graham Osprey and Mark Gaudreau were expert witnesses. The court also considered affidavit evidence from Warren Rapoport, a lawyer, sworn December 2, 2020 and Brian Iler, a lawyer, sworn December 4, 2020; the affidavit evidence came into the record on the consent of the parties.

Evidence of Marlene Monroe

[40] Marlene Monroe is a member of the WLI Board of Directors. She joined WLI as a corporate member in 2002. She was elected to the board at the beginning of 2005, and she has continued in that role since that time.

[41] Ms. Monroe described that WLI is a non-profit economic development corporation, established to foster the economic interests of the members of WFN on the Reserve. WLI is funded by the lease payments that it receives from lots that it holds on the Reserve. It allocates those funds to businesses and projects on the Reserve, including start-up business loans, working capital loans, youth grants, and other supports for community members.

[42] It was Ms. Monroe's evidence that she was WLI's controller for the Rezmart project. It was her role to ensure that WLI's allotments to Rezmart were properly approved by the board.

[43] Ms. Monroe testified that WLI was first approached by the respondent in mid-August 2005; he was seeking a personal business loan. Initially, his request was denied because the proposed loan exceeded the amount that WLI had historically advanced to individuals and their businesses, and WLI had no prior knowledge of or history with the respondent.

[44] Although WLI denied the respondent's request for a loan, Ms. Monroe testified that it did raise the option of a joint venture with him; this arrangement would allow WLI to have input into the respondent's business and its finances. It was Ms. Monroe's evidence that the respondent "whole-heartedly" agreed to a joint venture and that, to her knowledge, he did not express any dissatisfaction with the proposed arrangement.

[45] Ms. Monroe gave evidence regarding preliminary agreements and negotiations leading to the execution of the JVA. She testified that she was not involved in the transaction when the LOI and the T&C were signed; she became involved in December 2005.

[46] Ms. Monroe testified that she first attended a meeting with the respondent as a representative for WLI on December 12, 2005. That meeting involved a discussion about the JVA, including WLI's intention to incorporate a numbered company through which WLI could become involved in, but remain at arm's length from, the joint venture. That numbered company was subsequently incorporated on December 19, 2005 by Brian Iler.

[47] Ms. Munroe provided evidence regarding a subsequent meeting conducted on December 19, 2005. During that meeting, a draft version of the JVA was reviewed by the attendees. It was Ms. Monroe's evidence that the draft JVA was prepared by Mr. Iler.

[48] It was Ms. Monroe's evidence that one of the December 2005 meetings was conducted concurrently with the WLI annual Christmas party.

[49] It was Ms. Monroe's evidence that funds were being advanced to the respondent by WLI prior to signing the JVA. She testified that the funds were being advanced in good faith, on the strength of the preliminary agreements confirming that the respondent intended to enter into a joint venture with WLI. The amount of the funds advanced was not insignificant; by December 12, 2005, it totalled at least $60,000. A further $50,000 was advanced in February 2006.

[50] Ms. Monroe testified about a meeting conducted on February 3, 2006 at the Georgian Inn in Parry Sound. The purpose of the meeting was to sign the JVA. Ms. Monroe was present at that meeting, as were Russell Tabobandung, Richard Lightbown, and the Desroches. Members of the

WLI Board of Directors were in attendance at the Georgian Inn but were not present when the JVA was signed.

[51] It was Ms. Monroe's evidence that, during the meeting on February 3, 2006, some handwritten changes were made to the JVA. The date of the JVA was changed from December 2005 to February 3, 2006. The term "manager" was changed to "operator" in two places; those changes were made at the request of the respondent and were initialled during the meeting by Ms. Monroe, Mr. Tabobandung, and the DesRoches. The JVA was signed by the DesRoches during the meeting; their signatures were witnessed by Mr. Lightbown.

[52] It was Ms. Monroe's evidence that the words, "Without Prejudice" were not added to the JVA by the DesRoches during the meeting at the Georgian Inn.

[53] Ms. Monroe testified that, after the JVA was signed, she returned to the WLI office with the DesRoches and Mr. Lightbown to make photocopies of the JVA and to deliver a cheque to the respondent. While they were at the office, the DesRoches asked to review the JVA. It was Ms. Monroe's evidence that she was, "taken aback" to see the DesRoches add the "Without Prejudice" notation to the JVA. The DesRoches did not explain the purpose of their amendment. Although she found it, "a little strange", she testified that she did not do anything about what she had observed. It was her evidence that, although the office was a small space, no-one else present was aware of the DesRoches' amendments to the JVA.

[54] It was Ms. Monroe's evidence that, following the meeting on February 3, 2006, Mr. Lightbown delivered the original executed agreement, JVA1, to Mr. Iler, who was in Toronto. It was her understanding that Mr. Iler was unhappy about the "Without Prejudice" notation added to JVA1 by the DesRoches, and that he directed that it be redacted. A meeting was scheduled to take place at the WLI office approximately five weeks after the February 3, 2006 meeting. The DesRoches were asked to attend the meeting; the sole purpose of the meeting was the redaction of the "Without Prejudice" notation.

[55] It was Ms. Monroe's evidence that the respondent attended the meeting; Nicole DesRoches did not attend. She testified that she was present while Mr. Lightbown advised the respondent that, if the "Without Prejudice" notation was not redacted from JVA1, no further funds would be advanced to the respondent and the joint venture would be at an end. She observed the respondent redact the words "Without Prejudice" and initial next to the redaction. Following that meeting, Mr. Lightbown delivered the original redacted agreement, JVA2, to Mr. Iler.

[56] In cross-examination, Ms. Monroe was confronted with the fact that she had sworn affidavits identifying JVA1 as the final version of the JVA, and that she had failed to correct that evidence to disclose the existence of JVA2, even after the respondent served affidavits that referenced the "Without Prejudice" notation on JVA1 and alleged that JVA2 was not authentic and that it contained two forged initials. In response to this apparent inconsistency in her evidence, Ms. Monroe testified that she believed she would have an opportunity to testify about the respondent's redaction of the "Without Prejudice" notation at a future court hearing.

[57] Ms. Monroe was then confronted with statements that she made during a cross-examination on her affidavit evidence on March 26, 2018. During that cross-examination, she was asked if she recalled any discussion at the time JVA1 was signed regarding the "Without Prejudice" notation; she testified that she did not. She was then asked if she had an issue with the "Without Prejudice" notation on JVA1 at the time it was signed; she testified that she did not know what it meant, so it did not set off any red flags for her. She was asked if the "Without Prejudice" notation had been raised in later discussions amongst the applicant's Board; she testified that she did not recall any discussion about it. Her counsel during the cross-examination on her affidavit evidence indicated on the record that the respondents had been asked to re-sign the JVA to redact the "Without Prejudice" notation, but they refused.

[58] Ms. Monroe testified that she must not have understood the questions when they were asked and that she had no reason for failing to disclose her observations. She confirmed that she would have been aware in March 2018 that the "Without Prejudice" notation had been redacted from JVA1. She testified that she had time to think since the March 2018 cross-examination on her affidavit and insisted that she now had a very clear recollection of the respondent's redaction of the notation.

[59] Next, Ms. Monroe was confronted with her affidavit of August 22, 2019. In that affidavit, she stated that she witnessed the respondent redact and initial JVA2 on February 3, 2006 during a management meeting of the joint venture. It stated that, to the best of her recollection, original copies of JVA2 were subsequently provided to the respondent and to Mr. Iler, and that Mr. Iler's original copy of JVA2 was filed with the court as evidence at a hearing conducted on April 20, 2018.

[60] Ms. Monroe acknowledged during her testimony that this information was incorrect and reiterated her evidence that JVA2 had been redacted by the respondent five weeks after the February 3, 2006 meeting.

[61] Ms. Monroe was asked why neither she nor Mr. Lightbown had initialled next to the respondent's redactions on JVA2. It was her evidence that Mr. Iler did not request that she and Mr. Lightbown initial the redactions.

[62] Ms. Monroe was asked whether it was possible that the document signed by the respondent after the meeting of February 3, 2006 was something other than JVA2. It was suggested to her that she may have, in fact, observed the respondent sign a contract with Scribblers, dated April 5, 2006, for the development of a logo and branding for the respondent's tobacco product called "Warriors". Ms. Monroe was emphatic that it was not.

[63] Ms. Monroe testified about several documents which were produced to the expert witnesses as handwriting samples of the respondent. From her evidence, I understood that she had observed him sign or initial the documents to open a joint account at Bank of Nova Scotia and the authorization to issue funds to him for the purchase of bathroom fixtures. During cross-examination, she acknowledged that she had not personally observed the respondent sign or initial other documents, including employee time records, an invoice from Georgian Bay Propane, and an invoice for Northland Building Supplies.

[64] At times during her evidence, it was apparent that Ms. Monroe was angry and upset about the respondent's allegation of forgery and his position that there was no joint venture agreement between the parties. She was argumentative during cross-examination and on several occasions, she forcefully stated that she was telling the truth.

Affidavit Evidence of Warren Rapoport

[65] Warren Rapoport is a lawyer and was former counsel for the applicant. He participated in a hearing on April 19, 2018 before Justice Koke.

[66] Mr. Rapoport stated that he participated in a cross-examination of Marlene Monroe on March 26, 2018, at which time he undertook to produce the original JVA between the applicant and the DesRoches. Between March 27, 2018 and April 2, 2018, he communicated with Brian Iler's office about obtaining documents from their file that were required for the litigation; one of those documents was the original JVA.

[67] On April 18, 2018, just prior to leaving for Parry Sound for the hearing, Mr. Rapoport picked up the original JVA from Mr. Iler's office. It was in an envelope. He placed it in his briefcase and brought it to the courthouse the following day, where he showed it to the respondent and to counsel for Nicole DesRoches.

[68] Mr. Rapoport stated that he provided the original JVA to the court exactly as he had received it from Mr. Iler's office. He stated that he did not alter or amend it in any manner before filing it. He attached a copy of the JVA to his affidavit as an exhibit; it was JVA 2.

Affidavit Evidence of Brian Iler

[69] Brian Iler is a lawyer and was former counsel for the applicant. He provided legal advice to the applicant regarding the JVA.

[70] Mr. Iler stated that he received the T&C from the applicant on November 30, 2005 (his affidavit indicated 2015 but he subsequently corrected that evidence in a cross-examination). The T&C formed the basis for the JVA, which he drafted.

[71] Mr. Iler stated that, on February 8, 2006, he received a faxed copy of JVA1 from the applicant. In the cover letter accompanying JVA1, there was a note which indicated that copies of JVA1 were circulated to the parties, and which queried, "Does the "Without Prejudice" contaminate the accord?".

[72] Mr. Iler stated that, on the same day he received the fax, he prepared an email to Richard Lightbown advising him that the "Without Prejudice" notation was unacceptable. He directed that the respondent be requested to redact it and initial it. He received the original amended JVA in due course and placed it in his file.

[73] Mr. Iler stated that it was his practice to keep the original of any commercial agreement in his file for safekeeping. To the best of his knowledge, the original amended JVA was held in his client file in storage, untouched, from when he received it in or about February 2006 until he provided it to Mr. Rapoport on April 17, 2018.

Evidence of Luc Desroches

[74] The respondent, Luc Desroches, has been residing on the Reserve since 2004; he was born and raised in Toronto. He is a member of WFN; his mother is an elder from WFN.

[75] The respondent received a land grant from WFN in 2005 pursuant to a Band Council Resolution; the land was located at 3314 Deemeemguk, on the main road of the Reserve. This was land on which Rezmart was eventually located (the "granted land").

[76] The respondent described that, in the summer 2005, he began to develop the granted land to build Rezmart. He moved into a trailer on the granted land, and he was initially selling cigarettes from a van. He cleared trees in order to create space to build a storefront; it was his plan that Rezmart would consist of a convenience store, a gas station, and possibly a tobacco manufacturing facility. He wanted to develop a cigarette brand called Warriors.

[77] It was the respondent's evidence that, as the development of the granted land progressed, he purchased a Quonset hut and gas tanks, and he prepared a foundation for the building. Eventually, he required funds to continue with the project. In August 2005 he approached WLI for a loan; initially, he was seeking $50,000.

[78] The respondent testified that he did eventually receive funds from WLI. It was his recollection that he received $10,000 in August 2005, $50,000 in December 2005, $50,000 in February 2006, and $50,000 in May 2006. The funds received in August, December and February were for the construction of the Rezmart premises, and the remaining funds received were for, the "content", which I understood to be inventory.

[79] It was the respondent's evidence that, after meeting with the directors of WLI in August 2005, they agreed to provide him with a loan of $50,000. The day following the meeting, he was advised by Dora Tabobondung, one of the WLI directors, that he was required to meet with Richard Lightbown to discuss the terms of the loan.

[80] During cross-examination, the respondent confirmed that, when he approached WLI, all he was seeking was a loan. He wanted to retain control of his business. He acknowledged that WLI advised him that they were not prepared to loan him money, but that they were prepared to enter into a joint venture. He confirmed that he did not favour the proposed arrangement; he wanted to be self-sufficient.

[81] The respondent confirmed during cross-examination that WLI continued to advance funds to him for the construction of the Rezmart premises while he and WLI negotiated the terms of their arrangement with one another. He acknowledged that, if WLI did not have a joint venture agreement, it might stop providing funds to him.

[82] The respondent acknowledged in his evidence that he signed the LOI, dated September 17, 2005. It was his evidence that he read the LOI before signing it, and that he was comfortable signing it because it contained a term that, "there was no obligation to this letter of intent". During cross-examination, he acknowledged that the LOI stated that he had approached WLI to invest in the business, and that WLI had declared an interest in making that investment, with a view to entering into a joint venture agreement. It was his evidence that he was still hoping to secure a loan; he acknowledged that he did not seek an amendment to the LOI to confirm that he was continuing to pursue the option of a loan.

[83] The respondent acknowledged during cross-examination that he required funds from WLI to continue to develop Rezmart. He acknowledged that the parties agreed in the LOI to proceed in good faith. He confirmed that, after he signed the LOI, WLI provided the financial assistance that he required, and they otherwise observed the guidelines set out in the LOI. He also acknowledged that he observed the guidelines set out in the LOI but reiterated that he continued to want a loan and did not want to be bound to a joint venture agreement with WLI.

[84] It was the respondent's evidence that, after signing the LOI, his negotiation with WLI continued and eventually lead to him signing the T&C, dated November 15, 2005. It was his evidence that he read the T&C before signing it. He testified that, when he signed it, he added the words, "Without Prejudice" to ensure that the document would not be binding. He acknowledged during cross-examination that he also initialled a handwritten addendum regarding his investment of "sweat equity" into the business; he acknowledged that this change was made for his benefit.

[85] During cross-examination, the respondent acknowledged that, in the T&C, he and WLI agreed to execute a joint venture agreement prior to completing their respective investments in Rezmart. He acknowledged that he did not request any amendment to the T&C to remove the reference to the joint venture agreement, or to add the option of a loan agreement; instead, he testified, he was waiting to review a draft joint venture agreement. He acknowledged that he was advised to consult his own counsel, but that he did not do so.

[86] Next, the respondent testified about signing JVA1. He confirmed that he signed JVA1, and that he initialled amendments to paragraph 2.1(i) and 6.3(d). He also confirmed that he wrote the words, "Without Prejudice" above his signature. He was asked about the additional notation, "U.C.C. 1-207"; he testified that he could not recall why he included that notation, but that he believed he read about it in a book, and it was intended to protect him. During cross-examination, he testified that it was his intention not to be bound by JVA1, because he did not want a joint venture agreement. When asked if he told WLI what he meant by signing the document "Without Prejudice", he testified that he thought they understood his intention, and that it was his view that JVA1 was a draft.

[87] It was the respondent's evidence that he recalled signing JVA1 in December 2005. It was signed at a meeting in the winter, conducted at the Jolly Roger, a hotel on Highway 400. It was not a formal meeting, but rather it was conducted at the same time as a dinner; he recalled that there were Christmas decorations, and that the dinner was Christmas-themed.

[88] It was the respondent's evidence that Richard Lightbown was present when he signed JVA1. He recalled that the meeting was conducted in a room just outside of where the dinner was taking place. It was the first time that he had seen JVA1; he briefly reviewed it, and he was asked to sign it. He recalled that he had some reservations about JVA1 because there were terms in it that he did not understand. He also recalled that there was no numbered company identified on the first page of JVA1, but rather that WLI was identified as a party to the JVA.

[89] The respondent was asked whether he had any reason to question his recollection of the day that he signed JVA1. He acknowledged that he had the opportunity to review the affidavit and cross-examination transcript of Brian Iler, who provided evidence that he prepared the JVA on December 20, 2005, the day after he incorporated 2089322 Ontario Corporation. This evidence led the respondent to conclude that it was possible that his recollection was incorrect and that he signed JVA1 sometime in February 2006.

[90] On cross-examination, the respondent's recollection was further explored. He did not have a specific recollection of reviewing the draft JVA prior to signing it but he believed that he had seen one draft of a JVA during meetings with WLI in December 2005.

[91] The respondent's recollection that there was no reference to the numbered company on the first page of JVA1 when he signed it was also explored. He acknowledged that the numbered company was referenced on the second page of the JVA, in paragraph 2.1(i), immediately below where he had initialled the handwritten amendment substituting the word "operator" for the word "manager".

[92] The respondent was asked in cross-examination whether he had ever asked to change JVA1 from a joint venture agreement to a loan agreement. He acknowledged that he did not. It was his evidence that he did not receive a copy of JVA1 after it was signed, that he believed his negotiation with WLI was ongoing, and that he was waiting to receive a further draft JVA to consider his options.

[93] The respondent was questioned about JVA2. He denied that he initialled the document next to the handwritten date at the top of the first page. He denied that he removed the words, "Without Prejudice" above his signature at the end of the document, or that he initialled next to that amendment. On cross-examination, he denied that he was advised by Richard Lightbown that he was required to redact the words "Without Prejudice" from JVA1 or he would receive no further funds from WLI.

[94] The respondent was questioned about a Design Services Agreement between WLI and Scribblers' Club, signed April 5, 2006. He confirmed that the signature at the end of the document was his signature, and that he wrote the date on the document. It was his evidence that this document pertained to the development of the logo for the Warriors brand tobacco manufacturing venture. Although the Design Services Agreement was dated February 3, 2006, it was the respondent's evidence that he signed it on April 5, 2006.

[95] In cross-examination, the respondent was questioned about his practice for submitting invoices to WLI for payment. It was his evidence that he could not recall every invoice that he submitted, or whether he signed or initialled those invoices. He testified that if he had signed an invoice, there would be no need for him to initial it as well. With respect to the specific invoices provided to the parties' expert witnesses and verified by Ms. Monroe during her evidence, he acknowledged that the initials on those documents could have been his, but that he had no independent recollection of signing them. The respondent did verify his initials on a specimen sheet prepared for his expert witness, a series of Enterprise car receipts, receipts for Colabor and Summit, and a Scotiabank joint bank account document. He verified his signature on an employee time record, but denied that he had initialled it, he denied that he initialled an authorization to issue funds to him for the purchase of bathroom fixtures, an invoice from Georgian Bay Propane, and an invoice from Castle Building Centres (Northland Building Supplies). He denied that he had ever entered into an agreement with Active Energy.

[96] Mr. Desroches answered questions directly and confidently, even when those answers seemed to be contradicted by the documentary evidence that was being presented to him. He acknowledged shortcomings in his memory and accepted the affidavit evidence of Mr. Iler over his own evidence regarding the timeline for the execution of JVA1. He was combative in cross-examination during an exchange about whether he had repaid the funds advanced to him by WLI; he argued that he had made efforts to engage with WLI about repayment, but that his efforts had been rebuffed.

Evidence of Nicole Smith

[97] Nicole Smith is a member of WFN. In 2005 and 2006, she was employed as an executive secretary at WLI.

[98] Ms. Smith described that one of her duties was to manage the paperwork in the WLI office, including minutes for the Rezmart Management Committee. It was her evidence that those minutes were usually prepared by Richard Lightbown, that she would receive them in draft form, and that she would distribute them to the WLI Board of Directors and the Management Committee. She did not forward minutes to the respondent as it was her understanding that he would receive them in draft at the meetings, if he attended. Ms. Smith did not recall the respondent attending to see minutes at the WLI office outside of attending a meeting.

[99] Ms. Smith also testified that she was aware that a joint venture agreement was being negotiated between WLI and the respondent. The documents pertaining to the joint venture were not routinely filed by her; any documents pertaining to the joint venture were handled by Brian Iler or Mr. Lightbown.

[100] It was Ms. Smith's evidence that the original copy of the JVA was not retained in the files at the WLI office; it was her understanding that either Mr. Lightbown or Mr. Iler were in possession of the original copy of the JVA and an unsigned draft copy was kept in the safe at the WLI office.

[101] Ms. Smith testified that she was aware of an allegation that the JVA had been tampered with; it was her evidence that the respondent brought that allegation to her attention.

[102] Ms. Smith was not cross-examined.

Expert Witnesses

Evidence of Marc Gaudreau

[103] Marc Gaudreau was an expert witness called on behalf of the respondent. He produced a Forensic Report, dated December 1, 2019 and a Critique of Mr. G.P. Ospreay's Report, dated September 11, 2020. Mr. Gaudreau was qualified as an expert in Forensic Document Analysis.

[104] Mr. Gaudreau has worked as a forensic document examiner since 1983, working for agencies including the Royal Canadian Mounted Police, Canadian Security Intelligence Service and the Canadian Border Services Agency. Since August 2008, he has worked for the Canadian Bank Note Company and also as a private forensic consultant in the field of forensic document examination. He has training in forensic handwriting examination.

[105] Mr. Gaudreau was retained to examine the handwritten initials on the top of page 1 of JVA2, as well as the handwritten initials next to the respondent's signature on page 14 of JVA 2. He was asked to determine whether those initials were written by the same individual who prepared specimen material which was provided to him.

[106] Mr. Gaudreau's analysis compared the original handwritten initials on JVA2 to handwriting specimens acknowledged to be those of the respondent. The specimen material provided to Mr. Gaudreau included JVA1, the T&C, handwriting samples prepared specifically for Mr. Gaudreau's examination, and carbon copy handwriting samples on a series of Enterprise car rental agreements.

[107] Mr. Gaudreau acknowledged that he focused on three specimens for the purpose of his comparison, namely, the T&C and the two known initials on JVA2; he gave them more significance in his examination and analysis.

[108] Mr. Gaudreau conducted both a macroscopic and microscopic examination of the specimen and questioned materials. He conducted a spectral examination of JVA2. He examined the materials for observed similarities and divergences.

[109] Using the Scientific Working Group – Documents ("SWGDOC") Standard Terminology for Expressing Conclusions of Forensic Document Examiners, it was Mr. Gaudreau's opinion that the handwritten initials on pages 1 and 14 of JVA 2 were "probably not" executed by the writer of the specimen material that he examined. According to the SWGDOC Standard Terminology, this means:

> **Probably did not** - the evidence points rather strongly against the questioned and known writings having been written by the same individual, but, as in the probable range above, the evidence is not quite up to the "virtually certain" range. *Examples*

> - It has been concluded that the John Doe of the known material probably did not write the questioned material, or it is my opinion (or conclusion or determination) that the John Doe of the known material probably did not write the questioned material.

[110] Mr. Gaudreau acknowledged that there were some limitations to the comparison that he was able to conduct. The specimens that he reviewed were not contemporaneous with the questioned initials. Some of the specimen material provided was only available as a carbon copy, which could not be completely assessed for features such as pen pressure.

[111] Mr. Gaudreau also acknowledged that it was more challenging to conduct a handwriting analysis of initials, because it represented a more limited sample of an individual's writing habits.

[112] Mr. Gaudreau examined the handwriting for features including line quality, initial connecting and terminal strokes, pen lifts, pen pressure, punctuation, size and proportions, alignment, arrangement, and slope. Based upon this examination, he observed the following:

a. That the questioned initials exhibited features indicative of conscious execution.

b. The initial and terminal strokes of the questioned initials differed from the initial and terminal strokes in the specimens.

c. The downstroke on the "L" in the questioned initials differed in writing speed from the specimens.

d. The design of the "D" on the questioned initials differed from the specimens.

e. The downstroke and termination of the "D" in the questioned initials differed in writing speed from the specimens.

f. The placement of the period in the questioned initials differed from the specimens.

[113] Mr. Gaudreau acknowledged that there were some pictorial similarities between the questioned materials and the specimens that he examined. It was his evidence, however, that closer examination revealed differences that were attributable to subconscious writing habits, which he attributed as differences due to a different writer.

[114] Mr. Gaudreau testified about the difference between "copybook" and "non-copybook" letter formations. "Copybook", as I understood his evidence, are the letter formations that students learn in school, whereas "non-copybook" are the deviations that people adopt as they develop their own handwriting style. It was his observation that the questioned initials tended to be closer to "copybook" than "non-copybook", and that this was evidence of conscious execution by the writer.

[115] Mr. Gaudreau also reviewed the report of Mr. Ospreay, the expert retained by the applicant. His comments and observations included the following:

a. Mr. Ospreay did not appear to have used the known initials of the respondent on pages 2 and 6 of JVA2 for the purpose of conducting his analysis.

b. Mr. Ospreay observed what he described as both a "wide variation" and a "very wide variation" in the respondent's initials in the specimens provided to him to examine. There was nothing in his report to suggest that he considered whether the variation was so wide that he ought to have questioned their authorship, or whether he considered excluding some of the specimen materials.

c. Mr. Ospreay's opinion demonstrated a lack of attention to microscopic details of the handwriting samples. This resulted in an oversimplification in the comparison and an inadequate assessment of the physical evidence.

d. The strength of Mr. Ospreay's conclusion was not warranted. He did not acknowledge limitations to his examination, including the fact that the questioned material consisted of initials.

e. Mr. Ospreay's analysis regarding fundamental features in handwriting failed to acknowledge that some of the features that he referred to could be present when a writer attempts the imitate the handwriting of another.

f. He disagreed with the significance of Mr. Ospreay's indentations analysis.

[116] Mr. Gaudreau acknowledged on cross-examination that one of the significant differences in the analysis that he conducted and Mr. Ospreay's analysis was that Mr. Ospreay reviewed a large number of additional writing samples. He also testified that Mr. Ospreay's points of similarity tended to be more general, and that he and Mr. Ospreay did not appreciate the details of the different features in the writing the same way.

[117] On cross-examination, Mr. Gaudreau acknowledged that handwriting could be affected by the circumstances surrounding its creation. He acknowledged that a person initialling a document under happy circumstances might have handwriting that is more relaxed and free-flowing and less conscious. He agreed that if a person is hesitating or under stress that it would influence their handwriting. He acknowledged that factors including mood, location and body positioning could affect the execution of their initials.

[118] Mr. Gaudreau acknowledged that he was not aware of the different circumstances surrounding the initials in JVA2 when he compared them. He acknowledged that he proceeded under the assumption that the initials were placed on the document during the same sitting or within days of one another.

[119] Mr. Gaudreau acknowledged during cross-examination that there was a wide variation between the known handwriting samples that he received from the respondent. He acknowledged that there were some general pictorial resemblances between those specimens and the handwriting on JVA2, including resemblances between specimens that he excluded on his final analysis.

Evidence of Graham Ospreay

[120] Graham Ospreay was an expert witness called on behalf of the applicant. He produced a Report dated April 30, 2020. Mr. Ospreay was qualified as an expert in Forensic Handwriting Analysis.

[121] Mr. Ospreay is a private forensic consultant in the field of forensic document examination and forgery analysis. He described his primary job as that of a "master copyist", with a special interest in examining artist's signatures.

[122] Mr. Ospreay described that he is involved in signature analysis on a daily basis as a component of his work. He has been engaged in this field for 28 years, since 1992. He has testified both at civil and criminal trials and has given evidence both for and against documents which he has been asked to examine.

[123] Like Mr. Gaudreau, Mr. Ospreay was retained to examine the handwritten initials on the top of page 1 of JVA2, as well as the handwritten initials next to the respondent's signature on page 14 of JVA2. He was asked to determine whether the questioned initials were written by the respondent.

[124] For the purpose of his analysis, Mr. Ospreay compared the original handwritten initials on JVA2 to handwriting specimens attributed to the respondent. The specimen material provided to Mr. Ospreay included the material provided to Mr. Gaudreau, as well as numerous invoices, banking documents, and business records. He noted that, with the exception of the specimen sheet produced by the respondent for Mr. Gaudreau, other specimens were non-requested or informal standards, meaning that they were written during the writer's normal course of business. It was Mr. Ospreay's evidence that the informal handwriting samples were more reliable for comparison purposes because they more accurately reflect the subconscious habits of the writer.

[125] Mr. Ospreay testified that he did not favour the specimen sheet prepared by the respondent for comparison purposes. He noted that it was prepared 13 years after the alleged redactions on JVA2. It was also not clear that the specimen sheet was prepared under supervision.

[126] Mr. Ospreay examined the specimen and questioned materials with low powered illuminated magnifiers. He employed a stereoscopic microscope as well as a forensic optical comparator. JVA2 was examined for indented writing impressions on pages 2 and 15. Like Mr. Gaudreau, he examined the materials for observed similarities and differences.

[127] Mr. Ospreay acknowledged as a limitation the fact that some of the documents submitted for examination were copies. He noted that, while copies could be helpful for comparison purposes, they could not replace an original document.

[128] Mr. Ospreay noted that the variation in the respondent's known initials was wide.

[129] Mr. Ospreay testified about the factors that can affect a person's writing including deliberate attempts to disguise the writing, changes in health, changes in physical ability, an individual's emotional state, the type of writing instrument, the writing surface, the body position of the writer, and available writing space on the page. It was Mr. Ospreay's evidence that no two signatures are ever completely the same.

[130] It was Mr. Ospreay's opinion that it was "highly probable" that the writer of the specimens wrote the questioned initials on JVA2. The possibility that an alternative hypothesis was true was considered to be very unlikely.

[131] Mr. Ospreay pointed to identifiers which he considered to be unique to the respondent. He identified a tick-shaped period mark, which only appeared in one of the handwriting specimens that he reviewed. He also identified an angular shape to a loop formation which only appeared on one other writing sample. It was his view that, because each of those features only appeared on one other specimen, they were very unique individual features. It was his evidence that unique features were more difficult to replicate and that someone copying a signature or an initial would be likely to use familiar features to create something close to the norm.

[132] It was Mr. Ospreay's evidence that he was able to account for every variation that he observed in the questioned handwriting by examining the respondent's known handwriting specimens. He did not observe any unexplained dissimilarities as between the questioned initials and the specimens.

[133] Mr. Ospreay acknowledged that initials are different from full signatures, and that some examiners tended to approach initials with more caution. It was his evidence that he was frequently called upon to examine initials in real estate documents and other similar business documents.

[134] Mr. Ospreay elected not to use the two known and acknowledged initials in JVA2 for the purpose of his analysis, as he did not know if they were known signatures. He was asked if using them would have altered his final opinion; it was his evidence that it would not.

[135] Mr. Ospreay was questioned about his use of the term, "fundamental features", which Mr. Gaudreau testified was not part of the vernacular of handwriting analysis. He disputed this assertion and referenced authoritative texts by Albert Osborn and James Conway which made reference to "fundamental features" and "fundamental agreements" in support of his position.

[136] Mr. Ospreay disagreed with an opinion advanced by Mr. Gaudreau that the questioned initials were in copybook form. It was his view that they initials were more complicated than copybook form and that they demonstrated a lot of variation.

[137] Mr. Ospreay explained the common aspects of his opinion and Mr. Gaudreau's opinion. He noted that, in some instances, they agreed on their observations, but disagreed about the significance of those observations.

Discussion

[138] It is the applicant's theory that the respondent has concocted the allegation about the forged initials on JVA2 because he is attempting to escape his liability under the JVA. It is the respondent's theory that someone connected to the applicant removed the "Without Prejudice" notation and forged his initials on JVA2 when they realized that they had advanced significant funds to the respondent but did not have a binding agreement with him.

[139] Given the disparate recollections of Ms. Monroe and Mr. DesRoches regarding the execution of JVA1 and JVA2, any assessment of their evidence must also include an assessment of their reliability and credibility.

[140] The Court of Appeal, in *R. v. H.C.*, 2009 ONCA 56, at para. 41 noted:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately:
>
> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.) at 526. [Citations in original.]

[141] Consistency is a significant consideration in assessing the credibility and reliability of witness testimony. It is a multi-faceted assessment, which involves a review of the witness' pretrial statements and trial evidence, the witness's evidence on direct examination and cross examination, and the witness' evidence in relation to the evidence as a whole. A lack of consistency, particularly with respect to material facts and issues, may be fatal to the Court's acceptance of all or part of a witness' testimony: *R. v. M.(A.)*, 2014 ONCA 769, 123 OR (3d) 536, at paras. 9-13.

[142] Considering first the evidence of Marlene Munroe, I find that her evidence on the crucial point of the respondent's redaction of JVA2 is of no assistance to the court in determining the authenticity of JVA2. It is simply too unreliable for the court to place any weight on it.

[143] When she swore her affidavits on February 25, 2017, February 12, 2018, and February 20, 2018, and when she was cross-examined on those affidavits on March 26, 2018, Ms. Monroe had no independent recollection of the respondent redacting the words, "Without Prejudice" from JVA2. When she swore her affidavit on August 22, 2019, she was certain that the respondent had redacted JVA2 on February 3, 2006.

[144] In this hearing, more than 15 years after the fact, Ms. Munroe was adamant that, upon reflection, she had a clear and unassailable memory of the respondent redacting JVA2 approximately 5 weeks after JVA1 was signed on February 3, 2006. She provided the court with a detailed narrative about how and why JVA2 was redacted by the respondent in the presence of herself and Richard Lightbown.

[145] Ms. Monroe provided no evidence to explain how she had unearthed her latent memory of the respondent's redaction of JVA2, other than to say that she, "thought about it" and that "it started coming back pretty clear". Had she anchored that memory to some late-discovered documentary evidence or to a corroborating witness, it would have been easier to accept her current version of events. In the absence of this, I am left to reconcile Ms. Monroe's vastly differing narratives over the course of her involvement in this litigation. In my view, they cannot be reconciled. I do not accept Ms. Monroe's evidence; it is impossible for me to determine on a balance of probabilities whether her latest recollection is merely convenient or accurate.

[146] I find that the affidavit evidence of Wayne Rapoport and Brian Iler provides little assistance to the court in assessing the authenticity of JVA2. While I accept their evidence as factually accurate and credible, neither provided any first-hand evidence that supported the authenticity of JVA2. At best, their evidence confirmed that they came into possession of an original document that was purported to have been redacted by the respondent. Mr. Iler was able to confirm that he advised the applicant that JVA1 needed to be redacted, but, again, this evidence does not assist the court in determining whether the applicant then required the respondent to make that redaction or whether it took matters into its own hands and created JVA2 to ensure that it would have an enforceable agreement.

[147] In the absence of reliable, germane evidence from applicant's lay witnesses supporting the authenticity of JVA2, the court must consider whether the evidence of the applicant's expert witness, Graham Ospreay, establishes on a balance of probabilities that the initials and redactions on page 1 and page 14 of JVA2 were written by the respondent. I am satisfied that it does.

[148] As a starting point, I accepted as a fact that the invoices, employee time records, agreements, and other documents submitted by the applicant to Mr. Ospreay, which purported to contain the respondent's initials did, in fact, contain his initials.

[149] The respondent's evidence that he either did not initial or could not recall initialling these documents, almost all of which resulted in payments to him and benefitted him, was self-serving. It was apparent to me upon reviewing the evidence that the applicant required that documents be initialled as a form of financial "check and balance" to verify Rezmart expenses; the submitted documents were initialled both by WLI members, including Marlene Monroe, and by the respondent. In my view, it is not credible to suggest that the applicant not only forged the respondent's initials on JVA2, but that it then attempted to conceal that forgery by randomly initialling other documents in an effort to mislead the parties' expert witnesses. It is far more plausible that the documents do contain the respondent's initials and that the respondent has, either innocently or conveniently, forgotten that he initialled them.

[150] I find that the documents contained specimens of the respondent's handwriting and initials that were appropriately considered by the parties' expert witnesses in arriving at their opinions about the authenticity of JVA2.

[151] With respect to the opinion provided by Mr. Ospreay, I make the following findings:

a. Mr. Ospreay was qualified as an expert in Forensic Handwriting Analysis; this is different than Mr. Gaudreau, who was qualified as an expert in Forensic Document Analysis. While I accept Mr. Gaudreau's expertise in Forensic Document Analysis, in this case, where the court is being asked to assess handwriting, I preferred the expertise and qualifications of Mr. Ospreay.

b. I accepted and was persuaded by Mr. Ospreay's evidence that there were unique features of the respondent's handwriting and initials that were present in the questioned initials and that would have been difficult for someone other than the respondent to identify and replicate.

c. I accepted and was persuaded by Mr. Ospreay's evidence that there were wide variations in the respondent's initials, that he was able to account for those variations in the handwriting specimens that he examined, and that the respondent's handwriting and initials were more complicated than the copybook form opined by Mr. Gaudreau.

d. I was persuaded by the fact that Mr. Ospreay reviewed a larger sample of the respondent's handwriting specimens, and that he gave some consideration to the circumstances of those handwriting specimens in arriving at his opinion.

e. I accepted Mr. Ospreay's opinion that it was "highly probable" that the writer of the specimens, which I have found as a fact were written by the respondent, also wrote the questioned initials on JVA2. I also accepted his opinion that the possibility that an alternative hypothesis was true was very unlikely.

[152] In addition to accepting that the applicant's expert evidence supports the authenticity of JVA2 on a balance of probabilities, I find that the respondent's evidence fails to support the respondent's allegations of forgery on a balance of probabilities.

[153] The expert of evidence of Mr. Gaudreau did not persuade me, on a balance of probabilities, that the questioned initials on JVA2 were forged. Mr. Gaudreau was obliged to acknowledge on cross-examination that he had no information and had not considered the circumstances under which the questioned initials would have been executed, after testifying that those circumstances would have impacted the handwriting and in particular the conscious execution upon which he relied heavily in arriving at his opinion. He was obliged to acknowledge that the methodology used to obtain the respondent's sample initials was less than ideal and that it would have been preferable for them to have been obtained under supervision. He was also obliged to acknowledge that contemporaneous business records would have been preferable for examination purposes; those were the records that were relied upon by Mr. Ospreay in conducting his examination. Collectively,

this evidence rendered it impossible for me to rely upon Mr. Gaudreau's opinion in making factual findings.

[154] In arriving at my factual findings, I have also considered totality of the evidence, including the evidence of the respondent.

[155] It was clear from the evidence that the respondent did not want to be bound by the proposed joint venture agreement. He maintained that it was always his intention to pursue a personal loan from WLI. He was careful to ensure that every document that he signed with WLI gave him the ability to extricate himself from a business arrangement that he felt was being foisted upon him.

[156] Unfortunately for the respondent, he was eventually given an ultimatum. When Brian Iler reviewed JVA1 and saw that the respondent had signed it, "Without Prejudice", he informed the applicant and its business consultant Richard Lightbown that the notation had to be redacted or the JVA was worthless. I find that, upon receiving this information, the applicant took steps to secure the redaction of JVA1 by the Desroches. It was able to secure the redaction of the respondent by using the bargaining tool that it had – its ability to withdraw his funding, which he needed to proceed with Rezmart. It had no similar leverage with Nicole DesRoches and was therefore unable to secure her redaction.

[157] I find that it is not plausible that the applicant would have resorted to forging the respondent's initials on JVA2 when it had other legitimate avenues to rectify the JVA. It is not plausible that it would have continued to advance substantial funds to the respondent on the strength of a questionable document. The only logical conclusion is that the applicant proceeded once it had secured the redaction of JVA2 from the respondent.

[158] I find that it is plausible, and indeed likely, that when the respondent received the application record and observed that it mistakenly contained a copy of JVA1 as opposed to the redacted JVA2, he saw another opportunity to extricate himself from the joint venture and he took advantage of it. Unfortunately for the applicants, they gave the respondent fertile ground in which to cultivate that argument.

[159] On the evidence before me, I find that JVA2 is the original, authentic agreement between the parties and that the respondent's initials were not forged on pages 1 and 14 of JVA2.

Issue Three: What is the impact of s. 28 of the Indian Act on the enforceability of the JVA?

The Law

[160] Section 20 of the *Indian Act* provides that to be lawful, possession of land on a reserve must be allotted by the reserve's band council and possession of land may only be allotted to an "Indian" as defined in the *Indian Act*. If possession has been allotted, a Certificate of Possession may be issued by the Minister of Indigenous Services (the "Minister") as evidence of the right to possess the land.

[161] Section 28 of the *Indian Act* provides that a deed, lease, contract or agreement which purports to permit a person other than a band member to occupy, use, or exercise rights on reserve land is void. The Minister may issue a permit extending such authority to a non-band member for up to a year, or longer with the permission of the band council.

[162] A Framework Agreement on First Nation Land Management was signed by the Minister of Aboriginal Affairs and Northern Development and 13 First Nations on February 12, 1996, pursuant to the *First Nations Land Management Act*, S.C. 1999, c. 24. The Framework Agreement sets out the terms and conditions under which First Nations can establish their own land management regimes through "land codes", thereby removing their reserve lands and resources from the control of the Minister under the *Indian Act*. Pursuant to s. 16 of the *First Nations Land Management Act*:

> **16 (1)** After the coming into force of a land code, no interest or right in or licence in relation to First Nation land may be acquired or granted except in accordance with the land code of the First Nation.
>
> **Interests or rights of third parties**
>
> **(2)** Subject to subsections (3) and (4), interests or rights in and licences in relation to First Nation land that exist on the coming into force of a land code continue in accordance with their terms and conditions.
>
> **Transfer of rights of Her Majesty**
>
> **(3)** On the coming into force of the land code of a First Nation, the rights and obligations of Her Majesty as grantor in respect of the interests or rights and the licences described in the First Nation's individual agreement are transferred to the First Nation in accordance with that agreement.
>
> **Interests and rights of First Nation members**
>
> **(4)** Interests or rights in First Nation land held on the coming into force of a land code by First Nation members pursuant to allotments under subsection 20(1) of the Indian Act or pursuant to the custom of the First Nation are subject to the provisions of the land code governing the transfer and lease of interests or rights in First Nation land and sharing in natural resource revenues.

The Evidence

[163] The LOI signed by the parties on or about September 17, 2005, stipulated that it did not create any enforceable legal or equitable rights between the parties, except the obligation to proceed in good faith. It included the following acknowledgements and terms:

a. That the DesRoches were both registered members of WFN;

b. That the respondent had received a grant of 5 acres of unoccupied land on the WFN reserve on which to locate Rezmart with the written approval of the WFN Chief and Council;

c. That the DesRoches had prepared a site on the granted land and had begun to erect a building for Rezmart; and,

d. That the respondent would obtain the approval of Chief and Council for the registration of the granted land under a Certificate of Possession in his name, and that he would lease the granted land to Rezmart pursuant to s. 58 of the *Indian Act*.

[164] The T&C dated November 15, 2005 stipulated that it was being signed in contemplation of a comprehensive joint venture agreement to be prepared by WLI's counsel. It provided that, in the event that the joint venture agreement was not signed on or before December 1, 2005, either party could, at their option, elect not to proceed further. The T&C included the following terms:

a. That Rezmart was located on the granted land.

b. That the granted land was granted to Luc DesRoches on March 8, 2005 by a resolution of the WFN Chief and Council; it was granted for commercial use.

c. That Luc DesRoches had applied to Indian and Northern Affairs Canada (as it then was) for a Certificate of Possession for the granted land and, upon receipt of the Certificate of Possession, he agreed to execute a five year lease to Rezmart, with automatic renewal, for its exclusive use of the granted land in exchange for an annual rent of $1,000.

[165] The JVA addressed the issue of the Rezmart land lease contemplated in the LOI and the T&C as follows:

a. "Lease" was defined as, "the lease of the Real Property to the Venturers for a five year term, with automatic renewals of that term at the option of the Business, and annual net rent payable of $1,000", where:

   i. The "Venturers" were the applicant and Rezmart, which was identified as, "a registered partnership" between the DesRoches;

   ii. The "Business" was defined as, "the variety store, gas bar, tobacco wholesaler and retailer and all related operations carried on under the name Rezmart on the Real Property and elsewhere"; and,

   iii. The "Real Property" was defined as, "the property known municipally as 3371 Deemeemguk Road, Parry Island, Ontario, being Lot 71, Plan 55088 Sheet 2, comprised of 20.7 acres, more or less" (previously identified as the granted land).

b. It was a requirement of the JVA that the Lease would be a good and valid lease prior to the applicant making any contributions to Rezmart. This was a condition which the applicant could waive or postpone in its discretion.

c. The Lease was identified as a "Key Agreement" for the Business. The JVA provided that the Key Agreements were to be governed by the laws of Ontario and Canada.

[166] The JVA imposed no condition on the DesRoches to apply for a Certificate of Possession or to otherwise seek approval for the Lease either from WFN or Indian and Northern Affairs Canada. Although the Lease was identified as a "Key Agreement", the JVA made no provision for how or when the Lease was to be executed and did not include a copy of the Lease, or a draft Lease, as a Schedule to the JVA.

[167] The JVA contained an "Entire Agreement" clause that made no reference to the LOI or to the T&C. It also contained a severability clause, which confirmed that the invalidity or unenforceability of one part of the JVA did not annul the balance of the JVA.

[168] It is undisputed that the respondent did not obtain a Certificate of Possession, did not obtain approval either from WFN or Indian and Northern Affairs Canada for the lease, and did not enter into a lease with WLI or any party to the JVA. It is also undisputed that, notwithstanding the absence of the Certificate of Possession, approval, or a lease, WLI and the applicant continued to invest time and money into the development of Rezmart.

[169] It is undisputed that, at the time of the execution of the JVA, the granted land would have been subject to ss. 20 and 28 of the *Indian Act*. It is also undisputed that, on June 1, 2017, the WFN Land Code (the "Land Code") came into effect.

[170] The applicant has had interim possession of Rezmart since April 27, 2018, pursuant to the Order of Justice Koke and later the Order of the Court of Appeal. The management of Rezmart has been undertaken by WLI since that date.

Discussion

[171] The respondent submits that, at the time the JVA was signed, it was governed by s. 28 of the *Indian Act*. He submits that, because the JVA purported to permit the applicant, a corporation and non-member of WFN, to permanently occupy or use the Rezmart premises, it was rendered void pursuant to s. 28 of the *Indian Act*. In support of his position, he cites the decision in *Ziprick v. Simpson Estate*, 2020 BCSC 401, at para. 72, which noted:

> Neither the band nor any band members may enter into legally binding lease agreements and to the extent that they purport to do so, the agreements are void. Such informal arrangements (commonly referred to as "buckshee leases"), are illegal and unenforceable.

[172] The applicant argues in response that, because the JVA contemplated a lease to the applicant and the respondent collectively as parties to a joint venture, and the respondent was properly in possession of the granted land pursuant to the *Indian Act* at the time of the JVA, there was, in fact, compliance with the *Indian Act*.

[173] In my view, this argument by the applicant is untenable. The purpose of ss. 20 and 28 of the *Indian Act* is to ensure that reserve land does not fall into the hands of non-Indians without the express approval of the Band or the Minister. This objective would be thwarted if unapproved parties were permitted to circumvent the legislation by entering into joint ventures with lawful occupants.

[174] The applicant argues in the alternative that the parties' rights pursuant to the JVA should be determined by the governing regulatory framework at the time the court enforces the JVA; it argues that, at this time, that framework is the Land Code. The respondent argues that the *First Nations Land Management Act* is not expressly retrospective and that, as a result, the JVA continues to be subject to s.28 of the *Indian Act* notwithstanding the enactment of the Land Code.

[175] In my view, in order to determine this issue, I must first determine the nature of the land interest, if any, conferred on the applicant by the JVA.

[176] The JVA, in its opening paragraphs, identified that its purpose was to, "form a joint venture for the purpose of acquiring, owning, and operating the Business". The JVA was not a lease, it did not contain terms for a lease, and it did not explicitly confer any possessory interest in the granted land to the applicant in the absence of a lease, either during the term of the JVA or upon default.

[177] At best, the JVA contemplated a lease of the granted land by the respondent to the applicant and Rezmart. It was always possible that the third party approvals that were required to finalize the contemplated lease would not be granted. Had the approvals been denied, the parties would have been required either to revisit the location of Rezmart, to revisit the requirement of the lease, or to revisit the joint venture; there was language in the JVA which gave the parties the latitude to do either. As we now know, the lease was never finalized, and the business relationship of the parties disintegrated before they had an opportunity to consider what arrangements they wanted to negotiate in its stead.

[178] If, at the time it was executed, the JVA were a lease, contained terms for a lease, or otherwise conferred a possessory interest in the granted land to the applicant, then I would agree with the respondent's submission that it would have been wholly or partially void pursuant to s. 28 of the *Indian Act*. The mere contemplation of a lease, however, is not sufficient to void the JVA pursuant to s. 28.

[179] Although the JVA is not void, it does not automatically follow that it is enforceable in the manner being requested by the applicants. Ultimately, the applicant is seeking permanent possession of a business located on reserve land. Whether the court has the jurisdiction to grant permanent possession to the applicant on the strength of the unrealized lease contemplated in the JVA, or at all, remains a live issue in this application. When that issue is determined, pursuant s. 16(2) of the *First Nations Land Management Act*, any rights of the applicant will be subject to any

interests or rights that the respondent may have had in the granted land on the date that the Land Code came into effect, as well as any other relevant provisions of the *Indian Act*.

Disposition

[180] For the reasons given above, I order as follows:

1. I order and declare that the Joint Venture Agreement, dated February 3, 2006, and containing initialled redactions on pages 1 and 14 of the agreement, is the original, authentic joint venture agreement between the applicant, 2089322 Ontario Corporation, and the respondents, Luc DesRoches and Rezmart Gas & Convenience.

2. I order and declare that the Joint Venture Agreement, dated February 3, 2006, is not wholly or partially voided by the operation of s. 28 of the *Indian Act*, R.S.C. 1985 c.I-5.

3. The parties may contact the Trial Co-Ordinator to schedule a Case Conference before me to discuss a litigation plan for the remaining outstanding issues in this application.

4. If the parties are unable to agree upon costs, they may make written submissions within 30 days of the date of this decision, with any reply submissions to follow within 15 days thereafter.

The Honourable Madam Justice K.E. Cullin

Released: March 17, 2023

CITATION: 2089322 Ontario Corporation v. DesRoches, 2023 ONSC 1681
COURT FILE NO.: CV-07-201
DATE: 2023-03-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2089322 Ontario Corporation

Applicant

– and –

Luc W. DesRoches and Rezmart Gas and Tobacco

Respondents

DECISION ON APPLICATION

Cullin, J.

Released: March 17, 2023