Court File No. 32-2480036
Estate File No. 32-2480036

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., OF THE CITY OF BRANTFORD, IN THE PROVINCE OF ONTARIO

FACTUM OF FINETEX, ENE INC.

June 5, 2019

BAKER & McKENZIE LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 2100
Toronto, ON M5J 2T3

Michael Nowina (LSO#: 49633O)
Email: michael.nowina@bakermckenzie.com
Tel.: 416.865.3312 / Fax: 416.863.6275

Glenn Gibson (LSO# 72881I)
Email: glenn.gibson@bakermckenzie.com
Tel.: 416.865.2317/Fax: 416.863.6275

Lawyers for Finetex, Ene Inc.

TO: SERVICE LIST

Court File No.: 32-2480036
Estate File No.: 32-2480036

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., OF THE CITY OF BRANTFORD, IN THE PROVINCE OF ONTARIO

E-SERVICE LIST

mabramowitz@blaney.com; ateodorescu@blaney.com; ailchenko@pallettvalo.com; matthew.lem@mnp.ca; Michael.Litwack@mnp.ca; RJaipargas@blg.com; Michael.Nowina@bakermckenzie.com; glenn.gibson@bakermckenzie.com; yw.kim@ftene.com; dw.park@ftene.com; Christopher.Thoms@colliers.com; diane.winters@justice.gc.ca; kevin.ohara@ontario.ca; scott.guertin@canada.ca

SERVICE LIST

TO:

MNP LLP
Licenced Insolvency Trustees
111 Richmond Street West, Suite 300
Toronto, ON M5H 2G4

Matthew Lem, CIRP, LIT
e: matthew.lem@mnp.ca
t: 416 515 3882 / f: 416 323 5240

Michael Litwach
e: michael.litwach@mnp.ca
t: 647.475.4589/ f: 416 323 5240

Insolvency Trustee

AND TO: **BLANEY McMURTRY LLP**
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Mervyn Abramowitz (LSO# 28325R)
e: mabramowitz@blaney.com
t: 416 597 4887 / f: 416 593 3396

Alexandra Teodorescu (LSO# 632889D)
e: ateodorescu@blaney.com
t: 416 596 4289 / f: 416 594 2506

Lawyers for FT ENE Canada Inc.

AND TO: **BAKER & MCKENZIE LLP**
Brookfield Place, Suite 2100
181 Bay Street
Toronto, Ontario
M5J 2T3

Michael Nowina (LSO# 49633O))
e: michael.nowina@bakermckenzie.com
t: 416 865.2312 / f: 416 593 3396

Ms. Glenn Gibson (LSO# 72881L))
e: glenn.gibson@bakermckenzie.com
t: 416 865.2317 / f: 416 593 3396

Lawyers for Finetex EnE Inc., a creditor

AND TO: **VW Credit Canada Inc.**
4865 Marc-Blain Street, Suite 300
St. Laurent, QC H4R 3B2

t: 1 800 668 8224

Creditor

AND TO: **COLLIERS INTERNATIONAL**
305 King Street West, 6th Floor, Suite 606
Kitchener, ON N2G 1G9

Christopher Thoms
e: christopher.thoms@colliers.com
t: 1 519 904 7015 / f: 1 519 570 1185

Creditor

AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
The Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Diane Winters
e: diane.winters@justice.gc.ca
t: 416 973 3172 / f: 416 973 0810

Lawyers for the Canada Revenue Agency

AND TO: **MINISTER OF FINANCE (ONTARIO)**
Legal Services Branch
777 Bay Street, 11th Floor
Toronto, ON M5G 2C8

Kevin J. O'Hara
e: kevin.ohara@ontario.ca
t: 416 327 8463 / f: 416 325 1460

Lawyers for Her Majesty the Queen in Right of Ontario

AND TO: **PALLETT VALO LLP**
77 City Centre Drive
West Tower, Suite 300
Mississauga, Ontario
L5B 1M5

Alex Ilchenko (LSO #33944Q)
e: ailchenko@pallettvalo.com
t: 905.273.3022 x 203/ f: 905.273.6920

Lawyers for MNP Ltd.

AND TO: **FINETEX ENE INC.**
23-1, Hyoryeong-ro, Seocho-gu
Seoul, South Korea, 06694

Mr. Yoon Won Kim
Mr. D.W. Park
Tel: +82-2-3489-3300
Fax: +82-2-3482-0854
Email: yw.kim@ftene.com
Email: dw.park@ftene.com

AND TO: **THE OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY CANADA**
Federal Building-- Hamilton,
55 Bay Street N.,
9th Floor,
Hamilton, ON
L8R3P7

Mr. Scott Guertin
Email: scott.guertin@canada.ca

Court File No. 32-2480036
Estate File No. 32-2480036

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., OF THE CITY OF BRANTFORD, IN THE PROVINCE OF ONTARIO

FACTUM OF FINETEX, ENE INC.

PART I - OVERVIEW

1. Finetex, EnE Inc. ("**FTEI**") is the Korean parent company of FT EnE Canada Inc. ("**FT EnE Canada**"). FTEI brings this motion because it wishes to regain control of its subsidiary from Jong Chul Park ("**JC Park**") and his son-in-law, Yoonjun Park, who are not acting in the best interests of FT EnE Canada, and to stay any further sales of its assets beyond the current sale to Edwards Protech.

2. FTEI is subject to insolvency proceeding under South Korea's *Debtor Rehabilitation and Bankruptcy Act* ("**DBRA**") and is supervised by the Korean Court. FTEI has begun a stalking bid process which would see the acquirer assume control of FTEI and its subsidiaries on a going-concern basis. Specifically, FTEI has made an application to the Korean Court for the approval of a stocking horse bid. The bid contemplates that Toptec Co. Ltd. will acquire 50 + 1% of the total issued shares of FTEI and assume control of the company and its subsidiaries.

PART II - FACTS

3. FTEI is a publicly traded company incorporated in the Republic of Korea and owns 100% of two subsidiaries located in Canada and the Philippines:

a) FT EnE Canada Inc. ("**FT EnE Canada**"); and.

b) Finetex Technology Philippines Corporation ("**FT Philippines**").[1]

4. For FY 2017, FTEI's Korean auditor refused to deliver an unqualified audit of the financial statements because the Korean auditor had not been able to access satisfactory information related to FTEI's overseas subsidiaries.[2] As a result of the qualification, the Korea Exchange ("**KRX**") suspended trading shares of FTEI on the Korean Securities Dealers Automated Quotations ("**KOSDAQ**"), Korea's secondary stock exchange in March of 2018. Trading resumed for a short period of time in September 2018 before being suspended again in October 2018.[3]

5. On October 25, 2018, JC Park was dismissed as "representative director" of FTEI, but he remains a director on the board.[4]

6. The last financial reporting FTEI received from FT EnE Canada were interim reports for Q3 2018. FTEI has not received any further financial reporting regarding FT EnE Canada's operations since then.[5]

7. In December 2018, FTEI's vice-president came to Canada to obtain information about FT EnE Canada, but he was told that such information was a personal achievement of JC Park.[6]

---

[1] Certified Translation of the Affidavit of Yongwon Kim, sworn May 28, 2019, para. 3 ("**Kim Affidavit**"). FTEI Motion Record ("**MR**"), Tab 3B, p. 196.
[2] Kim Affidavit, para 4, MR, Tab 3B, p. 196.
[3] Kim Affidavit, para 5, MR, Tab 3B, p. 196.
[4] Kim Affidavit, para 6, MR, Tab 3B, p. 196.
[5] Kim Affidavit, para 9, MR, Tab 3B, p. 197.
[6] Kim Affidavit para. 9, MR, Tab 3B, p. 197.

8. FTEI commissioned a report from the firm HaengBok MaRu Consulting Co. Ltd. to investigate the reasons for the auditor's qualification of the FY 2017 financial statements.[7]

9. In Korea, FTEI has made a criminal complaint that JC Park, Jong Man Park, the former Vice President of FTEI and CEO of FT Philippines and others, conspired and engaged in conduct to:

   (a) inflate FT EnE Canada and FT Philippines revenue and assets, hide losses, and falsify related documents to maintain FTEI's profit position in its 2017 quarterly report, and

   (b) cause FT Philippines to engaged in transactions with companies controlled by them for personal gain.[8]

Misleading Statements have been made to this Honourable Court and to the Proposal Trustee

10. Yoonjun Park, the General Manager of FT EnE Canada has sworn two affidavits in support of this proceeding that stated the following with respect to FT EnE Canada's awareness of the insolvency proceedings in Korea.

11. In his affidavit sworn on March 22, 2019 on behalf of FT EnE Canada, Yoonjun Park stated "*The parent company has begun steps to file for insolvency protection in South Korea. **The precise details of that proceeding are not known to me…**"* (emphasis added)[9]

12. In his second affidavit sworn April 30, 2019, Park stated that "… *At the time, there was great uncertainty as to what FTEI was doing and what would happen to the Company, its Canadian subsidiary. We had heard that FTEI had partially ceased its business*

[7] Kim Affidavit, para. 10, MR, Tab 3B, p. 197.
[8] Kim Affidavit, para 7, MR, Tab 3B, p. 197.
[9] Affidavit of Yoonjun Park, sworn March 22, 2019, para. 18, MR, Tab 2C, pp. 35-36.

operations and that it was considering commencing rehabilitation proceedings and seeking protection from its creditors in South Korea. ***However, at the time of the NOI, the Company was not aware of the full details of the process in South Korea****…*" (emphasis added)[10]

13. Through its sole director, JC Park, FT EnE Canada was aware of the *DBRA* proceedings in Korea. JC Park participated in the FTEI board of director's meeting where the Korean rehabilitation proceeding was discussed along with the proposed stalking horse bid from Toptec Ltd.[11]

14. In addition, in the Second Report of the Proposal Trustee, it states:

> *39. The Company has advised that its 2017 corporate tax returns have not been filed as the Company was in the process of having the 2017 fiscal year re-audited and potentially restated at the request of its South Korean parent. Such re-audit process was suspended with the restructuring filings in Canada and South Korea*.[12]

15. FT EnE Canada has refused to give its consent so that BDO Canada can confirm why the audit was not completed.[13]

Notice given to FTEI of Canadian Insolvency Proceedings

16. Since its NOI filing, JC Park has not contacted anyone at FTEI to discuss FT EnE Canada's proposal.[14] However, his counsel, Blaney McMurty LLP, sent a letter on March 8, 2019, purporting to terminate the worldwide IP license that FTEI and FT EnE Canada rely on to operate their businesses.[15]

---

[10] Affidavit of Yoonjun Park, sworn April 30, 2019, para. 19, MR, Tab 2D, p. 48.
[11] Kim Affidavit, para. 13, MR, Tab 3B, p. 198.
[12] Second Report of the Proposal Trustee dated May 2, 2019, para. 39, MR, Tab 2F, p. 85.
[13] Affidavit of Kim Humphrey sworn May 28, 2019, Exhibit "B", MR, Tab 2B, p. 14.
[14] Kim Affidavit, para. 14, MR, Tab 3B, p. 198.
[15] Kim Affidavit, para. 21, MR, Tab 3B, p. 200.

PART III - ISSUES

17. The issues to be decided on this motion are:

    a) Whether JC Park should be removed as a director of FT EnE Canada?

    b) Whether Blaney McMurtry LLP should be removed as solicitor of record for FT EnE Canada?

    c) Whether the Court-approved sales process should be stayed?

    d) In the alternative to (a) & (b), whether an interim receiver should be approved?

PART IV - LAW AND ARGUMENT

A. JC Park should be Removed as Director of FT EnE Canada

18. In addition to representing 99% of the unsecured creditors, FTEI is also the 100% owner of FT EnE Canada. Absent the stay of proceedings, FTEI could call a meeting to remove JC Park.

19. Section 64(1) of the *BIA* provides that the Court, on the application of any interested person, may make an order removing a director from office if the Court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or likely to act inappropriately as a director in the circumstances.

20. It does not appear that section 64 has been interpreted by the Canadian/Ontario courts. However, a parallel provision exists in the *CCAA.* In *Essar Steel Algoma Inc. (Re),* 2017 ONSC 5710, Justice Hainey determined that it was unnecessary to remove the directors under section 11.5 of the *CCAA* where it would cause disruption in the restructuring process and it was in the best interests of the company to maintain the status quo.[16]

[16] *Essar Steel Algoma Inc. (Re)*, 2017 ONSC 5710, paras. 17-21, Book of Authorities ("**BOA**"), Tab 1.

21. FTEI and JC Park are in direct conflict and his control of FT EnE Canada jeopardizes any potential proposal that the company might make.

22. This conflict is epitomized by the letter dated March 8, 2019, that Blaney McMurty LLP wrote letter, on behalf of JC Park purporting to terminate the IP licence between JC Park and FTEI. FT EnE Canada and FTEI rely of this license to operate their businesses.

23. JC Park has put his interests in direct conflict with FTEI and FT EnE Canada. As Granger J. stated in *Moffatt v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.):

> Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.[17]

B. Blaney McMurty LLP should be Disqualified

24. The Rules of Professional Conduct of the Law Society of Ontario ("**LSO Rules**") Rules 3.4-1 and 3.4-2 provide clear guidance to counsel to ensure that the duties of loyalty, confidentiality, candor and commitment owed by a lawyer to their client are protected. A conflict of interest exists where "*there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person*."[18]

25. The "*bright line rule"* from the Supreme Court of Canada is that a lawyer cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent.[19] Furthermore, the LSO Rule 3.4-3 expressly prohibits a lawyer from representing opposing parties in a dispute.[20]

---

[17] *Moffatt v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.), p. 390, BOA, Tab 2.
[18] Law Society of Ontario, Rules of Professional Conduct, Rule 3.4-1 & Commentary.
[19] *Canadian National Railway Co. v. McKercher LLP, [2013] 2 S.C.R. 649,* BOA, Tab 3. *See also* Law Society of Ontario, Rules of Professional Conduct, Rule 3.4-1, Commentary & Rule 3.4-2
[20] Law Society of Ontario, Rules of Professional Conduct, Rule 3.4-3 & Commentary.

26. The court in *Rice v. Smith,* [2013] O.J. No. 784 emphasized that: "*a lawyer representing a corporate organization must remember at all times that the corporation has a legal personality distinct from its individual directors and shareholders, and that those interests may very well diverge, thereby preventing a lawyer's continued involvement in an internal corporate dispute.*"[21]

27. Furthermore, notwithstanding the good faith intention of counsel, if it is ambiguous that can represent one party's interests without adversely affecting the other, it is appropriate for counsel to be removed as the solicitor of record.[22]

C. The Court-Approved Sales Process Should be Stayed

28. Here are the some of the facts that this Court was not told when it approved the sales process:

(a) Without consulting its parent company, FT EnE Canada filed its NOI hours after FTEI started its rehabilitation proceeding in Korea;

(b) JC Park participated in the director's meeting where the Korean rehabilitation proceeding was discussed including that FTEI was entering into an agreement with Toptec Ltd. for a stalking horse bid acquisition of FTEI's shares conducted through the rehabilitation proceeding;

(c) FTEI had no knowledge of the prior steps taken by FT EnE Canada to sell its real estate with Colliers Macaulay Nicolls Inc.;

(d) FT EnE Canada was refusing to provide information to FTEI; and

(e) FT EnE Canada failed to contact FTEI in any way after the filing of the NOI to discuss the proposed sales process.

---

[21] *Rice v. Smith*, [2013] O.J. No. 784, para. 25, BOA, Tab 4.
[22] *Bulloch-MacIntosh v. Browne*, [2015] O.J. No. 1292, paras. 25-33, BOA, Tab 5.

29. In addition, FTEI has heard through third parties that JC Park intends to buy the assets of FT EnE Canada.[23]

30. The Ontario Court of Appeal has recently re-stated the well-known factors a court must consider when deciding whether to approve the sale of property in insolvency proceedings. The Court must consider the following factors when deciding whether to approve a sale of a property by a receiver:

    (i) The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

    (ii) The court should consider the interests of all parties.

    (iii) The court should consider the efficacy and integrity of the process by which the offers are obtained.

    (iv) The court should consider whether there has been unfairness in the working out of the process. [24]

31. A passage from Justice Dunphy's recent decision in *Dundee Oil and Gas Limited, Re*, 2018 ONSC 6376, addresses concerns with a bidder inappropriately affecting a sales process.[25] The same principle applies to a debtor seeking a sales process.

32. In this proceeding, the Court has not been apprised of information that was important. The going-concern acquisition of FTEI and its subsidiaries may represent the best outcome for FT EnE Canada and there is no excuse for the complete failure of FT EnE Canada to speak to its parent company. The sales process should be stayed.

---

[23] Kim Affidavit, para. 15, MR, Tab 3B, p. 198.
[24] *Reciprocal Opportunities Inc. v. Sikh Lehar International Organization*, 2018 ONCA 713, para. 39, BOA, Tab 6.
[25] *Dundee Oil and Gas Limited, Re*, 2018 ONSC 6376, para. 41, BOA, Tab 7.

D. In the Alternative, an Interim Receiver should be appointed

33. Alternatively, in light of the evidence put forward by FTEI, it is appropriate in the circumstances to appoint a interim receiver to monitor and protect the property of FT EnE Canada.

34. Section 47.1(3) of the *BIA* provides that an interim receiver can be appointed where it is shown to be necessary for the protection of the debtor's estate or the interests of one or more creditors, or of the creditors generally.

35. For example, in *Tucker v Seaquest Capital Corp*, [2011] OJ No 5182, an interim receiver was appointed under section of the 47.1 of the BIA on consent of the parties where there were allegations of fraud and the Court was concerned that a party was not being candid with the court because it had failed to disclose relevant information, including that certain creditors who swore affidavits on the motion were non-arm's length parties.[26]

36. Similarly in *Royal Bank of Canada v. Canadian Print Music Distributors Inc.*, [2006] O.J. No. 2492 Justice Cumming granted a section 47(1) application for a receiver to protect a bank's security interests. In that case, the bank was concerned about suspicious transactions and cheques that were payable to parties that were related to the debtor. The bank retained PWC to conduct a preliminary investigation, that concluded that *inter alia*, there was an unusual number of intercompany transactions.[27] Justice Cummings emphasized that proof of misfeasance was not necessary, and that the bank had successfully established on a balance of probabilities the need for an immediate interim receivership to assure conservation of the Respondents' assets.[28]

---

[26] *Tucker v Seaquest Capital Corp*, [2011] OJ No 5182, para. 9, BOA, Tab 8.
[27] *Royal Bank of Canada v. Canadian Print Music Distributors Inc.*, [2006] O.J. No. 2492, para. 10, BOA, Tab 9.
[28] *Ibid.*, para. 18, BOA, Tab 9.

PART V- ORDER REQUESTED

37. For all of the foregoing reasons, FTEI requests:

a) an Order replacing JC Park as director of FT EnE Canada with directors nominated by FTEI;

b) an Order removing Blaney as solicitor of record for FT EnE Canada;

c) an Order staying the sales process authorized by the Order dated March 28, 2019; and

d) in the alternative to (a) & (b), an Order appointing MNP as interim receiver of FT EnE Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2019

MICHAEL NOWINA/GLENN GIBSON
Baker & McKenzie LLP

Lawyer for Finetex, EnE. Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

	CASE LAW
1.	*Essar Steel Algoma Inc. (Re)*, 2017 ONSC 5710
2.	*Moffatt v. Wetstein* (1996), 29 O.R. (3d) 371, [1996] O.J. No. 1966 (Gen. Div.)
3.	*Canadian National Railway Co. v. McKercher LLP, [2013] 2 S.C.R. 649*
4.	*Rice v. Smith,* [2013] O.J. No. 784
5.	*Bulloch-MacIntosh v. Browne*, [2015] O.J. No. 1292
6.	*Reciprocal Opportunities Inc. v. Sikh Lehar International Organization*, 2018 ONCA 713
7.	*Dundee Oil and Gas Limited, Re*, 2018 ONSC 6376
8.	*Tucker v Seaquest Capital Corp*, [2011] OJ No 5182
9.	*Royal Bank of Canada v. Canadian Print Music Distributors Inc.*, [2006] O.J. No. 2492

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(c) take conservatory measures; and

(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

R.S., 1985, c. B-3, s. 47 1992, c. 27, s. 16 2005, c. 47, s. 30 2007, c. 36, s. 14

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or

(c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment

(1.1) The appointment expires on the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) court approval of the proposal.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;

(b) take possession of all or part of the debtor's property mentioned in the order of the court;

(c) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(d) take conservatory measures; and

(e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

1992, c. 27, s. 16 2005, c. 47, s. 31 2007, c. 36, s. 15

Removal of directors

64 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

R.S., 1985, c. B-3, s. 64 1992, c. 27, s. 29 1997, c. 12, s. 40 1999, c. 31, s. 20 2005, c. 47, s. 42

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the

obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42 2007, c. 36, s. 24

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

> **(a)** the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> **(b)** any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

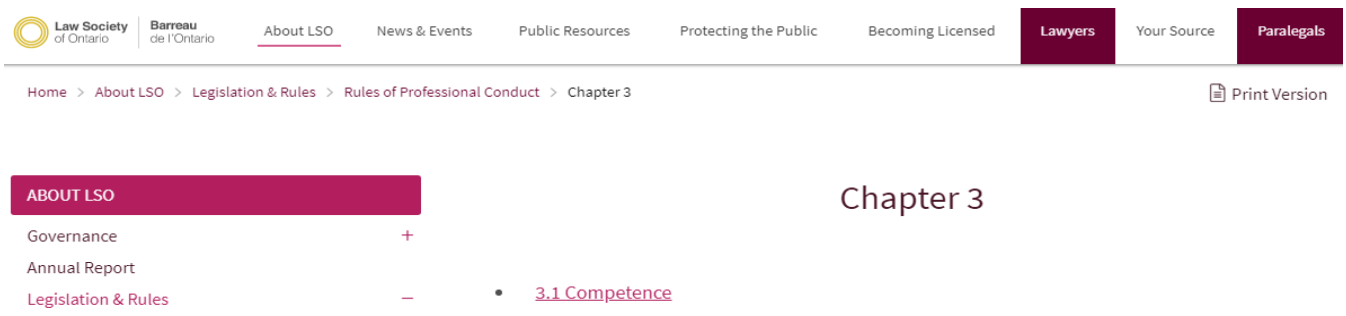
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Individual

(3) In the case of an individual,

> **(a)** the court may not make the order unless the individual is carrying on a business; and
>
> **(b)** only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42 2007, c. 36, s. 24



Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

[3] A client may be unable to judge whether the lawyer's duties have actually been compromised. Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of impairment rather than actual impairment. The expression "substantial risk" in the definition of "conflict of interest" describes the likelihood of the impairment, as opposed to its nature or severity. A "substantial risk" is one that is significant and plausible, even if it is not certain or even probable that it will occur. There must be more there a mere possibility that the impairment will occur. Except as otherwise provided in Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

Personal Interest Conflicts

[4] A lawyer’s own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a lawyer is asked to advise the client in respect of a matter in which the lawyer, the lawyer’s partner or associate or a family member has a material direct or indirect financial interest. But other situations may not be so obvious. For example, the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer.

[5] Lawyers should carefully consider their relationships with their clients and the subject matter of the retainer in order to determine whether a conflicting personal interest exists. If

the lawyer is a member of a firm and concludes that a conflicting personal interest exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work without the involvement of the conflicted lawyer.

Current Client Conflicts

[6] Duties owed to another current client can also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict. Conflicts may also arise in a joint retainer where the jointly represented clients' interests diverge. Acting for more than one client in separate but related matters may risk impairment because of the nature of the retainers. The duty of confidentiality owed to one client may be inconsistent with the duty of candour owed to another client depending on whether information obtained by the lawyer during either retainer would be relevant to both retainers. These are examples of situations where conflicts of interest involving other current clients may arise.

[7] A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. c.f. *Canadian National Railway Co*. v. *McKercher* LLP, [2013] 2 S.C.R. 649. The bright line rule holds that a lawyer cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent. The bright line rule applies even if the work done for the two clients is completely unrelated. The scope of the bright line rule is limited. It provides that a lawyer cannot act directly adverse to the immediate legal interests of a current client. Accordingly, the main area of application of the bright line rule is in civil and criminal proceedings. Exceptionally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that the client's law firm will not act against the client in unrelated matters.

[8] The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. This type of conflict may also arise outside a law partnership, in situations where sole practitioners, who are in space-sharing associations and who otherwise have separate practices, hold themselves out as a law firm and lawyers in the association represent opposite parties to a dispute.

[9] A lawyer should understand that there may be a conflict of interest arising from the duties owed to another current client even if the bright line rule does not apply. In matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies but whether there is a substantial risk of impairment. In either case, there is a conflict of interest.

Former Client Conflicts

[10] Duties owed to a former client, as reflected in Rule 3.4-10, can impair client representation and loyalty. As the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter. Lawyers also have a duty not to act against a former client in the same or a related matter even where the former client's confidential information is not at risk. In order to determine the existence of a conflict of interest, a lawyer should consider whether the representation of the current client in a matter includes acting against a former client.

Conflicts arising from Duties to Other Persons

[11] Duties owed to other persons can impair client representation and loyalty. For example, a lawyer may act as a director of a corporation as well as a trustee. If the lawyer acts against such a corporation or trust, there may be a conflict of interest. But even acting for such a corporation or trust may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, make it difficult if not impossible to distinguish between legal advice from business and practical advice, or jeopardize the protection of lawyer and client privilege. Lawyers should carefully consider the propriety, and the wisdom of wearing "more than one hat" at the same time.

Other Issues To Consider

[12] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation or in a transaction can give rise to new conflicts of interest that must be addressed.

[13] Addressing conflicts may require that other rules be considered, for example

(a) the lawyer's duty of commitment to the client's cause, reflected in Rule 3.7-1, prevents the lawyer from withdrawing from representation of a current client, especially summarily and unexpectedly, in order to circumvent the conflict of interest rules;

(b) the lawyer's duty of candour, reflected in Rule 3.2-2, requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. Even where a lawyer concludes that there is no conflict of interest in acting against a current client, the duty of candour may require that the client be advised of the adverse retainer in order to determine whether to continue the retainer;

(c) the lawyer's duty of confidentiality, reflected in Rule 3.3-1 and owed to current and former clients, may limit the lawyer's ability to obtain client consent as permitted by Rule 3.4-2 because the lawyer may not be able to disclose the information required for proper consent. Where there is a conflict of interest and consent cannot be obtained for this reason, the lawyer must not act; and

(d) rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

[14] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary and other principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by the Law Society even where a court dealing with the case may decline to order disqualification as a remedy.

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable and not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's

behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Consent and the Bright Line Rule

[6] The bright line rule, referred to in the Commentary to Rule 3.4-1, does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. No issue of consent arises in such circumstances absent a substantial risk of material and adverse effect on the lawyer's loyalty to or representation of a client. Where such a risk exists, consent is required even though the bright line rule does not apply.

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by rules 3.3-2 to 3.3-6.

[*Amended - October 2014*]

Commentary

[1] A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter. (See Section 3.4 Conflicts.)

[5] Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

(a) retained by a person about a particular matter; or

(b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

[7] Sole practitioners who practise in association with other licensees in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another licensee in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the licensees' practices are integrated, physically and administratively, in the association.

[8] A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

[8.1] Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

[9] In some situations, the authority of the client to disclose may be inferred. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students and other licensees engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief that the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given to the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

[11] A lawyer may have an obligation to disclose information under rules 5.5-2, 5.5-3 and 5.6-3 (Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

[11.1] The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Dispute

3.4-3 Despite rule 3.4-2, a lawyer shall not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending the rules in Section 3.4.

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC., OF THE CITY OF BRANTFORD, IN THE PROVINCE OF ONTARIO

Court File No. 32-2480036
Estate File No. 32-2480036

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto, Ontario

FACTUM OF FINETEX, ENE. INC.

Baker & McKenzie LLP
Brookfield Place
181 Bay Street, Suite 2100
P.O. Box 874
Toronto, Ontario M5J 2T3

Michael Nowina (LSO#: 49633O)
Email: michael.nowina@bakermckenzie.com
Tel.: 416.865.3312 / Fax: 416.863.6275

Glenn Gibson (LSO# 72881I)
Email: glenn.gibson@bakermckenzie.com
Tel.: 416.865.2317/Fax: 416.863.6275

Lawyers for Finetex, EnE, Inc.