

Date: 20120711  
Docket: CI 07-01-51524  
(Winnipeg Centre)  
Indexed as: 4726031 Manitoba Ltd. v. A  
Stepping Stone Adult Learning Centres Inc. et al.  
Cited as: 2012 MBQB 205

**COURT OF QUEEN’S BENCH OF MANITOBA**

**BETWEEN:**

<b>4726031 MANITOBA LTD.,</b>	)	
	)	<u>Peter Halamandaris</u>
	)	for the plaintiff
	)	
plaintiff,	)	
	)	<u>W. Glenn McFetridge and</u>
- and -	)	<u>Sean D. Boyd</u>
	)	for The Government of
	)	Manitoba
	)	
<b>A STEPPING STONE ADULT LEARNING</b>	)	
<b>CENTRES INC., THE GOVERNMENT OF</b>	)	
<b>MANITOBA AND THE SEVEN OAKS</b>	)	<u>Bernice R. Bowley and</u>
<b>SCHOOL DIVISION,</b>	)	<u>Sven T. Hombach</u>
	)	for the Seven Oaks
defendants.	)	School Division
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	July 11, 2012

**McCawley, J.**

**Introduction**

[1] The plaintiff corporation claims damages arising from the breach of a lease agreement it had with A Stepping Stone Adult Learning Centres Inc. (“ASS Inc.”) with respect to premises located on Cumberland Avenue, in the City of Winnipeg. At the relevant time, Ass Inc. was a not-for-profit corporation which

operated an adult learning centre known as A Stepping Stone Adult Learning Centre ("ASSALC").

[2] The plaintiff says that The Government of Manitoba (the "government") and The Seven Oaks School Division ("Seven Oaks") conspired together against the plaintiff to induce ASS Inc. to breach the lease and further, that they wrongfully interfered with the contractual relationship between ASS Inc. and the plaintiff to the plaintiff's detriment.

[3] There is no issue that the lease was breached by ASS Inc., which did not defend the action. Accordingly, the plaintiff is entitled to judgment against it. The issue to be decided is whether the plaintiff is entitled to judgment against either or both of the remaining defendants.

### **Background**

[4] The events giving rise to this litigation go back a number of years. The plaintiff is the landlord of the premises on Cumberland Avenue, a mixed use building comprised of several addresses. For the sake of simplicity the premises which were the subject of the lease in question will be referred to as 350 Cumberland Avenue. Ken Campbell is the plaintiff's sole officer and director and directing mind. Again, for simplicity's sake, reference to the plaintiff will mean either the corporate entity or Ken Campbell who at all times was the individual who acted on its behalf.

[5] Ken Campbell is a businessman who has considerable experience in real estate and property management in Winnipeg. He owns 50% of a realty and

insurance company, that engages in that business, as well as some leasing and brokerage businesses. Ken Campbell is also a long-time friend of Brenda Garner, the principal of ASS. Inc who ran ASSALC. Their friendship goes back to their university days, some 40 years ago. It was Brenda Garner who signed the lease for 350 Cumberland Avenue on behalf in ASS Inc. in 2004, in her capacity as the only active director of that corporation as well as being the educational director of ASSALC.

[6] For many years, Brenda Garner had been involved in adult education in Winnipeg, initially in partnership with Lionel Orlikow. In 2000, she and Lionel Orlikow went their separate professional ways. The same year, Brenda Garner incorporated Upward Bound A Stepping Stone Inc. ("UBASS Inc.") to operate three of the six adult education centres she and Lionel Orlikow had previously run. They also divided up the equipment from the centres, some of which became the property of UBASS Inc. UBASS Inc. was dissolved by the Manitoba Companies Branch in 2007.

[7] The world of adult education underwent a number of changes after 2000 according to John Sawchuk of the Adult Learning and Literacy ("ALL") branch of the government's Department of Advanced Education and Literacy. He was responsible for overseeing adult learning centres for ALL and subsequently became its director. He testified that in 2001 a new adult learning program was introduced in Manitoba. With its introduction came a new funding model and the requirement that adult learning centres run by not-for-profit companies be in partnership with a school division. All existing adult learning centres received

funding and ALL attempted to assist them in making the transition. It appears that as a result of these changes a number of centres ceased operating and overall government funding was reduced for the 2002/2003 school year.

[8] In anticipation of the passage of *The Adult Learning Centres Act*, C.C.S.M., c. A5 (the "**Act**"), on March 27, 2001, Brenda Garner incorporated ASS Inc. which named herself, her then life partner, and her then office administrator as directors. They remained the only directors of ASS Inc. listed with the Manitoba Companies Branch.

[9] The **Act**, which came into force in 2003, sets out the purpose of the legislation, which is to provide educational programs to adult learners who have not completed secondary schooling or who are ineligible to pursue post-secondary education or other educational and employment opportunities because they do not have the necessary prerequisites. It provides a comprehensive legislative scheme, administered under the auspices of a Registrar, whereby adult learning centres and recognized educational institutions may register to operate adult learning centres with or without a partner.

[10] The Registrar has broad powers under the **Act** and **Regulations** to impose conditions on the registration of an adult learning centre. Registration is for a one year term, or part thereof, ending on June 30th of each year to correspond with the regular school year. Renewals are by annual application. However, if a registered operator applies to renew before the expiration of the existing registration, the registration continues until the renewal has been either

granted or refused pursuant to s. 13(1) of the **Act**. The Registrar also has the right to suspend or cancel a registration for reasons set out in s. 14 of the **Act**, subject to a right of appeal.

[11] The **Act** also includes reporting requirements and outlines how the centres will be funded. It includes a provision which allows the Registrar to withhold funds, in whole or in part, where a registered operator has failed to comply with the **Act**. The **Regulations** contain more detailed requirements, including provisions covering learning plans for each learner, the keeping of daily attendance records, and a requirement that the standards set by the Minister of Education be maintained.

[12] In 2002/2003, ASS Inc. took over the three educational learning centres mentioned earlier with Seven Oaks as its registered educational partner. For reasons of cost effectiveness, ALL later required the three centres to be consolidated. Thereafter, the operation continued as ASSALC out of one location at 80 Salter Street for the 2003/2004 school year, again with Seven Oaks as the registered partner.

[13] With the advent of the new legislation also came a greater degree of accountability for all adult education centres. This included increased reporting requirements and filling in of forms, inspections, and the other inevitable by-products of government regulation. Brenda Garner had not previously been subjected to such close oversight. Her real interest was in ensuring that the services ASSALC was providing were available to those who needed them most

and she found these administrative requirements difficult to live with. They chafed, and she came to see them as unnecessary intrusions into time better spent on other things as well as a waste of precious resources. As a result, she adopted what might be described as a casual attitude towards adherence to them which gradually became firm resistance. Her approach became increasingly problematic for ALL and also for her staff.

[14] For those at ALL who were responsible for bringing the adult education centres on side with the new legislation and enforcing requirements to ensure standards were met with some degree of consistency, Brenda Garner became an aggravation. On occasion she could be outright difficult. Documents were often filed late, and ALL was not kept advised of matters concerning ASSALC even though there was a clear obligation on Brenda Garner to do so. As a result, the relationship between Brenda Garner and ALL became strained. Even the staff at ASSALC, who maintained an ongoing respect for Brenda Garner and her accomplishments as a pioneer in the field of adult education in Winnipeg, were frustrated by her actions, or failure to act. They were also increasingly concerned about the impact of the situation on their ability to continue to deliver educational services, particularly to the newly arrived immigrants and Aboriginals who lived in the area.

[15] Brenda Garner herself acknowledged that her relationship with ALL was up and down. That there were philosophical differences between her and ALL about program methods and delivery was also obvious. To what extent these differences contributed to the deterioration in the relationship between Brenda

Garner and ALL was a central issue at trial. The plaintiff takes the position that it was as a result of philosophical differences that ALL eventually conceived a plan to rid themselves of Brenda Garner, who had become a thorn in their side, and to close the centre. The plaintiff also says that Seven Oaks was a willing ally. The “plan” was allegedly implemented in the spring of 2007 when conditions were imposed on ASSALC’s registration. The plaintiff says these conditions forced Brenda Garner to step down as director of ASSALC in order to save the future of the program. From Brenda Garner’s perspective, this effectively ended her career as an adult educator. When ALL refused to agree to ASSALC’s proposal that Brenda Garner be kept on as a consultant to assist in whatever transition needed to be made, this was seen as further evidence of the plan to get rid of her.

[16] The plaintiff then says that once Brenda Garner resigned, the next step was for ALL to “cut out” ASSALC which it proceeded to orchestrate through, among other things, creating a new legal entity, redirecting the funding that would have gone to ASSALC to it, moving to a new location, removing the assets of ASSALC and causing the lease at 350 Cumberland Avenue to be breached by ASS Inc.

### **Philosophical Differences**

[17] The philosophical difference between Brenda Garner and ALL were clear. Brenda Garner was committed to providing what she described as a “flexible” program that was sensitive to the many challenges the learners who went to

ASSALC faced. Committed to helping them achieve success, she had trouble accepting the changes that came with the passing of the **Act** and was prepared to relax the rules or ignore them entirely.

[18] ALL saw this as a deliberate unwillingness to adhere to the legislative and regulatory requirements they were responsible for enforcing under the new regime. The manner in which ASSALC was delivering its services, under the direction of Brenda Garner, with its lack of structure and timely reporting, was non-compliant in a number of ways which ALL considered to be significant and Brenda Garner did not.

[19] The court heard from a number of witnesses from ALL, as well as the staff from ASSALC. They shared many of the same concerns about the implications of the model being used at ASSALC. Over time these concerns deepened. In large measure they related to Brenda Garner's commitment to an open and continuous intake model where learners essentially came and went on their own schedule. As already noted, to Brenda Garner's mind this was necessary given the daily challenges of the students. For the teachers, it created numerous practical problems including not knowing how many students would be in a particular class on any given day, having students at different levels show up on any given day requiring different levels of instruction, as well as the general disruption of people coming and going and all times.

[20] Fran Taylor was one of the teachers at ASSALC. She began teaching there in 2003 and ultimately took over as acting director. She described a



number of the problems in detail which reflected the views of other ASSALC staff who were called to testify. In addition to the concerns already mentioned, she testified that there was no Canadian Language Benchmark testing done at ASSALC although many of their learners were at a low level with respect to their English language skills. Although someone was hired to do some language training in 2004, the problem remained ongoing and had a significant impact on the ability of the students to do well in their course work.

[21] Staff at ASSALC were also increasingly frustrated with the minimal amount of structure which they felt had virtually disappeared by 2005, as well as the fact that they were required to pitch in to do clerical work and even cleaning. Brenda Garner attributed these problems, and most of the other difficulties at the centre, to a decrease in funding. She felt she was being punished by the government because of philosophical differences through a reduction in funding. The evidence disclosed, however, that funding had not been reduced as much as Brenda Garner believed, and was explained by events and decisions other than the ulterior motive attributed to the defendants.

[22] In addition to Brenda Garner's lack of attentiveness to meeting administrative requirements, there was also concern expressed by the ASSALC staff about her increasing absence from the centre. This was denied by Brenda Garner, who pointed out that she did not hold a full-time position in the spring of 2005, but nevertheless was there days, evenings and weekends. However, the evidence disclosed that from April to June 2005 she was under contract with another organization for which she was being remunerated in the

amount of \$2,500 per month. This would suggest that she was not working at ASSALC as much as she had indicated.

[23] ALL's frustration with its ability to enforce the **Act** and **Regulations** with respect to ASSALC was illustrated by a number of examples. For instance, ASSALC did not require regular attendance and did not keep attendance records. It was therefore impossible to know with any certainty how many students were in attendance when the numbers fluctuated daily. Attendance records were required by the **Regulations** and funding was dependant, in part, on enrolment.

[24] More concerning was that ALL could not get a good understanding of how intake was done at ASSALC and particularly what assessment was done of each learner. The evidence was that very few grade 9 to 11 classes were offered and generally students were put directly into grade 12 regardless of their education level or language proficiency raising questions about the integrity of the program overall.

[25] This practice also raised some tough questions about whether all the graduates of the program had met the necessary course requirements and cast doubt on the credits received. It was for this reason that ALL asked to see 64 transcripts so they could review them. The problem was exacerbated by the fact that what record keeping there was at ASSALC was often disorganized and in many respects inadequate. Considerable follow-up by the staff at ALL was needed to get information that should have been made readily available to them.

[26] To the extent it is alleged that ALL was trying to force Brenda Garner out by focussing on these issues, it is noteworthy that many of the concerns raised by ALL, and confirmed by the staff at ASSALC, were also confirmed by an independent review conducted by a former vice-principal in the public school system in 2001/2002. This shows that not only were the concerns not new, but they were not adequately addressed over a period of several years.

[27] Throughout their testimony, the witnesses from ALL took care not to discredit Brenda Garner's overall educational objectives or the program model she favoured. For example, John Sawchuk readily acknowledged that the program was meeting an important need in the community and that it graduated a reasonable number of students many of whom faced multiple challenges. He also recognized there was merit in some flexibility of approach and in allowing students to work independently. Similarly, he acknowledged that the staff at ASSALC, who were hired by Brenda Garner, were experienced teachers. The overall impression left was that, despite the fact that a more structured model would have been preferred by ALL, and its view a different set up and location might have worked better, ALL continued to support the operation of the centre. The same went for Brenda Garner, if she was prepared to work with ALL in meeting the legislative requirements. However, by the spring of 2005 Brenda Garner's working relationship with ALL had significantly deteriorated.

[28] Overall, I found the staff members of ALL to be professional in their demeanour. Although it was evident that relations with Brenda Garner on a personal level were strained (more so with some than with others), they were all

respectful of Brenda Garner's educational goals and achievements and gave their evidence in a straightforward and balanced way. Similarly, I found the staff of ASSALC to be committed professionals, genuinely concerned about providing the best services possible to their learners within the available resources, and obviously saddened by the fact it had all come to this.

[29] Brian O'Leary, superintendent of Seven Oaks, was asked about whether he had any concerns about ASSALC in the spring of 2005. He testified that, in addition to Brenda Garner's tardiness, he too was concerned about the assessment of learners at entry and the fact so many were placed in grade 12 courses. As well, the high enrollment numbers were not reflected in a high rate of graduation. Brian O'Leary made the observation that in the two other adult learning centres in which Seven Oaks was involved, there were fewer students and the success rate was higher. However, he also stated that it was his impression that ASSALC was working on the various issues that had been identified suggesting his continuing support if they were gradually being met.

### **Funding**

[30] The funding ASSALC received from ALL for 2001/2002 related to operations at three adult learning centres located on Salter Street, Concordia Avenue and Osborne Street. However, by the end of that funding year, ALL had concerns about the physical conditions of the Concordia and Osborne locations as well as its concerns about the program model. It required ASS Inc. to consolidate the three centres into one location in 2003, and thereafter ASSALC

continued to operate an adult learning centre, in partnership with Seven Oaks, at the Salter Street location.

[31] Brenda Garner's evidence as to the process for funding and registering an adult learning centre for a school year was confirmed by Brian O'Leary. An initial funding application would be prepared by Brenda Garner for ASSALC which she would submit to ALL. ALL would send out a letter to ASSALC setting out the funding allotment for the coming school year as a consequence of which ASSALC would submit a revised budget based on the actual funding available. This was traditionally less than what had been sought. As the partner of the adult learning centre, Brian O'Leary would sign the funding application and any revised budgets on behalf of Seven Oaks as well as the annual funding agreement between the non-profit operator, the registered educational institution and the government. Brian O'Leary testified that it was not uncommon for him to receive the documentation for his signature at the last minute and he frequently was required to sign on the spot without time to properly review it while a courier waited, in order to meet deadlines.

[32] The teaching staff at ASSALC was on the Seven Oaks' payroll and fell within their collective bargaining agreement with a special provision for seniority. Seven Oaks billed ASS Inc. by way of reimbursement. Although the 2005/2006 memorandum of partnership stated that ASS Inc. was responsible for supervising and disciplining teachers, Brenda Garner testified that the teachers were only under her authority insofar as she had the power to fire teachers for budgetary

reasons, not for disciplinary matters. Interestingly, the ASSALC staff considered Brenda Garner to be their supervisor and took their instruction from her.

### **The Board**

[33] One issue at trial was who or what was “the board.” Was it ASSALC’s advisory board, consisting of Jim Silver, John Wiens and Phil Baker, or the directors of ASS Inc. as last registered with the Companies Branch, two of whom were inactive?

[34] Although Jim Silver considered himself to be a member of the formal board of ASS Inc., his main interest was in adult education and not day to day operations. Jim Silver stated that they met infrequently and the evidence is that they acted largely in an advisory capacity. They were not involved in the approval of the Cumberland lease or the approval of funding applications, nor involved in the supervision of budgets, nor involved in the other kinds of activities normally associated with a formal board of directors. John Wiens testified he took on a role with ASSALC to help out and saw himself as an advisor and advocate only. According to a calendar produced by him, in the period 2002 to 2005, he was at a total of six meetings, only two of which included Jim Silver and none of which included Phil Baker. The others would have been meetings between himself and Brenda Garner.

[35] Brenda Garner acknowledged on cross-examination that the board consisting of Silver, Wiens and Baker did not have the power to make decisions on behalf of ASS Inc., did not have regular board meetings, and did not pass

motions and resolutions. When she submitted her letter of resignation it was submitted to Jim Silver and not to John Wiens or Phil Baker.

[36] Brenda Garner also acknowledged that in 2004/2005 she was the only active director of ASS Inc. and that the other two "directors" registered with the Companies Branch had had no ongoing involvement for some time. They were a carry-over from UBASS Inc. and she said she did not know why the listing had never been changed.

[37] On the evidence before me, I am satisfied that Jim Silver, John Wiens and Phil Baker were, at most, an informal advisory group that Brenda Garner could call on from time to time for guidance. Jim Silver acted in that capacity more than the others and after the April 27, 2005 letter imposing conditions on ASSALC was received, stepped up to the plate to do what he could to assist in keeping the centre going in some form. Insofar as any formal board of directors was concerned, it is clear that by 2005 the board existed in name only and that Brenda Garner was the only active director of ASS Inc.

### **350 Cumberland Avenue**

[38] Ken Campbell testified that in the spring of 2004, he received a telephone call from Brenda Garner asking if he was aware of any space suitable for an adult learning centre. At the time, ASSALC was located at 80 Salter Street. Jim Silver testified he agreed with ALL's view that the rent at 80 Salter Street was too high and the centre should relocate. Ken Campbell suggested his friend consider the premises owned by his company at 350 Cumberland Avenue. At that time it was

subject to a lease for \$2,000 per month although the rent being paid was \$1,000 per month. It seems that Ken Campbell had already suggested to the tenant, a Korean grocery store, that it relocate because he had a potential tenant for 350 Cumberland Avenue not related to the matter before the court.

[39] On May 28, 2004, Brenda Garner, on behalf of ASS Inc., signed an offer to lease with the plaintiff respecting 350 Cumberland Avenue for a term of five years commencing September 1, 2004. The rent was \$37,500 plus GST per year, or \$3,125 plus GST per month. Unlike earlier leases, there was no "escape clause" in the event that ASS Inc. found itself in the position of not being able to pay the rent and no guarantees were asked for or received.

[40] When asked how she arrived at the rental amount, Brenda Garner testified that she had looked at the funding and expenses and allocated the balance to rent. Her only discussions were with Ken Campbell from which one can infer she felt comfortable relying on him to charge an appropriate amount of rent. There was also evidence that he had improved the space, prior to ASSALC taking possession, to accommodate their needs.

[41] When questioned about the basis on which he had entered into the lease, Ken Campbell testified he wanted to help his friend. In order for the current tenant to vacate, he forgave two months' rent. He also acknowledged that he terminated the existing lease because the new arrangement with ASS Inc. was a "better economic proposition" than the one already in place. It was, more than three times so.



[42] The formal lease between the plaintiff and ASS Inc. was signed by Brenda Garner on August 26, 2004, on the same terms as the offer to lease. The agreement was reached solely between Ken Campbell and Brenda Garner with no involvement by ALL or Seven Oaks. Neither defendant was consulted about the location or the terms of the lease, nor did they receive a copy of the new lease. In fact, ASS Inc.'s 2004/2005 application for renewal provided to Brian O'Leary on June 29, 2004, and the funding agreement between ALL, ASS Inc. and Seven Oaks provided to him on October 13, 2004, showed ASSALC still at the old address.

[43] John Sawchuk was notified about the move from 80 Salter Street by way of an email from Gil Kneeshaw, financial consultant to ALL, dated September 3, 2004. Seven Oaks found out from a note posted at the entrance door to the 80 Salter Street location advising that ASSALC had moved. Similarly, none of the formal board members or the members of the advisory board of ASS Inc. were notified of the move.

[44] Ken Campbell admitted that, at the time he signed the lease agreement with ASS Inc. on behalf of the plaintiff, he knew that ASS Inc. was operating an adult learning centre and that it relied on annual funding; that government funding was ASS Inc.'s only source of funding; and furthermore that it was annual funding with no guarantee of renewal. He also admitted that he was prepared to take the risk without a guarantee from Brenda Garner or anyone else.

[45] Al Kinley was employed by Seven Oaks as an adult learning centre liaison person. It was he who discovered the note on the door of 80 Salter Street advising that the centre had moved. When he went to visit the new location in the fall of 2005, he said he found the location acceptable, but heard from the teaching staff that they had concerns about the layout, lack of secure office space for record keeping, and the fact they were now located close to two other learning centres. Al Kinley also expressed concerns about an increase in the number of African students who had recently arrived and who had poor English language skills, and how they would be dealt with at the centre.

[46] Other problems continued to affect the operation of the centre. Fran Taylor and Steve Jobs, both teachers at ASSALC, had their hours reduced with a resulting cut in salary and Bill Miller, another teacher, was let go entirely. These changes did not translate into a reduction in the amount of work and the staff worked hard to fill the gap.

[47] The staff at ASSALC continued to be frustrated with the continuous intake and flexible attendance model of adult education used. They felt it did not strike a proper balance between flexibility and structure. Additionally, as a result of Brenda Garner's increasing absence, teachers were taking on more and more duties such as answering telephones and completing forms. They testified that at times they did not know where Brenda Garner was.

[48] Steve Jobs testified that he also had serious concerns about Brenda Garner's adversarial relationship with ALL and her inflexibility in dealing

with them. Unaware of the concerns of the ASSALC staff, Brian O'Leary was harbouring his own concerns which centred around lateness in receiving documents, lack of assessment of learners, placement of students in grade 12 classes, and a lack of emphasis on the importance of meeting requirements in order to complete the courses successfully.

### **Brenda Garner's Resignation**

[49] Brenda Garner's resignation began with ASSALC's funding application for the 2005/2006 school year. Brian O'Leary received it with little opportunity to review it, signed it and it was submitted to ALL. The application was reviewed by three separate reviewers at ALL, as a result of which a letter dated April 27, 2005 was sent to ASS Inc. from the Registrar, Anna Beauchamp, advising Brenda Garner that ASSALC's registration was subject to a number of conditions for the remainder of the 2004/2005 school year, as well as the year for which the application was being received, effective immediately.

[50] The conditions with respect to continued registration addressed a number of issues which the evidence disclosed had been ongoing concerns. They included:

1. the need for proper assessment before a credit is to be granted and notification that ALL staff would be assessing course outlines, teachers' records and learners' files in May and June 2005;
2. the requirement to keep attendance records and what they should include;

3. a revision of the ASSALC intake/registration form to include Canadian Language Benchmark scores for listening/speaking/reading/writing, identification of learners whose attendance might affect their eligibility for financial assistance programs including the Refugee Assistance Program ("RAP") and Employment and/or Income Assistance ("EIA"), and a statement by the learner describing their goals and intended outcomes of attending the centre (**Regulation 1(a)**). This was to be submitted to ALL by May 13, 2005;
4. the requirement that learners' files include evidence that reporting for all learners eligible for RAP and EIA had been done in accordance with relevant government policies; and
5. the education director was to submit to ALL by May 9, 2005, a description of the Academic and Study Skills Course prepared in accordance with guidelines which were enclosed.

[51] The letter also advised that the total funding requests received from adult learning centres for 2005/2006 exceeded the amount allocated for the school year so that not all requests could be supported. ASSALC was told it would receive a grant of \$378,000, but that its funding would be subject to conditions as follows:

1. the education director was required to submit to ALL by June 15, 2005, copies of the transcripts for each of the 64 graduates from the 2003/2004 program year;
2. for the purpose of the 2004/2005 school Year End Statistical Return only learners who had attended and/or submitted course work on or after May 9, 2005, were to be counted as "still completing as of June 30, 2005," and only course registrations for which learners had submitted work on or after May 9, 2005, were to be counted as "still completing as of June 30, 2005";
3. the education director was required to submit to ALL by October 14, 2005, a list of learners who were counted as "still completing" on the 2004/2005 Year End Statistical Return and who returned to the centre to continue courses for the 2005/2006 program year;
4. the revised budget was to reflect an administration fee that covered no more than the actual costs of administrative services provided by the Educational Partner, and a detailed rationale for these costs; and
5. a revised budget acceptable to ALL, prepared by the financial representative of the program and approved by the Education Director was to be submitted by May 16, 2005, and was to match the approved ALL grant.

[52] The letter also included a revised 2004/2005 Registration Certificate which reflected the conditional registration status for the balance of the current year with directions to post it in the window. It was intended to replace the existing certificate which had not been posted, as was required.

[53] Seven Oaks received a copy of the letter setting out both registration conditions and funding conditions. Brian O'Leary testified that his only immediate concern was that the province still had concerns about the way ASSALC was run.

[54] When the staff of ASSALC saw the letter they were worried about their ability to meet the conditions because of the lack of systems in place and the manner in which the centre was being operated. Some of the staff were afraid that, as a result of their inability to meet the conditions, the centre would be shut down.

[55] Brenda Garner testified that a meeting took place a couple of weeks later on May 11, 2005, at 350 Cumberland Avenue. It was attended by John Sawchuk of ALL, herself and Fran Taylor, and Heather Kilbrai, a program consultant at ALL. Brenda Garner testified that the purpose of the meeting was to provide ALL with the 64 transcripts they had requested and with a copy of the new lease.

[56] In a subsequent letter to the Minister of Education dated July 28, 2005, she told the Minister that she did not understand why department officials had asked for a copy of the Cumberland lease and why the premises had become an issue. She went on to write that the landlord had spent approximately \$85,000

in improvements, but that the department had decided the program should move. Inaccurately, she also told the Minister that ALL had made it a condition that ASSALC provide them with a copy of the lease.

[57] None of the other witnesses, including Fran Taylor, recalls such a meeting taking place. In fact, Fran Taylor testified that later on in May, it was she who took the 64 transcripts to ALL's office. I agree with the position of the defendants that Brenda Garner is mistaken in her recollection of this meeting.

[58] After discussing the letter of April 27, 2005, Fran Taylor, Steve Jobes and Deb Schweyer, another teacher at ASSALC, sought Jim Silver's assistance. Jim Silver was aware that ASSALC was in crisis. It was his understanding that funds were being cut and that staff were feeling stressed and were also afraid of losing their jobs. He also understood there was a philosophical difference of approach between ALL and ASSALC. Much of his understanding was based on discussions he had with Brenda Garner.

[59] A meeting did take place on May 12, 2005 at ASSALC to discuss the conditions imposed by ALL and what should be done. In addition to differences as to who called the meeting, the evidence conflicted as to how Brenda Garner's resignation occurred. Whether Brenda Garner was asked to resign as Fran Taylor and Steve Jobes recollected, or whether she approached Jim Silver and offered to resign the next day on her own volition, the meeting was relatively short and was adjourned until the following day when Brenda Garner formally tendered her resignation.

[60] I have no doubt that, whatever was the case, Brenda Garner stepped down because she felt in her heart it was in the best interests of ASSALC to do so. As to the details of these meetings, since Fran Taylor took notes at both and later prepared minutes, it is most probable that the meetings took place as she remembered them. It included a game plan for how a number of the conditions would be met although Fran Taylor testified she felt that, whereas the staff could meet the conditions, Brenda Garner could not. Fran Taylor also took over as interim director of ASSALC and it was she who the next day provided ALL with some of the information they were seeking in satisfaction of one of the conditions.

[61] The May 13, 2005 meeting was held at Fran Taylor's house with the ASSALC staff, Jim Silver, and Brenda Garner. At this meeting, the preparation of a revised budget was discussed and Brenda Garner agreed to assist in its preparation.

[62] It is significant that Brenda Garner felt at this time that the conditions were imposed as a way to cut her out of the picture and that she had become the lightning rod for ALL's dissatisfaction. It was clear from her testimony that she felt the actions of ALL were directed at her personally. She also testified that she had been very disappointed that the funding for 2005/2006 had been cut by several thousands of dollars, but was forced to acknowledge on cross-examination that the level of funding that had been approved was in fact the same. Presumably it was as a result of discussions with her that Jim Silver was also under the impression there had been significant funding cuts. Nevertheless,



Brenda Garner was prepared to stay on in a consultative capacity for a one year period to help with the transition, which was supported by the staff, and as she stated, to ensure the program maintained its philosophy.

[63] ALL denied that the conditions were intended as a personal attack on Brenda Garner. They were certainly frustrated about what had been continuing problems, and admitted to differences of opinion as to philosophy and practical functioning of the centre. John Sawchuk testified that the conditions imposed were not a means to closure of ASSALC, but rather a method to encourage meeting operating expectations. A similar view was expressed by Heather Kilbrai. There was no evidence to suggest that the expectations being imposed on ASSALC were substantially different than those imposed on other adult learning centres in similar circumstances.

[64] It was at the May 13, 2005 meeting that the ASSALC staff discussed the possibility of keeping Brenda Garner on in an advisory role to assist the new director and this was included in a new proposed budget. Jim Silver testified there was no discussion at that meeting about changing the name or dissolving the partnership with Seven Oaks at that time. He remembered that the main concern was to keep the centre going at its current location. He also said he received a telephone call from Anna Beauchamp at the lake that day in which she told him that Brenda Garner could no longer be involved with the learning centre.

[65] On May 16, 2005, Fran Taylor said she wrote to ALL to advise ALL of Brenda Garner's resignation and that she was being recommended to take on the role as interim director effective July 1, 2005. She also submitted a new proposed budget for \$431,650 as opposed to the \$378,000, which had already been allocated to the centre. This was contrary to one of the conditions in the now infamous letter of April 27, 2005.

[66] Fran Taylor testified that the ASSALC staff, in their various discussions about the future of the centre around that time, discussed the possibility of moving and changing the centre's name because they felt that "A Stepping Stone" carried with it a stigma as a result of the Morris MacDonald scandal. It would not be surprising that this was not discussed at the May 13, 2005 meeting because the staff of ASSALC would be sensitive to Brenda Garner's feelings and were respectful of the work she had done. Insofar as a possible move was concerned, Fran Taylor testified Brenda Garner had told her she would talk to Ken Campbell to let him know that the program might not be running. Fran Taylor said that when she followed up with Brenda Garner about this, Brenda Garner said that she forgot. When Fran Taylor followed up a second time, she testified Brenda Garner did not respond.

[67] Fran Taylor testified that, in addition to a number of telephone calls with him, she had a meeting with John Sawchuk in late May 2005 to discuss various matters including her credentials, photocopiers and utilities and that she also asked about the Cumberland lease. A note in John Sawchuk's notebook indicates they had a discussion on May 24, 2005, where a change of name was

also discussed due to a concern about the centre's reputation. Since the future of the centre was up in the air, John Sawchuk told Fran Taylor not to worry about the lease yet. The plaintiff, however, alleges this is evidence which supports a deliberate plan to frustrate the terms of the lease.

[68] John Sawchuk and Gil Kneeshaw also met with Fran Taylor on May 24, 2005, to review the revised budgets and to discuss other matters arising from the April 27, 2005 letter. She followed up by sending more information to ALL along with her credentials as part of the ongoing effort to meet the conditions. Fran Taylor also testified that, at that time, she did not yet know whether ALL would approve the revised budget proposal or even whether she would be accepted in her position as interim director. The entire ASSALC staff felt like they were in limbo, and for them and the centre, the future was uncertain. In the meantime, however, they were continuing to work to meet the conditions imposed by ALL.

[69] Discussions among the ASSALC staff continued about the future of the centre and how it might operate. They discussed again the possibility of moving and making some changes to the program, including switching from the continuous intake model to regular semesters. There was even some thought given to moving the centre to Charleswood or St. James, although nothing ever came of it.

[70] Fran Taylor testified that she had a telephone conversation with John Sawchuk about the future of ASSALC on May 30, 2005. According to

John Sawchuk's notes, she told him they were looking at sites in Charleswood and St. James. Fran Taylor said they also discussed a different structure with no continuous intake, two semesters and a minimal number of credits. When she raised her concerns about a stigma she said John Sawchuk told her to sit tight until they both knew what they were doing.

[71] On June 3, 2005, Fran Taylor called Heather Kilbrai for advice on Academic Studies programs the centre could use and had a similar conversation with her.

[72] On May 31, 2005, John Sawchuk and Heather Kilbrai conducted an unannounced inspection of ASSALC. They were particularly interested in the record keeping with respect to the 64 reported 2003/2004 graduates. A review disclosed that eligibility to graduate could not be confirmed with respect to eighteen of the 64 files. Brenda Garner, who was continuing on at ASSALC till the end of the school year, walked Heather Kilbrai through the files but the information ALL was seeking was not all available. What could be produced was obtained from files scattered around in various filing cabinets and some information was in a file marked "miscellaneous." When they returned to the office, John Sawchuk and Heather Kilbrai determined, after further review, that five files remained problematic. As a result Brenda Garner and Fran Taylor were called to a meeting at ALL on June 8, 2005. Further concerns had also developed with respect to the 2004/2005 graduates.

[73] By all accounts the meeting was a difficult one. Brenda Garner said that John Sawchuk announced there would be no discussion and they would hear from Heather Kilbrai. That accorded with John Sawchuk's evidence that they did not want to engage in debate and that they wanted to ensure that the graduates, who had obtained their diplomas, had proper credits. Heather Kilbrai read the findings with respect to the five remaining problem transcripts and asked for follow-up. John Sawchuk advised them that Fran Taylor would have to look at student files for the learners who were to graduate that year. In effect, they were telling Fran Taylor that she had to review her director's work because abnormalities had been found in the credits granted by ASSALC. This was awkward for everybody. Brenda Garner testified that she requested a copy of the report from Heather Kilbrai, but was told no. Although John Sawchuk described the meeting as "businesslike," Fran Taylor and Brenda Garner felt uncomfortable and both were emotional afterwards.

### **The June 14, 2005 Meeting**

[74] One of the pivotal events was a meeting that took place on June 14, 2005. At the call of ALL, it included John Sawchuk, Anna Beachamp, Heather Kilbrai and Gil Kneeshaw for ALL; Jim Silver and Fran Taylor for ASS Inc./ASSALC; and Brian O'Leary and Al Kinley for Seven Oaks. Recollections as to what occurred at the meeting varied significantly. Memories were vague, participants did not make notes and how some interpreted what transpired was

obviously coloured by their own perspective and the information they had coming into the meeting.

[75] Critical to the plaintiff's claim is whether going into the meeting Seven Oaks and ALL already had a plan in place. Jim Silver testified that he made an opening statement at the beginning of the meeting in which he advised that Brenda Garner would no longer be involved with ASSALC. He also said he advised ALL that the centre was prepared to work within the amount of funding allocated and to move towards a more structured style of programming. Despite this, he testified it was apparent to him that ALL had a different plan from the outset – that the ASSALC partnership with Seven Oaks would be dissolved, a new entity would be created and moved and funding would be re-directed to it. It was his view that ALL was attempting to squeeze out ASSALC and this was the final step.

[76] Fran Taylor also recalled Jim Silver giving an opening statement. She said that he was complimentary about the ASSALC staff, expressed the need to move forward without the former director, and suggested the centre consider changing its name. She testified that this was consistent with what Jim Silver had discussed with the ASSALC staff members before the meeting and they were expecting this is what he would say. At no time did her evidence support the idea of a preconceived plan that was already in the works.

[77] John Sawchuk also recalled that Jim Silver spoke first, but his recollection was that he was more definitive on the change of name idea and that he also

indicated that ASSALC was prepared to not only change its name, but also its location. His preference would have been to have the centre stay in the downtown area. It was also his recollection that the partnership between ASSALC and Seven Oaks would not continue. He denied that ALL wanted ASSALC to move or reincorporate and that the department had said it would cover the moving costs. He did acknowledge that the possibility of reincorporation may have been discussed, but was clear that the topic had not been initiated by ALL. With respect to Anna Beauchamp's letter of July 22, 2005 to Jim Silver and Brian O'Leary indicating that the decision to dissolve their partnership was made jointly, he agreed it was technically correct. Since Anna Beauchamp testified that at the meeting it was her recollection that Brian O'Leary had said dissolving the partnership would be the best course, and there was no evidence to suggest that there had been any debate about this, the letter was not inaccurate, but did not necessarily mean it was part of a joint plan. To my mind, it again illustrates that there was a desire to find the best way to move ahead and not, as is suggested by the plaintiff, an indication that ALL and Seven Oaks were colluding to bring about the demise of the centre.

[78] Admittedly, others did think Jim Silver said the centre would continue to partner with Seven Oaks, but this could simply be because the matter was under discussion. They also remembered him saying that ASSALC was open to the possibility of reincorporation. Gil Kneeshaw testified that he remembered very little although he did say there was no definitive decision made about the partnership and he had no recollection of Brian O'Leary saying anything about

operating an adult learning centre with Seven Oaks. In particular, he had no recollection of a plan to relocate, change ASSALC's name, offer staff new jobs or pay the costs of the move or that ASSALC was advised to incorporate a new entity. Al Kinley did not remember what was discussed at the meeting at all.

[79] Heather Kilbrai did not have a clear recollection of what was decided at the meeting, but thought that Jim Silver had said that the board of ASSALC had decided that Brenda Garner should not continue and that the centre would operate under a new name at a new location and would reincorporate. She also thought that there was some decision made to dissolve something, but had no recollection of ALL suggesting a move, a name change, or incorporating a new entity to preserve funding.

[80] It would appear that there was discussion about the location of the centre with Brian O'Leary indicating he would prefer the centre to locate back to the north end or stay within Seven Oaks and Jim Silver feeling strongly that it should remain in the downtown core. This was consistent with Jim Silver's evidence when asked if he would continue to have a role in the centre. He answered that he was doubtful because he wanted to continue in the inner city. In my view, the asking of this question is inconsistent with the view that there was a plan in place to cut Brenda Garner out due to philosophical differences because it was well known that Jim Silver shared a number of her views although he was prepared to be more flexible in the mode of delivery. Although the plaintiff argues that Seven Oaks was in fact "the protagonist of the move" at the meeting, overall the evidence does not support that contention.



[81] John Sawchuk and Anna Beauchamp were under the impression that by the end of the meeting, Seven Oaks was no longer interested in continuing its partnership with ASS Inc., although Brian O'Leary testified that he had not reached any firm decision on the point because he needed to consult with the Seven Oaks Board of Trustees. This may be why John Sawchuk was left with the impression that Seven Oaks had to go away to make some decisions. Certainly John Sawchuk would have been aware of the obligation on the Superintendent to involve the school board in any final decision.

[82] Fran Taylor was under the impression that Seven Oaks was no longer desirous of dealing with ASS Inc. because it was Brenda Garner's company. The fact that Brian O'Leary was less than enthusiastic about continuing the partnership would, in the circumstances, be understandable. It also seems to be borne out by his decision, taken shortly after the meeting, that Seven Oaks would not renew the partnership with ASS Inc. for the 2005/2006 school year. His stated reason was because ASSALC was in an area already well served by other learning centres and because it faced ongoing operational concerns. It should also be remembered that the same concerns had been around for some time, but had grown increasingly problematic. It was now decision time.

[83] The plaintiff relies heavily on the evidence of Jim Silver in support of its position that there was a pre-existing plan in place as a result of the defendants conspiring together to get rid of Brenda Garner and start a new adult learning centre with money that should have gone to ASSALC. However, on cross-examination, Jim Silver admitted a number of times that he could not remember

details about the meeting. He also acknowledged that on April 5, 2011, less than a month before trial, he admitted to counsel for Seven Oaks that he had “virtually no recollection” of the events of 2005 including the June 14, 2005 meeting.

[84] Furthermore, although he testified to using documents to refresh his memory, he did not review the only meeting notes available, prepared by ALL. When the contact management notes on ALL’s computer system, as entered by Heather Kilbrai, were shown to him indicating that he had started the meeting by saying that the board of ASSALC had decided to relocate; Brenda Garner would not be involved in the centre; and that the centre would operate under a new name in partnership with Seven Oaks, he quite candidly allowed that as a reasonable man he had to wonder what was said.

[85] As well, when it was put to him on cross-examination that Gil Kneeshaw had suggested at the meeting that legal advice should be sought by ASS Inc./ASSALC with respect to the implications of the lease and any reincorporation, although he could not recall it, he agreed it could have been said and acknowledged he had not met with anyone subsequently to discuss the lease. Significantly, he admitted that a letter he wrote to the Minister of Education on August 2, 2005 was in defence of Brenda Garner’s reputation which he felt had been tarnished and that she had been treated badly, and that he urged the Minister to flow funds through a new entity so that a learning centre could continue.

[86] I have no hesitation in finding that Jim Silver testified honestly to the best of his recollection. However, his recollection was not strong. Without intending any criticism, it should also be noted that Jim Silver is a personal friend of Brenda Garner and has been for approximately 30 years. An educator himself, and a loyal and supportive friend, much of his understanding of events prior to the June 14, 2005 meeting was shaped by discussions he had with her. Given his admitted lack of memory about the meeting and admissions made on cross-examination, I prefer the evidence of the defendants that they did not go into the meeting with the future of ASSALC a *fait accompli*.

[87] It is not surprising that there was no clear consensus on exactly what was discussed. There had been numerous discussions among the participants with various others prior to the meeting. As well, the lapse in time since then, coupled with the obvious time pressure they were all under as the end of the school year loomed large, would not have helped. In my view, that the witnesses were unclear as to what had been determined as to the future of ASSALC when the meeting concluded is consistent with there being a number of possibilities raised and options considered. This also supports the defendants' position no plan was already in place.

[88] I am satisfied that, as to the future of ASSALC, Seven Oaks and ALL did not have a plan, but went to the June 14, 2005 meeting with open minds. When the issue of the location of the centre was raised by others, Seven Oaks expressed its preference and responded to the suggestion of a possible reincorporation, but did not initiate it. For the most part, Seven Oaks sat on the

sidelines with respect to the future plan of ASSALC with the main discussions taking place between the representatives of ALL and ASS Inc./ASSALC.

[89] Similarly, I find no basis on which to conclude that ALL had any intention other than to discuss the issues and hopefully come to some resolution as to how the centre could move ahead in time for the fall term in some form or another. Indeed, it appears that the participants at the meeting had a common purpose which was to find a future for the centre which has since been forgotten.

### **Seven Oaks Terminates ASS Inc.**

[90] I accept Brian O'Leary's testimony that it was after the June 14, 2005 meeting that he came to the decision that Seven Oaks should terminate its partnership with ASS Inc. although he was coming to that position at the June 14, 2005 meeting. As there were no more meetings of the board of trustees until the fall of 2005, he conferred informally with the board of trustees and obtained their approval to end the partnership and reapply for funding for a new centre. This was communicated to ASS Inc. by letter dated June 28, 2005.

[91] In the meantime, Fran Taylor and Brenda Garner spent two nights reviewing students' marks prior to the June 16, 2005 graduation ceremony for ASSALC's students. Once completed, Fran Taylor phoned Jim Silver, John Wiens and Phil Baker to apprise them of recent developments and to ask them whether they would be agreeable to her storing the equipment used at the centre off site for the summer given the uncertainty of ASSALC's future. Fran Taylor testified

that it was John Wiens who ultimately approved removing the equipment from 350 Cumberland Avenue on an interim basis although he did not recall this conversation. She also testified that Jim Silver gave her permission to move the equipment which he denied. Brenda Garner said she was never asked about whether things could be moved to Maples Collegiate.

[92] Since both John Wiens and Jim Silver were advisors only, not a lot turns on who gave permission other than to demonstrate that advice was sought and there was nothing to hide. Again, given Jim Silver's admission of having virtually no recollection of these events, I accept Fran Taylor's evidence on this point. I also find that she advised John Sawchuk on June 27, 2005, that she had permission from Jim Silver to move the equipment which needed to be stored.

[93] The equipment from 350 Cumberland Avenue was ultimately stored in the gym at Maples Collegiate at the request of ASSALC. I am satisfied it was intended as an interim measure and Seven Oaks was simply accommodating ASSALC's request as a reasonable solution to house the furniture and equipment over the summer months. In fact, it had been owned by UBASS Inc. which at this time no longer existed.

[94] There is no persuasive evidence to support the allegation that the chattels were moved as part of an overall plan to prevent the plaintiff from executing against them once funding to ASS Inc./ASSALC had been cut off and the lease had been breached. Although Heather Kilbrai and John Sawchuk were aware on June 27, 2005, that the equipment was going to be moved the next day, and

Anna Beauchamp acknowledged she was also aware of it, the evidence supports the fact that it was done as a matter of convenience because of the uncertainty of the centre's future. Anna Beauchamp also said she did not give permission to have the chattels moved. When asked whether she made any effort to find out what was there, she said she had not because she did not think there was any inventory of any significance to be concerned about, which was borne out by other evidence.

[95] On June 27, 2005, a meeting was held between Fran Taylor, John Sawchuk, Anna Beauchamp and Heather Kilbrai. ALL was advised that the partnership between Seven Oaks and ASS Inc. was being terminated and that Fran Taylor was not prepared to remain on as educational director of ASSALC. Nevertheless, Fran Taylor was writing a new proposal. At the meeting, she also explained why the staff wished to move and disassociate itself from the "A Stepping Stone" name. Some of the challenges facing the staff were also reviewed. John Sawchuk testified that, at its conclusion, he understood the centre would be relocating to the Maples, that this had been approved by Jim Silver and that Seven Oaks would assist with the relocation. This recollection conflicted with that of others.

[96] I accept Fran Taylor's evidence and that of the rest of the staff at ASSALC that the issue of whether and where the centre should be moved, and whether a change of name should take place, was still up in the air. Although John Sawchuk testified that Fran Taylor advised him on June 27, 2005, that she had been told by Al Kinley that the centre would be moving into the Maples area,

when she met with Brian O'Leary and the principal of Maples Collegiate, a Mr. Baldwin, the next day he advised her that the learning centre would not be located in his school. Whatever anyone thought, there was clearly no definite plan.

[97] As a result of being advised in writing that Seven Oaks was not renewing its partnership with ASS Inc., and that Fran Taylor was not prepared to remain as educational director of ASSALC, on July 22, 2005, Anna Beauchamp wrote to confirm that the partnership had been dissolved and that, as they had been told at the June 14, 2005 meeting, ASS Inc.'s operating grant had been rescinded.

[98] On the same day that Brian O'Leary wrote to ALL advising of the termination of the partnership with ASS Inc. (June 28, 2005), Seven Oaks also removed the contents from the learning centre to store them in the Maples Collegiate gym. It was Fran Taylor's evidence that she asked Brenda Garner to tell Ken Campbell about the move. Brenda Garner testified that she called Ken Campbell to advise him the furniture and equipment was being removed from the premises that day. Later that day, or the next, Fran Taylor received a call from Ken Campbell asking what was going on.

[99] She told him about ALL's conditions and the staff's concern that they could not be met, and that she was not prepared to become the director of ASSALC but was writing a proposal for a new centre. Ken Campbell said he asked about the lease and was told by Fran Taylor that she could not speak to it, but that she had mentioned it to John Sawchuk. It appears that little thought

had been given to the lease before then, but the rent had been paid up to the end of July 2005. Fran Taylor also said she felt like she had let Ken Campbell down.

[100] Fran Taylor indicated that Ken Campbell's main concern was why ASSALC was no longer being funded and why Brenda Garner was out of the picture. He went on to say that he intended on making it an issue if something was not clarified and that he would "go all the way." Fran Taylor also stated unequivocally that during this conversation Ken Campbell told her he was going to help his friend Brenda and would take the issue to the government and the courts, if necessary.

### **The New Centre**

[101] When Gil Kneeshaw became aware of Fran Taylor's new application, which had been described to him by Fran Taylor as the need for a new start, he prepared Treasury Board submissions to authorize the funds that would have otherwise been available to ASSALC to become available for a new centre. The fact that they were prepared before the details of the new entity were entirely known is relied on by the plaintiff as further proof of the alleged conspiracy. While it is certainly unusual to obtain government funding in such circumstances, in light of all the problems that had gone on before at ASSALC, and all the meetings and discussions with ALL in the hope of resolving them, there was some reason for optimism and the fall was fast approaching. ALL had always maintained that it was supportive of ASSALC and what it was attempting to



accomplish for adult learners but also had to ensure it was operating within the law. I am satisfied the submission to Treasury Board is equally consistent with its commitment to see the centre continue, although in a different form.

[102] Over the summer of 2005, discussions and meetings were ongoing with ASSALC teachers as different proposals were considered. Fran Taylor prepared an application entitled "Education for Adults" which she described as a "working document." It was never registered. On July 14, 2005, she met with ALL to look over a draft budget. She testified she was told by ALL that they had to go to Treasury Board to get approval for the full amount of funding for a new centre. They offered her \$200,000 which apparently was all they could advance without Treasury Board approval. Fran Taylor described the meeting as heated and refused to accept the \$200,000.

[103] It was after this meeting that she did some research and discovered that Seven Oaks could run the centre directly. Ultimately, she wrote an application which had Seven Oaks applying directly, without a partner, to operate a new centre called the "Seven Oaks Adult Learning Centre." It was Brian O'Leary's understanding that this model had been decided upon to allow the Seven Oaks Board of Trustees to oversee the new centre instead of an external board which had not operated effectively in the past.

[104] On July 22, 2005, Anna Beauchamp wrote to Brian O'Leary and Jim Silver confirming a number of things including that the partnership between

Seven Oaks and ASSALC was not being renewed, as a result of which ASSALC's registration was cancelled and it was no longer eligible for an operating grant.

[105] Over the course of the summer, Fran Taylor continued negotiating with ALL as to the amount of funding to be received. On August 16, 2005, funding was ultimately approved for the whole \$378,000 that had earlier been allocated for ASSALC. The fact of its uncertainty prior to this supports the view that there was no preconceived plan that was simply being rolled out.

[106] Fran Taylor learned informally that the funding was in place so that preparations could be made for the new students to register in the fall. It was formally confirmed by letter from ALL dated September 8, 2010. In the meantime, she heard from Brian O'Leary that Seven Oaks was prepared to have the adult learning centre. On September 8, 2010, ALL registered the Seven Oaks Learning Centre as an adult learning centre for the 2005/2006 school year. These events, and the timing of them, also support the position of the defendants that there was no plan in place as claimed by the plaintiff.

[107] Four of the previous teachers at ASSALC received positions at the new Seven Oaks Adult Learning Centre. Again, this was relied upon as evidence of an advance plan, particularly because they had not made efforts to find employment elsewhere. I disagree. In my view, the fact that the staff from ASSALC spent the summer putting together a workable plan for the fall for a new centre which operated on a more structured education model is evidence of their dedication to

seeing the enterprise continue in a form which met the concerns of ALL, concerns they too saw as legitimate.

[108] Ken Campbell decided he wanted to bring the matter to the attention of the government which he did by letter dated December 20, 2005, to the Assistant to the Deputy Minister of Advanced Education and Training. A copy of the correspondence was sent to Seven Oaks. This was the first contact Seven Oaks received from him since the premises had been vacated six months earlier. In it, Ken Campbell alleged that ALL had acted illegally, induced a breach of contract and interfered with the economic relations between the plaintiff and ASSALC.

### **Reletting of 350 Cumberland Avenue**

[109] Initially, Ken Campbell decided to relet 350 Cumberland Avenue through his own company, Sussex Realty and Insurance Agencies Ltd., although it did not specialize in leasing commercial real estate. He posted an ad in the Winnipeg Free Press and forwarded a brochure he made to several agents as well as posting a sign in the windows. His efforts did not bring in any results and in mid-December 2005 the premises were advertised through J J Barnicke Winnipeg Ltd. ("J J Barnicke").

[110] The property was listed at \$14 per square foot from December 2005 until April 7, 2007 when the listing price was reduced to \$10 per square foot. It remained listed at that price until the Winnipeg School Division leased the property on May 26, 2008 on a square footage basis of \$10 or \$2,368.33 per

month plus an additional \$456.57 to cover costs incurred by the landlord to do leasehold renovations and GST. ASS Inc. had been paying \$13.19 per square foot, which was substantially over the \$4.80 per square foot Ken Campbell had been receiving from his former tenant, the Korean grocer.

[111] J J Barnicke, through Cushman and Wakefield Lepage Brokerage Services, invoiced the plaintiff \$7,460.25 for its services. On December 27, 2006, Ken Campbell advised a representative of J J Barnicke that he had threatened the government with legal action and, although there was no indication they would settle the claim by referring a tenant to the plaintiff, if they did it would not be due to the efforts of J J Barnicke. As a result, J J Barnicke agreed it would reduce its fees by 50% if that should occur.

### **Law and Analysis**

[112] As noted earlier, the plaintiff is entitled to default judgment against ASS Inc. for breaching the lease respecting 350 Cumberland Avenue.

[113] As against the government and Seven Oaks, the plaintiff argues that ALL decided that a new legal entity should be created to preserve the funding that would otherwise go to ASSALC and that is why Seven Oaks withdrew from the partnership with ASS Inc. By doing so, the plaintiff claims that it was defeated in its ability to continue to collect rent from ASS Inc. and, after the lease was breached, to execute on the assets of ASS Inc. However, any assets identified by the plaintiff did not belong to ASS Inc. but had been the property of UBASS Inc. and therefore could not be executed against by the plaintiff.

[114] The plaintiff alleges three causes of action against the remaining defendants, namely conspiracy, inducement of breach of contract, and wrongful interference with contractual relations. There was no disagreement on the applicable law, but rather on the facts to which the law is applicable. Accordingly, I will deal with the law briefly. To the extent that I have already made significant findings of fact, in addition to those that follow, I adopt them here and will not repeat them.

**1. Conspiracy**

[115] It is submitted by counsel for Seven Oaks and counsel for ALL that the plaintiff failed to plead conspiracy and is therefore not entitled to advance it.

[116] The plaintiff's statement of claim is framed entirely in inducement of breach of contract and wrongful interference with contractual relations, but for paragraph 12 which states:

The plaintiff[s] says that the Crown and Seven Oaks discussed creating a new legal entity to continue to carry on the business of the Tenant so that once the Tenant had breached the Lease, the plaintiff would not be able to collect on any judgment it may obtain.

[117] Counsel for Seven Oaks relies on Bullen & Leake & Jacob's, *Precedents of Pleadings*, 14th ed, Volume 2 (London: Sweet & Maxwell, 2001) at p. 823, in support of their argument that in order to succeed a plaintiff must plead four necessary elements in a claim for conspiracy:

- (i) a combination or agreement between two or more individuals;
- (ii) an intent to injure;
- (iii) pursuant to which combination or agreement and with that intention certain acts were carried out; and
- (iv) resulting loss and damage to the claimant.

[118] It is submitted that the plaintiff has pled only a “discussion” between ALL and Seven Oaks which does not meet any of the foregoing requirements. In support of its position, it points to *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 (Ont. S.C.J.), where the court struck an allegation of conspiracy because the particulars of the agreements among the parties, the overt act or acts in furtherance of the conspiracy, and the injury and special damage caused by such conspiracy were not specifically pled. In the present case, not only were the particulars not pled, conspiracy was not pled.

[119] In reply, the plaintiff says that the defendants have known for a considerable period of time that the plaintiff’s claim included a claim for conspiracy and did not take issue with the pleadings. The court was referred to the pre-trial conference briefs of both defendants which refer to the allegations of a conspiracy between Seven Oaks and ALL. As well, the plaintiff points out that although “conspiracy” is not mentioned in the statement of claim, the facts and allegations included in it support the cause of action of conspiracy. It is

therefore submitted by the plaintiff that the defendants are not taken by surprise by an allegation of conspiracy and should not be permitted to raise the sufficiency of the pleadings only in closing argument.

[120] In any case, the plaintiff says that it would be entitled to perfect its pleadings, relying on ***Ranjoy Sales and Leasing Ltd. et al v. Deloitte, Haskins & Sells*** (1990), 63 Man.R. (2d) 248 (C.A.), where the Manitoba Court of Appeal held that the general practice is to allow amendments virtually anytime up to the date of trial and observed that amendments during the trial, at the conclusion of the trial or even at the hearing in the Court of Appeal are not unusual (at para. 11).

[121] I am satisfied that the defendants had notice of the plaintiff's intention to include conspiracy as a cause of action. They addressed it prior to trial, during trial and in written argument. I therefore find there is no prejudice to either defendant to allow this cause of action to stand.

[122] No evidence was led by the plaintiff of any combination or agreement between ALL and Seven Oaks. The plaintiff asks the court to infer, from the facts it urges the court to find, that such a combination or agreement existed.

[123] In support of this allegation, the plaintiff argues that the government, through ALL, had it out for Brenda Garner and wanted to get rid of her. While conceding that Seven Oaks was "not necessarily a conceiver of the plan," the plaintiff argues that Seven Oaks was an active participant in helping ALL make it happen.

[124] Reference is made in the plaintiff's argument to the fact that the Minister responsible for Adult Education, Drew Caldwell, was very supportive of Brenda Garner and her work, but that changed in 2002 when Diane McGifford took over his responsibilities. It was never clearly stated what inference was being suggested, but the fact is that in 2002 and subsequently, the way in which adult learning centres were run was substantially changed with the advent of and ultimate passage of the *Act*. I am satisfied that relations between ALL and Brenda Garner did deteriorate from that point on because of her apparent inability to adapt to the changes and ensure that ASSALC met the necessary legal requirements in a timely way.

[125] Although the plaintiff argued that no concerns had been raised prior to the April 27, 2005 letter imposing conditions on funding and registration for the 2004/2005 school year, this does not accord with the evidence. In addition to the independent study done of the 2001/2002 school year, a number of concerns were also raised as a result of the site visit at the Cumberland location conducted by Heather Kilbrai and Lois Morin on November 4, 2004. This was a regular site visit which ALL conducted after the move from 80 Salter Street. At that time, there were concerns about lack of coding of courses, the challenges facing second language learners and ASSALC's ability to assess them, and unreliability in ASSALC's completion of reliable statistics. Although no letter was written specifically setting them out, they were made known to Brenda Garner who should have been aware of their importance.



[126] Furthermore, an issue arose with respect to students on EIA. Brenda Garner refused to share this information with ALL because some students may have been in contravention of another government department's rules. Brenda Garner received a copy of the site visit's profile which she was required to and did sign and is therefore taken to be aware of its contents. In a letter to Minister McGifford dated July 20, 2005, Brenda Garner incorrectly stated that the site visit had occurred in February 2005 and complained that it had been unprofessionally conducted and suggested it was designed to prevent meaningful dialogue or follow-up. There was no evidence of her dissatisfaction with the visit prior to them.

[127] It should be clearly stated that the conditions on funding and registration imposed by the April 27, 2005 letter address serious concerns about the operation of the centre which were shared by the staff at ASSALC. The fact that they were worried they may not be able to meet the conditions and that the centre might have to close as a result indicates that ASSALC was significantly offside in meeting its requirements. I do not find that the April 27, 2005 letter is evidence of an intention on the part of ALL to get rid of Brenda Garner and close the centre.

[128] I therefore find that the plaintiff has failed to prove a combination or agreement between Seven Oaks and ALL. The plaintiff's claim for a finding of conspiracy must fail.

[129] Before going on to the next cause of action, however, I also find that the evidence does not support an intent to injure the plaintiff. It is well settled that in order to prove conspiracy, the plaintiff must prove either of the following:

- (a) a predominant purpose of two defendants to cause injury to the plaintiff; or
- (b) conduct on the part of the defendants that is unlawful, directed towards the plaintiff, and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

***Cement LaFarge v. B.C. Lightweight Aggregate***, [1983] 1 S.C.R. 452

(at para. 34)

[130] In my view, the evidence indicates that, although ALL was legitimately frustrated about the difficulties they encountered in their dealings with Brenda Garner, as director of ASSALC, there is no evidence to support any intent to injure the plaintiff by getting rid of her and closing the centre, or otherwise.

[131] The conditions imposed on the centre were reasonable and necessary in the circumstances. The fact that ALL was not prepared to approve Brenda Garner's continuing on at the centre during the transition period was also reasonable given her resistance to adapting to the requirements of the new legislation and regulations and the fact that her working relationship with ALL had become unhealthy. I am satisfied that the evidence of a "cheeky joke" shared at her expense, taken in context, simply indicates the exasperation of one person at ALL at one moment in time. As well, I find that the draft letter to

ASSALC which was prepared with respect to a default of the first condition just before the deadline had passed shows nothing more than an efficient response to an established practice and the lack of confidence ALL had in Brenda Garner's ability to comply with deadlines. References were made to other examples picked out of letters or emails as tending to show a motive to get rid of Brenda Garner and execute the alleged plan. For the most part, they were adequately explained. Those that were not, in my view, did not lead to the conclusion that the plaintiff's assertions are established. Some could not be explained because the witnesses did not write them and did not know. One other, taken in context, could cause a suspicious mind to wonder, but in my view falls far short of the necessary proof. I am referring to the comment about cutting out ASSALC.

[132] I do not intend to refer to all of the points of evidence on which the plaintiff relies in support of its position. Whereas there were inconsistencies and some contradictions in the evidence of the defendants, I am satisfied these are not serious. Some inconsistencies are to be expected given the passage of time. The fact that ASSALC was only one of any number of other matters with which ALL and Seven Oaks were dealing at the end of the school year, and before, is also a relevant factor. I find that the evidence does not disclose that ALL disliked Brenda Garner although they were clearly frustrated in their dealings with her. Neither did ALL dislike the Cumberland location to the extent it is suggested, but rather they would have preferred another location as would the staff of ASSALC.

[133] The plaintiff also argues there was no statutory authority to impose conditions on the registration of ASSALC. The obvious implication is that it shows how far ALL was prepared to go to implement the plan. I do not accept the plaintiff's interpretation of the statute.

[134] Section 9(2) of the **Act** allows the Registrar to impose any conditions on a registration that the Registrar considers provides. It provides:

#### **Conditions**

9(2) The registrar may impose any conditions on the registration that the registrar considers necessary.

[135] Furthermore, s. 14 of the **Act** gives the Registrar the authority to suspend or cancel registrations for the reasons set out subject to a right of appeal. It provides:

#### **Suspension and cancellation of registration**

14 The registrar may suspend on terms and conditions or cancel a registration if, in the opinion of the registrar, the registered operator or the registered centre

(a) no longer meets the standards and requirements set out in this Act and the regulations;

(b) has failed to comply with a provision of this Act or the regulations, a term or condition of the partnership agreement, if any, or a condition or requirement imposed by the registrar; or

(c) has failed to comply with a term or condition of a funding agreement under section 26.

[136] As well, pursuant to s. 30 of the **Act**, funding may be withheld in whole, or in part, if a registered operator does not comply with the **Act**, the **Regulations**, a condition or requirement imposed by the Registrar, or a term of condition of the funding agreement. It provides as follows:

**Withholding funding**

30 If a registered operator that receives funding under this Act does not comply with a provision of this Act or the regulations, a condition or requirement imposed by the registrar or a term or condition of a funding agreement, the minister may withhold payment of all or part of any funding under this Act until the registered operator complies.

[137] These provisions gave the Registrar the authority to write the letter of April 27, 2005 imposing conditions on the registration and funding. There is nothing in the governing legislation to limit the imposition of conditions to the time of registration as was argued by the plaintiff.

[138] On the basis of the evidence, I find the plaintiff has not proved a “predominant purpose” of an intention on the part of either Seven Oaks or ALL to harm the plaintiff to prevent it from realizing on any assets of ASS Inc. There was no intention to harm at all.

[139] Although referred to earlier in these reasons, I will comment further on the allegation that Seven Oaks committed trespass or conversion of the goods available for execution by the plaintiff. Any assets purchased by ASS Inc. through government funding would not have been available for the plaintiff to execute against as a result of the operation of s. 32 of the **Act**. Furthermore, any assets purchased between 1998 and 2000 remained the property of UBASS Inc. which was dissolved in March 2007. Accordingly, ownership of them vested in the Crown pursuant to s. 221(1) of **The Corporations Act**, C.C.S.M., c. C225, and they would not have been available for the plaintiff to execute against.

[140] It is also significant that no demand was ever made by Brenda Garner for the return of any furniture or equipment taken from 350 Cumberland Avenue and no claim was made by her or the plaintiff for them at the time. In my view, neither Seven Oaks or the government conducted themselves unlawfully.

## **2. Inducement of Breach of Contract**

[141] In **OBG Ltd. v. Allan**, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) ("**OBG**"), the British House of Lords clarified the elements of both the tort of inducing breach of contract and the tort of interference with economic relations. As noted by the defendants, this decision has been adopted by a number of Canadian courts including the Ontario Court of Appeal in **Correia v. Canac Kitchens et al.**, 2008 ONCA 506, 240 O.A.C. 153; the New Brunswick Court of Appeal in **Sar Petroleum Inc. et al. v. Peace Hills Trust Co.**, 2010 NBCA 22, 357 N.B.R.

(2d) 202; and indirectly by the Manitoba Court of Appeal in ***Johnson v. BFI Canada Inc. et al.***, 2010 MBCA 101, 258 Man.R. (2d) 268 relying on ***Sar Petroleum***. To establish inducement of breach of contract, the plaintiff must prove the following:

- (a) a valid and subsisting contract between the plaintiff and a third party;
- (b) breach of the contract with the plaintiff by the third party;
- (c) that the defendant's acts caused the breach;
- (d) that the defendant was aware of the contract;
- (e) that the defendant knew it was inducing a breach of the contract;
- (f) that the defendant intended to procure a breach of the contract in the sense that the breach was a desired end in itself or a means to an end; and
- (g) that the plaintiff suffered damage as a result of the breach.

[142] If a plaintiff establishes the foregoing the defendant is entitled to raise the defence of justification.

[143] There was no issue that there was a valid and subsisting contract between the plaintiff and ASS Inc. and that the contract was breached by ASS Inc. As well, that the plaintiff suffered damage is not in dispute although the quantum of damages is.

[144] Central to the plaintiff's case against the remaining defendants is its assertion that ALL imposed conditions on ASSALC on April 27, 2005, in order to

squeeze Brenda Garner out and shut down ASSALC so the funding could be diverted to a new entity. As part of its plan, the plaintiff says that it was necessary for the relationship between Seven Oaks and ASSALC to be severed, the centre to be relocated in a different form, and the lease between the plaintiff and ASS Inc. to be breached. The breach of the lease, it is argued, was the means to a common end which was done solely to prevent the plaintiff from being paid what it otherwise would have been owed under the lease.

[145] In ***OBG***, the House of Lords dealt with what was meant by an intention to procure a breach of contract (at paras. 42-43):

The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. ....

On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. ....

[146] In ***Sar Petroleum***, the New Brunswick Court of Appeal adopted the House of Lord's formulation of the intention test as follows (at para. 53):

Lord Hoffman's formulation of the intention test makes eminent good sense. It accords with what I regard to be one of the tort's primary objectives: to protect contractual rights by placing limits on the ability of persons to pursue their economic self-interests, in a competitive marketplace, without due regard for the contractual rights of others. ***Lumley v. Gye*** [(1853), 2 E. & B. 216; 118 E.R. 749 (K.B.)] is the classic example. The law seeks to discourage those who deliberately embark on a course of action with the object of obtaining a contractual benefit promised to another. Similarly, those who pursue a course of action designed to



bring about a breach of contract with a view to realizing an economic benefit or advantage for themselves or their principals at the expense of others should not be able to escape the grasp of this intentional tort. Such conduct qualifies as unacceptable commercial behaviour, best summed-up in the word “opportunism”. On the other hand, defendants who in good faith are pursuing their economic interests in accordance with existing contractual rights will fall outside the intended scope of the tort. Certainly they cannot be accused of acting for an improper purpose.

[147] The court went on to say (at para. 55):

In brief, if the breach of contract were neither an end in itself nor a means to an end, one must conclude that it was unintended. Hence, if the defendant did not act out of malice or obtain an economic advantage as a result of the breach, it should follow that the requisite intention is absent and the tort action must fail. ....

[148] On the basis of the evidence, I am satisfied that neither ALL or Seven Oaks acted out of malice or to obtain an economic advantage as alleged by the plaintiff. Neither was the breach of the plaintiff’s contract by ASS Inc. an end in itself, or a means to an end. The decision to relocate ASSALC was neither insisted upon nor negotiated by ALL or Seven Oaks. Rather, it was the result of the desire of the ASSALC staff to change locations for legitimate reasons including the wish for better space and a fresh start. The imposition by ALL of conditions on ASSALC’s registration, which did not include relocation, arose from legitimate concerns with respect to the integrity of the program and a continuing pattern of failing to meet legislative requirements.

[149] I also find that Seven Oaks chose not to continue its partnership with ASS Inc. as a result of a history of late filings and concerns about the integrity of the overall program which concerns were shared by ASSALC's staff. As I have already found, this decision was made after the June 14, 2005 meeting and after consultation with the Seven Oaks Board. Furthermore, with Brenda Garner's resignation, there was no board in place with which Seven Oaks and ALL could deal.

[150] It is significant that, although ASSALC ceased to exist as a result of the dissolution by Seven Oaks of its partnership with ASS Inc., Brenda Garner could have attempted to find a new educational partner for ASS Inc. or apply to have ASS Inc. operate an adult learning centre on its own. None of these options were considered. I also note that the ASSALC teachers who were ultimately hired by the new entity after funding for the new centre was confirmed, were unemployed and would have been available to be hired had Brenda Garner pursued these options.

[151] As a result of losing its funding, ASS Inc. was unable to honour its commitment to the five year lease it signed with the plaintiff. No attempt was made by Brenda Garner to sublet the premises and no explanation was given as to why not. I find that there was no evidence that Seven Oaks or ALL deliberately sought to bring about the breach of the lease between ASS Inc. and the plaintiff or to obtain a contractual benefit which formerly belonged to the plaintiff.

[152] I therefore find that the plaintiff has failed to demonstrate an intent to induce breach of contract. Accordingly, the plaintiff's claim on this ground fails.

[153] Having dealt with the more serious allegation, it is not necessary to consider the other grounds necessary to prove inducement of breach of contract. Had I done so, I would have come to the same conclusion on the causation test. Both Seven Oaks and ALL took reasonable and appropriate steps as a result of the difficulties they encountered with ASSALC. They were legally entitled to do so, and acted for legitimate reasons on behalf of the government and Seven Oaks. There is no evidence that either of them forced ASS Inc. to do anything or that either of them exerted pressure on Brenda Garner to take certain steps or not take others.

### **3. *Wrongful Interference with Economic Relations***

[154] The elements of the tort of interference with contractual relations is often confused with the elements required to prove inducement of breach of contract. In ***OBG***, Lord Hoffman explained four differences which are described by G.H.L. Fridman, Q.C., *The Law of Torts in Canada*, 3d ed (Toronto: Carswell, 2010) as follows (at pp. 765-766):

- (1) unlawful means is a tort of primary liability, not requiring a wrongful act by someone else, whereas inducing a breach of contract created what was termed "accessory liability", dependant on the primary wrongful act of the contracting party;
- (2) unlawful means required the use of independently unlawful means, whereas inducing a breach of contract required participating in the breach of contract;

- (3) liability for unlawful means does not depend, as does inducing a breach of contract, upon the existence of contractual relations, as long as the intended consequence of the wrongful act is damage in any form, for example, the plaintiff's economic expectations;
- (4) both are torts of intention, however the intended results are different, in that in unlawful means the defendant must have intended to cause the plaintiff damage, whereas in inducing a breach of contract an intention to cause a breach of contract is necessary and sufficient.

[155] Put more simply, Lord Hoffman, in ***OBG***, described the elements of the tort as follows (at para. 47):

The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.

[156] Although not specifically pled, the plaintiff argues that with respect to ALL, the unlawful conduct was the imposition of the conditions placed on ASSALC's 2004/2005 registration. I have already indicated that I do not accept the plaintiff's argument that the conditions on registration which the director under the ***Act*** can impose on a centre pursuant to s. 9(1) can only be imposed at the time of registration. There is no limitation under s. 9(2) on when conditions may be imposed on a registration. In my view, it would be a stretch to conclude that the legislature intended that the Registrar could not fulfill its responsibilities under the ***Act*** except at the time of registration each year. I also accept the

argument of the government that, when read with s. 3 of the **Act** which sets out the legislation's purpose and s. 8 which sets out the requirements for registration, the legislation should be more broadly interpreted than the plaintiff suggests. Otherwise, in order to ensure compliance during the course of the registration, the Registrar would have no option other than to suspend or cancel registration which seems draconian and would be devastating for the students in the program.

[157] It is submitted on behalf of ALL that even if the conditions were imposed without authority, they would not constitute a "actionable wrong" following the House of Lords' decision in **OBG**. Since the conditions imposed by ALL were regulatory conditions, if imposed without authority the remedy available to ASSALC would be judicial review, not an action by a third party. Given my findings, it is not necessary to decide this point.

[158] Insofar as the element of intention is concerned, with respect to ALL I agree with ALL's submission that the conditions imposed on ASSALC did not interfere with ASS Inc.'s ability or its obligation to continue to pay rent. Had the conditions been complied with, the centre would have continued to receive funding and events would have unfolded in a much different way.

[159] In my view, there is no evidence of an intention on the part of ALL to interfere with the lease agreement. Neither was there a deliberate intention to harm the plaintiff by targeting it. Following the reasoning of the Ontario Court of

Appeal decision in *Print N' Promotion (Canada) Ltd. v. Kovachis et al.*, 2011 ONCA 23, 271 O.A.C. 214, the evidence is simply not there.

[160] Similarly, the evidence does not support the plaintiff's contention that ALL somehow caused ASSALC to move, forced Brenda Garner to resign, nor was it reasonably foreseeable, when the conditions were imposed, that events would occur as they did. ALL did not behave unlawfully nor did it act in an opportunistic way. Neither did it act with the intent to harm or cause loss to the plaintiff.

[161] In so far as Seven Oaks is concerned, there is no evidence that Seven Oaks did anything unlawful. It simply elected not to renew its partnership with ASS Inc. for the legitimate and justifiable reasons I have already found. In particular, it did not commit conversion with respect to the furniture and equipment at 350 Cumberland Avenue, it simply stored them at the request of the ASSALC staff. Furthermore, the evidence fails to establish any intent on the part of Seven Oaks to cause damage to the plaintiff with whom it had no dealings.

[162] Accordingly, the plaintiff's claim for wrongful interference cannot succeed.

### **Damages**

[163] With respect to the amount of damages to be awarded to the plaintiff as against ASS Inc., neither Seven Oaks nor the government dispute the defendant's calculations which bring the total damages claimed to \$127,847.80 as follows:



August 1, 2005 to June 1, 2006 (7% GST) = \$3,343.75 x 11 =	\$36,781.25
July 1, 2006 to December 1, 2007 (6% GST) = \$3,312.50 x 18 =	\$59,625.00
January 1, 2008 to June 1, 2008 (5% GST) = \$3,281.25 x 6 =	\$19,687.50
July 1, 2008 to August 1, 2009 = \$3,218.25 - \$2,974.55 x 14 =	\$4,293.80
Commission payable to Cushman & Wakefield LePage	\$7,460.25
Total:	<u>\$127,847.80</u>

[164] However, the defendants argue that the plaintiff's damages should be reduced for the following reasons:

- The rent payable by ASS Inc. was significantly higher than the market rate because of the potential that ASS Inc. could lose its funding. Accordingly, the risk premium built into the rent should be removed.
- Damages should be recalculated at \$10 per square foot to reflect market rent in that ASS Inc. was paying \$13.19 per square foot per year which was well above what the previous tenant had paid and what the property was ultimately leased for.
- Although Winnipeg School Division leased the property three years later, when \$47,000 of tenant improvements are amortized over the five year lease the rent paid by the new tenant is \$10 per square foot per year which again supports the view that the market rent does not exceed \$10 per square foot per year.
- From July 1, 2005 to December 15, 2005, the plaintiff listed the premises through Ken Campbell's company which did not specialize in commercial properties. It did not list the property with a company that



did until December 15, 2005. This failure to mitigate should result in damages for this period being reduced by one-half.

- Similarly, listing the property at \$14 per square foot was unrealistically high – 30 per cent over what was demonstrated to be market. Despite evidence that J J Barnicke thought \$14 was reasonable, damages to April 7, 2007, should be reduced by one-half.

[165] On this basis, Seven Oaks argues that damages should be set at \$61,333.08.

[166] The government takes a similar view, but argues that damages should be reduced to \$84,523.03.

[167] In response, the plaintiff says that no evidence was called to demonstrate that, had the plaintiff taken alternate steps to lease the property it would have, on a balance of probabilities, resulted in the securing of a tenant sooner than it did.

[168] Furthermore, the plaintiff argues there was no evidence that the rental rate of \$14 per square foot was too high or would have resulted in the plaintiff securing a tenant any sooner, or that the steps taken by Ken Campbell, who did have experience in commercial leasing, was clearly unreasonable. On the basis of ***West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd.*** (1993), 144 A.R. 331 (Q.B.), [1994] 2 W.W.R. 230, aff'd (1995), 178 A.R. 127 (C.A.), [1996] 3 W.W.R. 191, the plaintiff says it has not been established that the plaintiff has failed to mitigate its damages.

[169] There is no question that the lease entered into between the plaintiff and ASS Inc. was well above what the plaintiff was being paid. Brenda Garner simply agreed to the amount of rent that was left over from ASSALC's funding after the rest of her budget had been allocated without any escape clause if funding was terminated. Ken Campbell was prepared to accept it without any personal guarantee. As a businessman, he would have known his company's economic interests were being well looked after. He was also aware that funding was on an annual basis and there was no guarantee from one year to the next.

[170] Given his experience, I do not find it unreasonable that Ken Campbell decided to make some initial efforts to lease the property through his own company. Accordingly, for the period of August 1, 2005 to December 14, 2005, I accept the amount of damages the plaintiff claims is payable under the lease, including GST, at \$15,046.88.

[171] For the period December 15, 2005 to June 30, 2006, a period of six and half months, I again accept the plaintiff's calculation of damages, including GST, at \$21,734.34. J J Barnicke had indicated that it was not unreasonable to attempt to lease the property at \$14 per square foot. However, after that time it should have become apparent that the asking price was not in accord with the market. Accordingly, for the period July 1, 2006 to April 6, 2007; April 7, 2007 to December 31, 2007; and January 1, 2008 to June 30, 2008, I am of the view that damages should be set based on a \$10 per square foot per year amount, including GST, which would be \$22,524.96, \$17,224.97, and \$13,124.98 respectively.

[172] For the period July 1, 2008 to August 1, 2009, no damages are payable in view of the lease agreement entered into by the plaintiff with the Winnipeg School Division.

[173] In the result, the damages payable to the plaintiff are:

August 1, 2005 to December 14, 2005	\$15,046.88
December 15, 2005 to June 30, 2006	\$21,734.34
July 1, 2006 to April 6, 2007	\$22,524.96
April 7, 2007 to December 31, 2007	\$17,224.97
January 1, 2008 to June 30, 2008	\$13,124.98
Commission payable to Cushman & Wakefield LePage	\$7,460.25
Total:	<u>\$97,116.38</u>

[174] Accordingly, there will be judgment against ASS Inc. in the amount of \$97,116.38. The claim against the remaining defendants is dismissed.

[175] With respect to costs, if the parties are unable to agree, costs may be spoken to.

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McCawley, J.