		Clerk's Stamp:
COURT FILE NUMBER	25-1799518 25-1799530 25-1799540 25-1799546 25-1799555 25-1800429	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
	IN THE MATTER OF THE BANKRUPTCY OF PLG CORPORATE SERVICES INC. PLG RESIDENTIAL SERVICES INC. SAS-CAN MASONRY AND RESTORATION INC. ASTY CONSTRUCTION INC. CON-FORTE CONTRACTING COMPANY INC. PLUMB-LINE GROUP HOLDINGS INC. (collectively referred to as the **"Plumb-Line Group"**)	
APPLICANT	**DELOITTE RESTRUCTURING INC., in its capacity as Trustee in Bankruptcy and not in its personal capacity**	
DOCUMENT	**BENCH BRIEF OF DELOITTE RESTRUCTURING INC., in its capacity as Trustee in Bankruptcy and not in its personal capacity**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. As requested by the Court in December 17, 2013, this Bench Brief deals solely with the issue of the jurisdiction of the Court to permit the Trustee in Bankruptcy to file a report instead of an affidavit in the proposed process for establishing the lien claims of the bankrupts.

LAW AND ARGUMENT

2. This Honourable Court has requested further submissions in writing with respect to the jurisdiction of the Court to permit the Trustee in Bankruptcy to rely on a report, as opposed to an affidavit in the process which the Trustee has proposed to determine the validity of various builders' lien claims filed by the Trustee on behalf of the bankrupt estates.

Builders' Lien Act

3. The premise of the parties opposed to the relief sought by the Trustee appear to base their position on ss. 48 and 52 of the *Builders' Lien Act* ("**BLA**"). With respect, those sections only require an affidavit where the opposing party first serves a notice to prove lien. In such circumstances, an affidavit proving lien can be filed within fifteen (15) days or, with consent of the Court, any further period of time.

4. These procedural provisions do not exclude the concept of a use of a report from a court appointed officer in a separate application (such as the one proposed by the Trustee) as to the validity and/or amount of the lien. As mentioned in oral submissions, the proposal by the Trustee mirrors, to a great extent, the "pre-trial application" process set forth in s. 53 of the BLA. There is no provision in s. 53 that limits the type of evidence which is to be heard in such an application to any affidavit proving lien. Indeed, no affidavit proving lien may have been filed at the time of the application. Accordingly, while the Court "may" consider an affidavit proving lien which has been filed, it is not limited to considering that evidence.

5. Further, s. 53(d) of the BLA provides that:

> "The Court may make further order or direction that it considers necessary or desirable..."

6. It is submitted that this provision, which places no limits on the nature of the Court's discretion, permits the Court to direct that evidence of a Court appointed officer be permitted by way of report, as opposed to an affidavit, in a s. 53 application.

7. It is submitted that, in the presence circumstances, this Honourable Court can permit the use of a Trustee's Report under s. 53(3)(d) of the BLA and, to the extent a notice to prove lien is issued, extend the time for filing an affidavit proving lien until the more efficient Trustee's process is concluded (at which time the issue will likely be moot).

Judicature Act

8. The law is clear that a superior court is unlimited in its ability to control its own process. The leading Alberta case on point is *Alberta Treasury Branches v. Leahy*, [1999] CarswellAlta. 1072 (QB) [**Tab 1**]. In that case, Mason J. stated:

> The Court has the inherent jurisdiction to control its own process.
>
> 7. The Court has an inherent power and duty to protect itself and its processes...
>
> 8 In essence, every court has unlimited power over its own processes in order to secure the most "just, expeditious and least expensive determination of civil proceedings." This inherent jurisdiction may equally be drawn upon by a judge sitting in chambers... The Court's ability to control its own procedure is encapsulated by section 8 of the *Judicature Act*, R.S.A. 1980, c. J-1:
>
> > 8 The Court in its exercise of its jurisdiction and every proceeding pending before it has the power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters involved." [emphasis added]

9. See also *Predator Corp. v. Ricks Nova Scotia Co.*, [2002] CarswellAlta 1278 (ABCA) [**Tab 2**], at para. 2-3.

10. The inherent jurisdiction of the court to control its processes has been applied to permit the court to establish procedures even where they are not provided for in builders' lien legislation. See *Taylor v. Georgina (Town)*, [1992] CarswellOnt. 3791 (OGD) [**Tab 3**], at para. 6; *Snowmount Investments v. Elliott*, [1997] CarswellOnt. 4333 (OCJ-GD) [**Tab 4**], at paras. 13, 17; and *450577 Ontario Ltd. v. Feldman*, [2010] CarswellOnt. 3359 (OSCJ) [**Tab 5**], at para. 19.

11. In the *Snowmount* case, the Ontario *Construction Lien Act* expressly delegated the adjudication of construction liens to a Master. The Court held that it had the inherent jurisdiction to provide for a adjudication by a Superior Court Judge. In the *Taylor* and *Feldman* cases, the Court held that it had the jurisdiction to order actions to be tried together in construction lien cases despite the fact that there is nothing in the Ontario *Construction Lien Act* which permitted this.

12. Accordingly, by virtue of the *Judicature Act* and its inherent jurisdiction, this Honourable Court has jurisdiction to permit evidence to be entered by way of Trustee's Report if, in the Court's discretion, the remedy is appropriate.

13. It is submitted that it is on this basis that the courts of this and other provinces have routinely permitted the use of the reports of receivers, trustees and monitors in determining both contested and uncontested applications. Contrary to the submission of some of the counsel opposing the application, the use of such reports is not limited to situations in which no remedy is sought by the officer. The examples where reports of court appointed officers have been used include:

    (a) A claim by a receiver (on behalf of the estate) where profits arising from the operation of the contract. See *Bank of Montreal v. ACS Precision Components Partnership*, [2001] ONSC, 700 (CanLII);

    (b) A response to a claim against the estate. See *Harris v. Belmont Dynamic Growth Fund*, [2011] ONSC, 4484 (CanLII);

    (c) A claim by a receiver to funds arising from a mortgage loan. See *Eisenberg v. 910234 Alberta Ltd.*, [2013] ABQB, 580 (CanLII); and

    (d) Claims that the estate is the proper owner of certain property, including shares of a company or trust funds. See *Bank of Nova Scotia v. Atcon Group Inc.*, [2011] NBQB, 1000 (CanLII) **[Tab 6]**, at paras. 28-94.

14. In each of these cases, some of which are not attached as they otherwise are not relevant to the issues at bar) the court appointed officer was either making a claim or resisting a claim in a contested matter.

Bankruptcy and Insolvency Act

15. In *Re: Residential Warranty Co. of Canada Inc.*, [2006] CarswellAlta., 383 (ABQB); upheld, [2006] CarswellAlta., 1354 (CA) [**Tab 7**], Justice Topolinski noted the following points, at paras. 25-27:

(a) A significant objective of the *Bankruptcy and Insolvency Act* ("**BIA**") is to ensure that all of the property owned by the bankrupt or which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the Trustee for realization. To further this objective, the BIA provides for practical, efficient and relatively inexpensive mechanisms for issues including asset recovery;

(b) The BIA preserves the Bankruptcy Court's equitable and ancillary powers. Therefore, inherent jurisdiction is available to assist the Court. The preconditions to the use of inherent jurisdiction are:

(i) The BIA must be silent on a point or not have dealt with a matter exhaustively;

(ii) After balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it;

(iii) Inherent jurisdiction is available to ensure fairness in the process of bankruptcy and fulfillment of substantive objectives of the BIA, including the administration and protection of the estate.

(c) Solutions to BIA concerns require consideration of the realities of commerce and business efficiency. A strictly legalistic approach is unhelpful in that regard, and a pragmatic problem solving approach which is flexible enough to deal with unanticipated problems, often on a case by case basis, is preferred.

16. Justice Topolinski quoted, with approval, the decision of Justice Farley in *Canada Ministry of Indian Affairs Northern Development v. Curragh Inc.*, in which Justice Farley stated that the Bankruptcy Court had jurisdiction to empower a court appointed officer (in that case a receiver) to do not only what "justice dictates" but also "practicality demands".

17. Section 183 of the BIA provides the Court of Queen's Bench in Bankruptcy the jurisdiction of a superior court, including jurisdiction in law and equity. Section 187 (9) permits the Bankruptcy

Court to waive any "formal defect" or "irregularity" unless substantial injustice is caused by the defect or irregularity which cannot be remedied by any further order of the Court.

18. In light of the foregoing, it is submitted:

(a) This Honourable Court has jurisdiction over claims by the Trustee in respect of property of the bankrupt. This includes choses in actions such as lien claims.

(b) This Honourable Court has inherent jurisdiction to make orders which resolve, in a practical and pragmatic basis, issues which arise in the course of administrating the estate.

(c) To the extent that the BLA requires an affidavit (which is not conceded based on the submissions above), and to the extent that the use of a Trustee's Report is a "defect" or "irregularity" with respect to that process, section 187(9) empowers the Court to waive such defect or irregularity.

Rules of Court

19. As submitted by counsel for opposing parties, the Bankruptcy Rules provide that, barring conflict, the practice and procedure of the Province in which an application or proceeding is heard will apply. Opposing counsel has suggested that this means that the requirement of an affidavit under s. 48 or s. 52 of the BLA must be followed by the Bankruptcy Court.

20. However, as submitted above, section 8 of the *Judicature Act* permits the Court to control its process. The *Judicature Act* is part of this Province's practice and accordingly, the Bankruptcy Court has jurisdiction to permit the Trustee's Report to be used under the *Judicature Act* and its inherent jurisdiction.

21. It is notable that Rule 6.11 of the *Rules of Court* governs the evidence which may be used in an application. There is no reference to a report of a court appointed officer in Rule 6.11 (unless it is in Rule 6.11 (1)(e), ie "anything permitted by any other rule or by an enactment").

22. It is submitted that the interpretation of the BLA advanced by counsel for the opposing parties would mean that all of the applications made under the Rules of Court by receivers, monitors and trustees which have heretofore used reports, were conducted improperly. This is obviously an unreasonable and incorrect conclusion. The correct conclusion is that, by virtue of the inherent

jurisdiction to control its process and s. 8 of the Judicature Act, court appointed officers' reports have been accepted properly.

Conclusion

23. For the foregoing reasons, the Trustee submits that the Court has jurisdiction to authorize use of a Trustee's Report as evidence in the proposed lien determination process. For the reasons set forth in oral submissions, it is submitted that this Honourable Court should exercise its discretion to use this jurisdiction. As mentioned in oral submissions, there is no substantive prejudice to the Respondents which cannot be addressed if necessary by future orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FIELD LLP

Per: _____

Douglas S. Nishimura, solicitor for the Trustee, Deloitte Restructuring Inc.

TAB 1

Westlaw

1999 CarswellAlta 1072, 74 Alta. L.R. (3d) 210, 39 C.P.C. (4th) 343, 257 A.R. 167

1999 CarswellAlta 1072, 74 Alta. L.R. (3d) 210, 39 C.P.C. (4th) 343, 257 A.R. 167

Alberta Treasury Branches v. Leahy

Alberta Treasury Branches, Plaintiff and Elmer Leahy, Defendant and Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian, Eskander Ghermezian, 273905 Alberta Ltd., Howard Anson, Mavis Halliday, 218703 Alberta Ltd., 579511 Alberta Ltd., 298936 Alberta Ltd., West Edmonton Mall Property Inc., Wem Holdings Inc., Wem Management Inc., Avista Financial Corporation, 298926 Alberta Ltd., ABNR Equities Corp., and Devcor Investment Corporation, Defendants by Order (WEM Applicants)

Alberta Court of Queen's Bench

Mason J.

Judgment: November 12, 1999
Docket: Calgary 9701-03767

Counsel: *C.D. O'Brien, Q.C.* and *E.B. Mellet*, for applicants, WEM.

J.T. Prowse, for plaintiff.

F.D. Cook, for defendant.

Subject: Civil Practice and Procedure

Practice --- Judgments and orders — Entering judgment

Plaintiff brought action against defendants for breach of fiduciary duty including allegations of bribery — Court issued ex parte orders for production of documents from third parties — Defendants applied to set aside orders, and plaintiff cross-applied to affirm orders — Defendants successfully applied to strike part of affidavit submitted by plaintiff in support of cross-application — Plaintiff brought application to delay formal entry of order striking affidavit — Application dismissed — Setting aside application was chambers application which lacked immediacy of putting trial on hold — Judgment was binding whether or not formally entered but delay in entering would prejudice defendants as plaintiff would have 20 days from entry to file notice of appeal — Case law suggested that lawyers have duty to ensure all orders are entered — Non-entry of order was not permitted as collateral means to re-hear application — Plaintiff did not establish that court should exercise its jurisdiction.

Judges and courts --- Jurisdiction — Jurisdiction of superior courts — General jurisdiction

Plaintiff brought action against defendants for breach of fiduciary duty including allegations of bribery — Court

issued ex parte orders for production of documents from third parties — Defendants applied to set aside orders, and plaintiff cross-applied to affirm orders — Defendants successfully applied to strike part of affidavit submitted by plaintiff in support of cross-application — Plaintiff brought application to delay formal entry of order striking affidavit — Application dismissed — Court had jurisdiction to delay entry as it had unlimited power over its own processes to secure just determination of proceedings.

Cases considered by *Mason J.*:

Begusic v. Clark, Wilson & Co., 57 B.C.L.R. (2d) 273, 1 B.C.A.C. 1, 1 W.A.C. 1, 82 D.L.R. (4th) 667, [1991] 6 W.W.R. 513 (B.C. C.A.) — considered

Burnham Estate, Re (1959), 27 W.W.R. 669 (B.C. S.C.) — referred to

Buskey v. Buskey (1997), 29 R.F.L. (4th) 24 (B.C. S.C.) — considered

Debly v. M. Gordon & Sons Ltd., 38 M.P.R. 72, [1955] 4 D.L.R. 636 (N.B. C.A.) — referred to

Debly v. M. Gordon & Sons Ltd., [1956] S.C.R. 522, 3 D.L.R. (2d) 1 (S.C.C.) — referred to

Durish v. White Resource Management Ltd. (March 24, 1997), Doc. Calgary Appeal 16339, 16341 (Alta. C.A.) — distinguished

Farkas, Re (1983), 49 C.B.R. (N.S.) 102, 50 B.C.L.R. 94 (B.C. S.C.) — considered

Fieldbloom v. Olympic Sport Togs Ltd. (1954), 14 W.W.R. 26, 63 Man. R. 47 (Man. C.A.) — referred to

Grant, Re (1879), 12 N.S.R. 538 (N.S. C.A.) — referred to

Janke, Re (1977), 2 B.C.L.R. 378, 3 C.P.C. 249 (B.C. S.C.) — considered

Lang v. Victoria (City) (1898), 6 B.C.R. 104 (B.C. S.C.) — referred to

Paterson v. Hamilton, 116 W.A.C. 382, 49 C.P.C. (3d) 290, 39 Alta. L.R. (3d) 37, [1996] 7 W.W.R. 257, 181 A.R. 382 (Alta. C.A.) — distinguished

Potash Corp. of Saskatchewan Mining Ltd., Lanigan Division v. Todd, [1986] 6 W.W.R. 646, 52 Sask. R. 231 (Sask. Q.B.) — applied

R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97 (S.C.C.) — applied

Riviera Developments Inc. v. Midd Financial Corp. (1994), 19 Alta. L.R. (3d) 208, 153 A.R. 266, 25 C.P.C. (3d) 339 (Alta. Q.B.) — referred to

Riviera Developments Inc. v. Midd Financial Corp. (1995), 26 Alta. L.R. (3d) 431, 167 A.R. 69 (Alta. Q.B.) — referred to

Schulz v. NRS Block Bros. Realty Ltd. (March 7, 1996), Vancouver CA019317 (B.C. C.A.) — referred to

Syncrude Canada v. Canadian Bechtel Ltd., 16 Alta. L.R. (3d) 153, [1994] 4 W.W.R. 397, (sub nom. *Syn-*

crude Canada Ltd. v. Canadian Bechtel Ltd.) 149 A.R. 54, (sub nom. *Syncrude Canada Ltd. v. Canadian Bechtel Ltd.)* 63 W.A.C. 54 (Alta. C.A.) — distinguished

394363 Ontario Ltd. v. Fuda (1983), 42 O.R. (2d) 779 (Ont. Master) — referred to

Statutes considered:

Judicature Act, R.S.A. 1980, c. J-1

s. 8 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Pt. 27 — referred to

R. 322 — considered

R. 506 — considered

APPLICATION by plaintiff to delay entering of order.

Mason J.:

I. Introduction

1 This is an application by the plaintiff, Alberta Treasury Branches ("ATB") to prevent the entry of an order regarding an application preliminary to an application to set aside a series of *ex parte* orders (the "Setting Aside Application"). ATB argues that since the preliminary order is interlocutory in nature, it need not be entered until judgment issues in the Setting Aside Application. ATB's primary concern is the possible use of an appeal on the interlocutory order as a means of further delaying the action. The defendants, Leahy and a group of individuals and companies related to the West Edmonton Mall ("WEM" or the "WEM Applicants"), assert that they are entitled to have a properly sought and obtained order formally entered.

II. Background

2 This action was commenced by ATB on March 11, 1997. The statement of claim alleges that Leahy, former acting superintendent of ATB, accepted bribes from ATB customers in exchange for the use of his influence to secure loans (the "Leahy Action"). ATB alleges this constituted a breach of Leahy's fiduciary duties. Another action was commenced by ATB on August 25, 1998 against the WEM Applicants for their role in the alleged briberies and alternatively for their failure to make adequate capital expenditures to maintain the Mall (the "WEM Action"). These actions have now been consolidated by order of Chief Justice Moore.

3 Between March 11, 1997 and May 15, 1998 I issued a series of *ex parte* orders tracing funds and compelling production of financial documents in the possession of third party financial institutions. In addition, In addition, I issued a Mareva injunction freezing an outstanding money order linked to the traced funds and an Anton Piller order preserving documents against Leahy. These orders were issued based on information set out in six affidavits deposed to by Bryan McBean, the Chief of Security for ATB.

4 On November 23, 1998 WEM brought the Setting Aside Application, having been added as a party to the action for the limited purpose of bringing this application. On December 1, 1998 ATB brought a cross application to have the *ex parte* orders affirmed, together with other relief (the "Cross Application").

5 ATB then filed the affidavit of Paulina Hiebert (the "Hiebert Affidavit") to be used as evidence on the Setting Aside and Cross Applications. As a preliminary application to the Setting Aside Application, the WEM Applicants sought to have the Hiebert Affidavit struck out in whole or in part.

6 On March 12, 1999 Reasons for Judgment were issued on this preliminary application. Portions of the Hiebert Affidavit were struck. It is this order that ATB now seeks to delay being formally entered.

III. Issues

(1) Does this Court have the discretion to expressly delay the entry of order on a preliminary application?

(2) If so, should the Court exercise its discretion to delay the entry of the order in this instance?

IV. Analysis

(1) Discretion to Delay Entry of an Order

(a) The Court has the Inherent Jurisdiction to Control Its Own Process

7 The Court has an inherent power and duty to protect itself and its processes: see for example *Fieldbloom v. Olympic Sport Togs Ltd.* (1954), 14 W.W.R. 26 (Man. C.A.). The ambit of judicial discretion has been described variously: *Grant, Re* (1879), 12 N.S.R. 538 (N.S. C.A.), *Riviera Developments Inc. v. Midd Financial Corp.* (1995), 26 Alta. L.R. (3d) 431 (Alta. Q.B.); allowing reconsideration of (1994), 19 Alta. L.R. (3d) 208 (Alta. Q.B.).

8 In essence, every court has unlimited power over its own processes in order to secure the most "just, expeditious, and least expensive determination of civil proceedings." This inherent jurisdiction may equally be drawn upon by a judge sitting in chambers: *394363 Ontario Ltd. v. Fuda* (1983), 42 O.R. (2d) 779 (Ont. Master). The Court's ability to control its own procedure is encapsulated by section 8 of the *Judicature Act*, R.S.A. 1980, c. J-1:

> 8. The Court in the exercise of its jurisdiction in every proceeding pending before it has the power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

9 WEM asserts that the right of a party, even an unsuccessful one, to have judicial determination perfected and entered is an absolute right over which the Court has no discretion. Authority for this proposition is found in *Burnham Estate, Re* (1959), 27 W.W.R. 669 (B.C. S.C.), the dissenting judgment of Davie C.J. in *Lang v. Victoria (City)* (1898), 6 B.C.R. 104 (B.C. S.C.) and *Janke, Re* (1977), 2 B.C.L.R. 378 (B.C. S.C.). Although the underlying rationale for these cases are useful, the decisions flow from interpretations of a B.C. rule of civil procedure for which there is no Alberta counterpart.

10 Both parties agree that the order will be entered at some point. The question here is whether the entry ought to be sooner or later. After a thorough review of both the *Alberta Rules of Court* and applicable case law, I conclude that the residual discretion of the Court to control its own processes includes the power to delay the entry of an order to a preliminary application to an application.

(2) Are There Equitable Reasons Warranting a Delay in the Entry of the Order?

(a) An Order in an Application Is Not Akin to an Evidentiary Ruling at Trial

11 ATB argues that a separate formal order need not to be entered on a preliminary application since it is akin to an interlocutory evidentiary ruling made part-way through a trial. As such, ATB asserts that the proper practice would be to enter up the order simultaneously with the judgment on the main application. In support of this argument, ATB has provided four authorities: *Paterson v. Hamilton* (1996), 39 Alta. L.R. (3d) 37 (Alta. C.A.), *Durish v. White Resource Management Ltd.* (March 24, 1997), Doc. Calgary Appeal 16339, 16341 (Alta. C.A.), *Syncrude Canada v. Canadian Bechtel Ltd.* (1994), 16 Alta. L.R. (3d) 153 (Alta. C.A.) and *Begusic v. Clark, Wilson & Co.* (1991), 82 D.L.R. (4th) 667 (B.C. C.A.). These cases warn of the negative consequences of appealing interlocutory evidentiary rulings during the course of a trial; mid-trial appeals on procedural points serve only to proliferate unnecessary, disruptive and costly appeals, on points that may ultimately be moot.

12 *Begusic* is the only above mentioned case which even discusses the possibility of delaying the entry of an order as a means of controlling the Courts' processes. Chief Justice McEachern summarizes (at 770):

> The *trial court*, however, *can probably* control the bringing of serial appeals by making it clear at the time an order is made for the trial of issues whether an order will be entered on discrete issues or whether the entire trial must be completed before any formal trial order will be entered. This is largely a matter for the trial court but I suspect many orders are made for the trial of issues without considering whether multiple appeals are in the best interest of the trial process. [emphasis added]

13 However, ATB's argument is premised on the interchangeability of the law of procedure at trial and on application. The policy considerations on an evidentiary ruling at trial differs materially from a chambers application: see *Patterson, supra* at 40. First, the magnitude of delay and cost are generally not comparable. Secondly, the entry of the order does not necessarily result in split proceedings.

14 More specifically, the case law provided does not apply to the present facts. The Setting Aside Application is not a trial but rather a chambers application relating to a series of *ex parte* orders made by this Court in 1997 and 1998. There lacks in the present case the immediacy of a trial put on hold, with the attendant witnesses and court staff held in abeyance. Additionally, as stated by WEM at para. 9 of their brief "...there is no indication or necessity that the order will in fact be appealed."

15 Even if this Court were to accept the proposition that evidentiary rulings at trial are analogous to orders made on applications, the case law provided would remain uninstructive. The above cases describe the question of when an appeal should be entertained by the Court of Appeal, not whether the order ought to have been formally entered in the first place.

16 On the point of granting leave to appeal under those circumstances, *Syncrude* at 158 states, "*in general* we strongly disapprove of appeals on procedural points." Likewise, *Durish* at 6 explains "the rule is not to entertain such appeals *unless* the appellant demonstrates exceptional circumstances." Finally, *Paterson* at 40-41 sets

out the circumstances justifying a mid-trial appeal:

> Exceptional or unusual circumstances justifying interference in the trial process must be such as to demonstrate that it would be manifestly unjust to one or both of the parties to let the trial proceed on the basis of the ruling appealed and that such injustice can not be adequately redressed if the trial is allowed to continue without the correctness of the ruling being tested in this Court.
>
> The foregoing considerations militate in favour of Staying the Notice of Appeal, and letting the trial process proceed to completion. The correctness of the rulings made by the Trial Judge will be subject to scrutiny on appeal if one is taken.

17 Thus, in the cases presented by ATB, leave to appeal was sought without addressing the question of entry. The proper time for ATB to put forward these arguments is *when and if* an appeal materializes.

(b) Effect of Formal Entry

18 The act of entering a judgment is characterized as a ministerial formality to be executed once the judicial functions have been performed by the judge: *Debly v. M. Gordon & Sons Ltd.*, [1955] 4 D.L.R. 636 (N.B. C.A.); aff'd on other grounds [1956] S.C.R. 522 (S.C.C.).

19 Part 27 of the *Rules of Court* sets out the statutory provisions governing entry of a judgment *or* an order. Rule 322 provides that a judgment is binding upon pronouncement, regardless of whether it has been formally entered. In Alberta, there is no rule requiring a judgment to be entered prior to issuing a notice of appeal. Thus, delaying entry of an order does not in fact achieve the proclaimed goal of preventing appeals of interlocutory proceedings prior to determining the substantive issue. However, it is undesirable to do so since the Appeal Court would be disadvantaged in determining the merits of an appeal without knowing the precise terms of the order: see for example *Schulz v. NRS Block Bros. Realty Ltd.* (March 7, 1996), Doc. Vancouver CA019317 (B.C. C.A.). This in turn would lead to a chaotic and uncertain practice.

20 One effect of delaying entry of an order is to forestall the application of Rule 506, which requires the notice of appeal be filed within 20 days from entry of the order. Such a delay in this case would prejudice WEM to the extent that WEM would not have the benefit of certainty with respect to ATB's decision to appeal. In any case, if the concern is a multiplicity of appeals, the appropriate remedy is to make application for a stay of the notice of appeal(s) pending the determination of the Setting Aside and Cross Applications.

(c) The Practice of Entering All Orders

21 ATB takes the position that the proper practice in Alberta is to delay the entry of orders on interlocutory or evidentiary points. While this may well be the case at trial, the jurisprudence relating to the entry of orders on an application indicates differently. In fact, the practice note under R. 322 in Fradsham's *Annotated Alberta Rules of Court* states:

> 3. Practice Note: Enter all orders. If you are successful in defeating an application, enter an order setting forth that the application was dismissed. Then remember to serve it!

22 The case law goes so far as to suggest that a barrister has a duty to enter orders promptly. In *Farkas, Re* (1983), 49 C.B.R. (N.S.) 102 (B.C. S.C.) a case involving a motion to set aside an *ex parte* order the Court held (at 105):

TAB 2

2002 CarswellAlta 1278, 2002 ABCA 248, 317 A.R. 322, 284 W.A.C. 322

2002 CarswellAlta 1278, 2002 ABCA 248, 317 A.R. 322, 284 W.A.C. 322

Predator Corp. v. Ricks Nova Scotia Co.

The Predator Corporation Ltd. (Appellant / Applicant) and Ricks Nova Scotia Co. (Respondent / Respondent)

Ricks Nova Scotia Co. (Respondent / Applicant) and Murphy Oil Canada Ltd., Apache Canada Ltd. and Murphy Canada Exploration Ltd. (Respondents / Respondents) and The Predator Corporation Ltd. (Appellant / Respondent)

Alberta Court of Appeal

Berger J.A., Fruman J.A. and Wittmann J.A.

Heard: October 9, 2002
Judgment: October 9, 2002
Written reasons: October 25, 2002
Oral reasons: October 9, 2002
Docket: Edmonton Appeal 0201-0008-AC

Proceedings: affirming *Predator Corp. v. Ricks Nova Scotia Co.* (2001), 2001 ABQB 1110, 2001 CarswellAlta 1652, 316 A.R. 378 (Alta. Q.B.)

Counsel: *R.A. Coad, Q.C., J.J. Patterson*, for Predator Corporation Ltd.

R.A. McLennan, Q.C., D.W. Dear , for Ricks Nova Scotia Co.

J.J. Marshall, Q.C., R.F. Smith, for Murphy Oil Canada Ltd.

D.J. Cichy, K.R. Anderson, for Apache Canada Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure

Partnership --- Dissolution — Distribution of assets

Applicant and respondent entered into partnership agreement for exploration for and acquisition, and development of oil and gas properties — Partnership acquired petroleum and natural gas rights in Ladyfern area of British Columbia pursuant to agreement — M Ltd. and A Ltd. commenced proceedings against applicant, respondent and partnership seeking declaration of construction trust in relation to Ladyfern prospects and other remedies — Applicant and respondent subsequently entered into partnership dissolution agreement pursuant to which all assets and interests of partnership were to be distributed — Agreement provided for 75 per cent of assets to be

transferred to respondent and remaining 25 per cent to be held pending final resolution of issue of ownership of that interest — Respondent settled its involvement in lawsuit and conveyed all of its 75 per cent interest in Ladyfern prospects to M Ltd. pursuant to settlement agreement — Respondent filed Originating Notice naming applicant, M Ltd. and A Ltd. as respondents — Applicant and respondent both brought applications which were ordered to be heard together — Application by applicant for order declaring it to be legal owner of 25 per cent interest in Ladyfern prospects was dismissed — Application by respondent to interplead its interest as bare trustee in said 25 per cent interest was granted with costs to be paid on a solicitor/client basis — Trial judge found that court was not bound to determine applicant's action first relying solely on evidence in that action — Trial judge found that issue to be determined in both actions was correct interpretation of clause of dissolution agreement dealing with distribution of assets — Trial judge found that clause unambiguously directed undivided 25 per cent interest in Ladyfern prospects to be held in trust pending final resolution of issue of ownership — Trial judge found that words "issue of ownership" referred to lawsuit by M Ltd. and A Ltd. — Trial judge declared that undivided 25 per cent interest in Ladyfern prospects was ordered to be held in trust by fiduciary pending final resolution of lawsuit — Applicant appealed — Appeal dismissed — Trial judge had power to control judiciary process by considering two applications on common evidence — Decision of trial judge not to draw adverse inference against respondent's president, who signed disputed contract but did not provide evidence in trial, was discretionary — No reviewable error was found as trial judge's interpretation of contract was reasonable and his decision was supported by admissible evidence.

Cases considered by *Fruman J.A.*:

Housen v. Nikolaisen, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1 (S.C.C.) — considered

Martens v. Gulfstream Resources Canada Ltd., 250 A.R. 62, 213 W.A.C. 62, 1999 CarswellAlta 919, 1999 ABCA 283 (Alta. C.A.) — considered

Statutes considered by *Fruman J.A.*:

Judicature Act, R.S.A. 2000, c. J-2

s. 8 — considered

APPEAL by applicant from judgment reported at 2001 CarswellAlta 1652 (Alta. Q.B.), where application for order declaring applicant to be legal owner of partnership interest, was dismissed.

***Fruman J.A.*:**

1 The Predator Corporation appeals a decision in respect of two matters heard together and determined on a summary trial basis: *Predator Corporation Ltd. v. Ricks Nova Scotia Co.*, 2001 ABQB 1110. The issue in dispute was the interpretation of a provision of a contract. Predator contends that the summary trial judge erred by considering the two applications on common evidence and also erred in his interpretation of the contract.

2 With respect to the first ground, the two matters were directed to be heard together by another judge, who made no ruling about the use of common evidence. At an earlier interlocutory application, the trial judge also made no ruling about the evidence. However, in the summary trial, the trial judge concluded that it would be "foolish in the extreme" for the court to make a determination in one action without considering the evidence in

the other, as it could create inconsistent decisions: at para. 42.

3 A trial judge always has the power to control the trial process. Section 8 of the ***Judicature Act***, R.S.A. 2000, c. J-2 requires a court, in the exercise of its jurisdiction in every proceeding before it, to ensure that "as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided."

4 The standard of review for a discretionary ruling is palpable and overriding error or unreasonableness. In this case, the trial judge properly exercised his discretion to consider the two applications on common evidence. The first ground of appeal fails.

5 The second ground of appeal alleges errors in contractual interpretation. The trial judge decided that the contract was unambiguous. He did not consider statements of the parties' understanding, belief or intention, though he properly considered evidence of the commercial context in which the contract was negotiated.

6 "The question of ambiguity is one of fact. The finding of a trial judge will only be displaced if it was unreasonable or constituted a palpable or overriding error":*Martens v. Gulfstream Resources Canada Ltd.*, 1999 ABCA 283 (Alta. C.A.) at para. 17. A similar standard of review applies for fact-findings, inferences drawn from facts and questions of mixed fact and law where there is no error in an extricable legal principle. See *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.). ***Housen*** explains that the strong policy reasons which underlie a deferential approach go well beyond the advantage a trial judge has to observe witnesses first-hand. Those policy reasons and standard of deference apply with equal force to summary trials.

7 Predator also argues that the trial judge erred in failing to draw an adverse inference against the president of Ricks, who signed the disputed contract, but did not provide evidence in the summary trial. The trial judge correctly concluded that he could not consider the evidence of intention adduced by the other signatory to the contract. As that ruling would also apply to Ricks' president, his evidence would have made little practical difference. In any event, the summary trial judge's decision not to draw an adverse inference is discretionary. Given the standard of review, we discern no reviewable error.

8 The summary trial judge's interpretation of the contract was reasonable and his decision was supported by admissible evidence. He did not commit a palpable and overriding error. The appeal is therefore dismissed.

SUBMISSIONS BY COUNSEL REGARDING COSTS.

***Berger J.A.*:**

9 We very much appreciate the representations of counsel. We order costs to Ricks on a solicitor-client basis payable from the trust funds. The remaining respondents shall each be entitled to a lump sum of $10,000 with respect to appellate costs.

Appeal dismissed.

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TAB 3

1992 CarswellOnt 3791, 3 W.D.C.P. (2d) 396

1992 CarswellOnt 3791, 3 W.D.C.P. (2d) 396

Taylor v. Georgina (Town)

Charles Taylor, c.o.b. as Chas. Taylor and Sons, Plaintiff and The Corporation of the Town of Georgina, Mike Baskerville and Glen Campbell, Defendants

Ontario General Division

West J.

Judgment: June 5, 1992
Docket: Kitchener 1578/91

Counsel: None given

Subject: Contracts; Civil Practice and Procedure

Contracts

Damages

Construction law

***West J.*:**

1 The motions before the court at this time concern three actions all arising out of a construction contract. The subject property is a park located in the Region of York and owned by The Corporation of the Town of Georgina (Town). I.M.S. Construction Ltd. (I.M.S.)was the contractor, and the plaintiff Chas. Taylor and Sons (Taylor) was a subcontractor.

2 Action 7447/90 was begun in Newmarket by Taylor under the Construction Lien Act on June 22, 1990. It names the Town and I.M.S. as defendants. The amount claimed is $106,176.73.

3 Action 1578/91 was begun in Kitchener on March 4, 1991. In that action, Taylor is plaintiff and the Town and the two individuals Baskerville and Campbell are named as defendants. The amount claimed is the same as that claimed in action 7447/90. The claim against the Town is for damages for breach of contract and the claim against the individual defendants was based in negligent misrepresentation. I.M.S. was not named as a defendant in this action, but it was added as a third party by the defendants. Newmarket was named as the place of trial in

this action.

4 Action 2288/91 was begun late in 1991. In that action I.M.S. is plaintiff and the Town is the sole defendant. The pleadings in that action are not before the court and I.M.S. did not participate in the motion. It is assumed that Newmarket is named as the place of trial in that action as well.

5 At this time the Town seeks to have action 1578/91 stayed pending the disposition of action 7447/90 or in the alternative to have the two actions heard together or one after the other. In a supplementary motion the Town seeks to have 2288/91 heard at the same time as action 1578/91 and the third party action contained within it. Both I.M.S. and the Town have been noted in default in action 7447/90. No issue was raised as to its status in bringing the motion by reason of its default, but leave will be granted to this effect in order to establish status on the motions.

6 The motions were opposed by counsel for Taylor. He alleged that the plaintiff would suffer prejudice and be subjected to delay if the relief sought were granted. He also contended that there was no status to join the individual claims against Baskerville and Campbell in the construction lien action. The claim against the Town in 1578/91 could have been added in the lien action as it is a claim for breach of contract. There is no statutory provision for joining the claims against the individual defendants in the lien action. The fact that the Construction Lien Act does not permit such claims to be joined in the action does not deprive the court of its jurisdiction to control its own process. It is desirable that all issues be resolved as expeditiously as possible. The final determination as to the order in which the matters should be heard, however, should be made by the trial judge. Accordingly, an order will go that the three actions and the third party action be heard together or one after the other in such manner and on such terms as the trial judge may direct.

7 Certain other issues raised on the motions were resolved on consent and an order will issue in the terms of the consent filed. In the circumstances, there will be no order as to costs.

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TAB 4

1997 CarswellOnt 4333, 153 D.L.R. (4th) 305, 13 C.P.C. (4th) 305, 36 C.L.R. (2d) 240

1997 CarswellOnt 4333, 153 D.L.R. (4th) 305, 13 C.P.C. (4th) 305, 36 C.L.R. (2d) 240

Snowmont Investments Corp. v. Elliott

Snowmont Investments Corporation, Plaintiff and Veronica Lynn Elliott, John Douglas Elliott, BettyAnn Lois Elliott and Muriel Financial Corporation, Defendants and Attorney General for Ontario Applicant for Leave to Intervene

Ontario Court of Justice, General Division

Brennan J.

Heard: November 16, 1995
Heard: June 10 and 19, 1996, May 2 and June 4, 1997
Judgment: November 3, 1997
Docket: Toronto CLA 12023/86

Counsel: *Robert A. O'Brien*, for the Plaintiff.

Melvyn L. Solmon, for the Defendants.

Thomas Bell and *Peter Landmann*, for the Intervener.

Subject: Civil Practice and Procedure

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Jurisdiction of court — General

Judge granted order referring construction lien action to master in Toronto — Defendants successfully moved before another judge to vary order so as to disqualify named master from hearing action on grounds of reasonable apprehension of bias — Attorney General moved for reconsideration of decision and for leave to intervene as friend of court to argue jurisdictional, constitutional and public interest grounds — Motion dismissed — Construction Lien Act creates simplified procedure and minimizes interlocutory proceedings but does not derogate from jurisdiction of judges — Consideration of disqualification by reason of apprehension of bias is part of core jurisdiction of federally-appointed judges and cannot be removed from superior court without constitutional amendment — Legislation validly empowers masters to deal with issue of disqualification on grounds of bias but does not remove inherent jurisdiction of superior court to exercise its discretion on same issue — Public interest in preserving Toronto practice of references to masters is embodied in legislation which preserves inherent jurisdiction of judges to control court's process even after reference order made — Construction Lien Act, R.S.O. 1990, c. C.30 — Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 13.02.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Jurisdiction of court — Duties and powers

Judge granted order referring construction lien action to master in Toronto — Defendants moved before another judge to vary order so as to disqualify named master from hearing action on grounds of reasonable apprehension of bias — Motion granted — References to excerpts from transcript of lien proceedings conducted before master led to conclusion that it was reasonable that parties affected would have reasonable apprehension of bias.

Cases considered by *Brennan J.*:

Adler v. Ontario (1992), 88 D.L.R. (4th) 632, 8 O.R. (3d) 200, 7 C.P.C. (3d) 180 (Ont. Gen. Div.) — considered

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 (S.C.C.) — applied

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161 (S.C.C.) — considered

McCardle Brothers, Re (1987), 66 C.B.R. (N.S.) 66, 66 Nfld. & P.E.I.R. 351, 204 A.P.R. 351 (P.E.I. S.C.) — referred to

Ontario (Attorney General) v. Paul Magder Furs Ltd. (1990), 42 C.P.C. (2d) 221 (Ont. H.C.) — referred to

Ontario (Attorney General) v. Victoria Medical Building Ltd., [1960] S.C.R. 32, 21 D.L.R. (2d) 97 (S.C.C.) — considered

R. v. Stark (February 23, 1994), Doc. 7270/92 (Ont. Gen. Div.) — referred to

Reference re An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31, 50 R.P.R. (2d) 137, 35 Admin. L.R. (2d) 169, (sub nom. *Reference Re Residential Tenancies Act)* 193 N.R. 1, (sub nom. *Reference Re Residential Tenancies Act)* 149 N.S.R. (2d) 1, (sub nom. *Reference Re Residential Tenancies Act)* 432 A.P.R. 1, (sub nom. *Reference re: Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act (N.S.), ss.7, 8(2))* 131 D.L.R. (4th) 609, (sub nom. *Reference re Amendments to the Residential Tenancies Act)* [1996] 1 S.C.R. 186 (S.C.C.) — applied

Statutes considered:

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No.5

s. 96 — considered

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — considered

s. 58(4) — considered

Mechanics' Lien Act, R.S.O. 1950, c. 227

Generally — considered

Mechanics' Lien Act, R.S.O. 1960, c. 233

Generally — considered

Rules considered:

Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 13.01 — referred to

R. 13.02 — referred to

MOTION by Attorney General for reconsideration of decision disqualifying master from hearing trial of construction lien action, and for leave to intervene as friend of court.

***Brennan J.*:**

1 On November 16, 1995, I heard a motion brought by the defendants, the purpose of which was to disqualify Master Clark from hearing the trial of this construction lien action. It took the form of a motion to vary the order of Mr. Justice Hughes, made in 1988, by which the construction lien action was referred to the master in accordance with the usual practice for such actions in Toronto.

2 It was apparent that this action had been greatly delayed. I considered it a matter of urgency that I render a decision as quickly as possible. I did so on the following day, when I made a brief endorsement as follows:

> I find there is a reasonable apprehension of bias and Master Clark ought not to proceed. No case was made and no submissions suggested bias in fact, but on balance I am persuaded several events give rise to a reasonable apprehension of bias and meet the test set out by Laskin, J. in *Committee for Justice and Liberty v. National Energy Board.* Further reasons will follow. Order to go that a Master other than Master Clark hear the trial of this action.

3 Shortly after making that endorsement, I received a letter from Mr. Bell of the Ministry of the Attorney General, indicating the Attorney General's intention to request that I reconsider my decision and to seek leave to intervene in the hearing of the motion for that purpose. Counsel for the Attorney General apparently contacted the parties' counsel, also by letter. In view of the pending request to reconsider, I refrained from writing further reasons for my decision. I was, quite properly, not privy to communications among counsel, and I heard no more of the matter until the Attorney General set down a motion returnable on June 10, 1996, seeking to intervene both as a party and as a friend of the court, and also seeking reconsideration of my decision of November 16, 1995.

4 At the June 10, 1996 hearing, I was told that the plaintiff took no position, other than to express the wish to move the matter forward without undue delay.

5 In his factum, and in the submissions made by his counsel, the Attorney General abandoned the request to be made a party pursuant to Rule 13.01, and argued only on the grounds of Rule 13.02, that he should be allowed to intervene as a friend of the court, to represent the public interest. Two issues were stated at paragraphs

8 and 9 of the Factum:

> 8. Is it appropriate in the circumstances of this case that the Attorney General be granted leave to intervene in the motion before Justice Brennan as *amicus curiae* to argue the issue of whether in the circumstances of this case, including the provisions of the Act, Justice Brennan had jurisdiction to make the order removing Master Clark?
>
> 9. In the event that leave to intervene is granted did Justice Brennan have jurisdiction to make the interlocutory order removing Master Clark as the master with carriage of the action pursuant to the provisions of the Act? [(My emphasis.]

6 The public interest in issue was said to be the preservation of the system established for the trial of construction lien actions. The system now in place in Toronto was established by the *Mechanics' Lien Act* of 1960, after the Supreme Court of Canada struck down the old *Mechanics' Lien Act* in *Ontario (Attorney General) v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32 (S.C.C.). The *Construction Lien Act*, R.S.O. 1990, c. C.30,under which the present proceedings were taken, is the successor of that statute, and carries the same legislative scheme forward to the present time. In the *Victoria Medical* case, the Supreme Court decided that the *Mechanics' Lien Act* was *ultra vires* the Ontario Legislature, because it purported to confer upon the master at Toronto jurisdiction to try, and finally determine, matters which were properly within the exclusive jurisdiction of judges appointed pursuant to s. 96 of the *British North America Act* (now the *Constitution Act*). The "new" legislation was carefully drafted to recognize the legislative limits on the Provincial Legislature. It provided that mechanics lien actions were within the exclusive jurisdiction of judges appointed pursuant to s. 96, but specified that those judges have the power to refer the entire action to a master, acting as a referee. After a trial the master makes a report which is subject to the approval of a judge. If the master's report is unopposed, it is deemed to be approved.

7 Counsel for the Attorney General argued that the *Construction Lien Act* conferred exclusive jurisdiction on the master, to the exclusion of judges of the General Division, and that I was therefore without jurisdiction to make the decision I made following the hearing of November 16, 1995. As I understand the position of the Attorney General, it is furthermore contrary to the public interest that a judge would consider the motion to disqualify the master by reason of an apprehension of bias. By that reasoning, my decision of November 16, 1995, was inconsistent with the legislative scheme, which contemplates that a master preside over all proceedings in a construction lien action once it has been referred by the order of a judge.

8 The Attorney General argued also that a motion to disqualify a judicial officer on the ground of reasonable apprehension of bias should always be made initially to that judicial officer.

9 Defendants' counsel responded that the interpretation supported by the Attorney General would allow the Provincial Legislature to oust the jurisdiction of a s. 96 judge and confer equivalent jurisdiction upon a master appointed pursuant to provincial legislation.

10 There was insufficient time to hear all the submissions of counsel on June 10, and I adjourned the motion hearing to June 19, 1996. I then accepted the defendants' submission that the Attorney General's argument gave rise to a constitutional question and the hearing of the motion must be adjourned to allow the parties to prepare submissions on that question, and to serve a notice of Constitutional Question on the Attorney General for Canada and on provincial Attorneys-General. The matter came on before me again on May 2 and June 4, 1997. I

shall refer to the hearing which extended over these two dates as "the final hearing".

Issues

11

1. The constitutional validity of the *Construction Lien Act*, 1990 R.S.O., c.c.30.

2. If it is valid legislation, the proper interpretation of its provisions relating to the jurisdiction of masters and judges.

3. Whether I had jurisdiction, as a s. 96 judge, to hear the motion to disqualify Master Clark on the ground of reasonable apprehension of bias.

4. Whether the Attorney General ought to be granted leave to intervene as friend of the court pursuant to Rule 13.02, to make submissions not made by a party, pertaining to the due administration of justice in construction lien matters.

5. Whether it is open to me to reconsider my decision at the request of the Attorney General as an inter- vener.

6. Whether, if reconsideration is open to me, I should now consider arguments not made by the parties upon the original hearing.

7. Whether a motion to disqualify Master Clark on the ground of reasonable apprehension of bias ought to be heard by him rather than by me, on the facts of this case.

Disposition:

12 The Attorney General's arguments on jurisdiction clearly raised a constitutional question. Among other submissions, included in his factum was a passage from the reasons of Anderson J. in *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Ont. Gen. Div.) at p. 205 as follows:

> In conventional litigation between subject and subject, [Rule 13] has, for the most part, been narrowly construed. That is probably because the interests considered in such cases are usually financial, and considerations of *stare decisis* and issue *estoppel* are of concern. Constitutional litigation presents a range of considerations which is much broader and much more difficult to define. Interest of various kinds may be affected by the decision in a constitutional case, which are almost impossible either to number or identify. [My emphasis.]

13 The Attorney General's arguments on this question include a number of statements that emphasize the interests of the public in allowing the intervention. For example, at para. 18 of his factum:

> ...The endorsement of Justice Brennan on the defendants' motion purports to permit the defendants to have interlocutory matter in the action taken out of the hands of the Master with carriage of the action pursuant to the Act and decided by a Judge of the Ontario Court (General Division). This decision, it is respectfully submitted, is clearly contrary to the process for construction lien actions established in the Act and pertinent case law, and adversely affects the due administration of law in connection with construction lien actions

which have evolved over many decades. This decision of Justice Brennan if permitted to stand will have direct adverse consequences in respect of the due administration of construction lien actions in Ontario Courts.

Paragraph 19 of the factum includes the following:

> ...The Attorney General has statutory obligations regarding the due administration of the justice system in Ontario. It is respectfully submitted that this is a case in which it would be appropriate for the Attorney General to be granted leave to intervene, given the important jurisdictional issues not raised by the parties on the motion before Justice Brennan, and the important issues concerning the due administration of justice under the Act. [My emphasis.]

14 After arguments calculated to demonstrate that no undue delay would result from allowing the Attorney General to intervene, the Attorney General's factum includes, at para. 25, the following:

> ...Further, it is submitted the Attorney General's request for leave to intervene will not unduly complicate or protract the lien action. The Attorney General seeks leave to intervene on a relatively narrow issue of jurisdiction, not on an issue touching on the substantive issues between the parties. [My emphasis.]

15 Although counsel for the defendants argued against the intervention of the Attorney General, I concluded that I should hear the Attorney General and the defendant on the jurisdictional and constitutional issues, and reserve my decision with respect to the Attorney General's right to intervene until I had considered those arguments. The defendants quite appropriately served a Notice of Constitutional Question.

16 In responding to that Notice at the final hearing, counsel either changed or clarified the position of the Attorney General, and now contended that s. 58(4) of the *Construction Lien Act* does not derogate from the jurisdiction of a judge but must be interpreted:

> ...to empower the Master to determine the interlocutory motion brought by the defendants, and that the efficient administration of lien actions requires that such a motion normally be determined at first instance by the Master himself. [My emphasis.]

This was a virtually complete reversal of the position taken by the Attorney General at the earlier hearings on his motion. It removed the jurisdictional basis for the request for intervener status.

17 Although the Attorney General offered no evidence relating to the efficient administration of lien actions, it is obvious that the intent of the legislation was to create a simplified procedure and to minimize interlocutory proceedings. The process by which construction lien litigation is delegated to the master and adjudicated by confirmation of a master's report, was a successful legislative response to the decision in the *Victoria Medical* case. But to suggest that the Act derogates from the jurisdiction of the judge is simply wrong, both because the statute was enacted to avoid that error, and because the legislature has not the power to enact such a law.

18 The final position taken by the Attorney General would dispose of the question of the constitutional validity of the *Construction Lien Act*, but for a position taken on behalf of the defendants in the Notice of Constitutional Question, and the arguments made in support of that notice. Mr. Solmon argued that consideration of disqualification by reason of apprehension of bias is part of the "core jurisdiction" of s. 96 judges, and cannot be removed from the superior courts by either level of government, without amending the constitution: "...(T)he

power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance to the rule of law itself." *MacMillan Bloedel Ltd. v. Simpson* (1995), [1996] 2 W.W.R. 1 (S.C.C.) per Lamer C.J.C. If the *Construction Lien Act* were interpreted as purporting to remove that jurisdiction from the judge and bestow it exclusively upon the master, it would be *ultra vires*. I do not interpret it so. While I am persuaded that the *Construction Lien Act* validly empowers the master to deal with such matters as disqualification on the ground of reasonable apprehension of bias, I hold that the legislation could not remove from the superior court the power to exercise that part of its "core jurisdiction".

19 Having concluded that the *Construction Lien Act* contains no provision calculated to derogate from the jurisdiction of a superior court judge, I would accept readily the proposition that the jurisdiction delegated to the master is sufficiently broad that a motion to disqualify Master Clark on the ground of reasonable apprehension of bias could have been made returnable before him and that he would have had jurisdiction to rule on it. I have no hesitation in holding that I also had jurisdiction to hear that motion, as an exercise of the inherent jurisdiction conferred upon a judge of this court. I dispose of the constitutional question of the validity of the *Construction Lien Act*, by holding that the Act is valid. It passes the tests set out in *Reference re An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31*, [1996] 1 S.C.R. 186 (S.C.C.), and in the *Victoria Medical* case, precisely because it does not purport to remove any of the jurisdiction of a s. 96 judge. Rather, it clearly preserves such jurisdiction while allowing construction lien matters to be dealt with by masters in their role as referees.

20 The notice of constitutional question was served as a result of the issues of jurisdiction and constitutionality originally raised by the Attorney General. The need for his intervention then became unquestioned, for the purpose of defending the validity of the legislation. That matter having been disposed of I return to the original question raised by the Attorney General: Should he be given leave to intervene as a friend of the court, pursuant to Rule 13.02, for the purpose of seeking reconsideration of the motion between the parties?

21 Having disposed of the jurisdictional and constitutional factors, I turn to the two remaining points which the Attorney General said support his being granted leave to intervene.

22 The first of these is that it is in the public interest to preserve the Toronto practice that all proceedings in construction lien actions, after the reference order, are disposed of before the master. I hold that the public interest is embodied in the Act, which preserves rather than purporting to oust the inherent jurisdiction of the judges to control the court's process even after an order is made referring the case to the master. In this very case, there have been some five occasions when a judge of the General Division has dealt with proceedings between the parties and three occasions when the Court of Appeal has intervened. These litigants have lost the advantages of simplicity and expeditious resolution of disputes of this kind, in spite of the proceedings having started within the construction lien system. I point out also that in the rest of the Province, the court generally lacks the luxury of referral of the whole lien action to a master. In this case, for these parties, the public interest in preserving the Toronto practice is of no relevance and I am unable to accept those submissions.

23 The Attorney General's leave motion therefore depends on the single point that the matter should have been referred back to the learned master as the judicial officer whose impartiality is the subject of the apprehended bias. That argument was not advanced by the plaintiff when the motion was first before me, and the plaintiff chose to take no part in the Attorney General's motion.

24 Is it generally preferable that a motion founded on a reasonable apprehension of bias be heard by the ju-

dicial officer whose conduct causes the apprehension? That question has been extensively explored in the arguments of the Attorney General and the defendants, but I have come to the conclusion that it is a matter better left for a case in which the parties, with their interest in the outcome and their experience of the proceedings, choose to litigate it. The authorities provided by the Attorney General suggest to me that there are many factors to consider and the matter depends on the facts of each case. See *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1989), 42 C.P.C. (2d) 221 (Ont. H.C.); *R. v. Stark* (February 23, 1994), Doc. 7270/92 (Ont. Gen. Div.), unreported; and *McCardle Brothers, Re* (1987), 66 C.B.R. (N.S.) 66 (P.E.I. S.C.).

25 Having decided against the application to intervene it follows, in the absence of an intervener, that there is no longer a request for reconsideration. It remains only to provide the further reasons that I indicated would be provided.

26 The presumption that a judge - in this case the learned master - is unbiased is fundamental to the due administration of justice. Real bias, while it may occur, is rare and is virtually never the ground on which disqualification of a judicial officer is sought. The question for decision is whether a reasonable apprehension of bias arises on the facts of the case. In the present case the motion was argued, quite properly, without the suggestion of actual bias, and in my brief reasons already given I made the point that "no case was made and no submissions suggested bias in fact". The events which I hold give rise in the present case to an apprehension that it is in the interests of justice that another master preside at the lien trial include the following.

27 Master Clark insisted that the defendant Mr. Elliott begin the lien trial without counsel on September 20 1994, after refusing his request for an adjournment while his counsel was appearing in the Court of Appeal to seek a stay of the trial. A stay was ordered by Grange J.A. on September 22. Master Clark was "visibly disappointed and frustrated", to quote the plaintiff's factum.

28 Both parties understood Master Clark to have expressed the view that Ms. Elliott could not succeed in her appeal of the striking out of her defence to the Court of Appeal. In fact she succeeded and the Court of Appeal later granted a request to clarify its ruling and stated that she was to have the right to make a full defence. There is evidence that Master Clark thereafter wondered aloud whether he wanted to preside at a new trial.

29 On an number of occasions when Mr. Elliott appeared on his own behalf, the learned master spoke with him in terms which could cause an apprehension of bias in the mind of a reasonable person. Without cataloguing these occasions, I refer to the excerpts from the transcript of the proceedings before the learned master on September 13 and 20, 1994, contained in the motion record of the plaintiff, as well as the affidavit of the defendant Mr. Elliott.

30 The learned master's order for an inspection of the defendants' premises required that the family members absent themselves at the time of the inspection. The moving party had not sought that order and was agreeable specifically that Ms. Elliott remain in the home at the material time. This exercise of the learned master's authority, in the context of the other features of the history of the case, could seem excessive and gratuitous to reasonable observers in the position of the defendants.

31 On the facts it is reasonable that "the parties affected would have a reasonable apprehension of bias". In all the circumstances, I consider that the tests expressed in *R. v. Stark, (supra)*, *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), and *Attorney General for Ontario v. Paul Magder Furs, (supra)*, are met.

32 I invite counsel to contact me to discuss the question of costs.

Motion to intervene dismissed; master disqualified from hearing lien action.

END OF DOCUMENT

TAB 5

Westlaw

2010 CarswellOnt 3359, 2010 ONSC 122, 98 C.L.R. (3d) 104, 188 A.C.W.S. (3d) 1002

2010 CarswellOnt 3359, 2010 ONSC 122, 98 C.L.R. (3d) 104, 188 A.C.W.S. (3d) 1002

450477 Ontario Ltd. v. Feldman

450477 Ontario Limited, c.o.b. Chartrand Equipment (Plaintiffs) and Lorne Feldman, Eleanor Feldman, 1602724 Ontario Inc. and Feldman Timber Company Limited (Defendants)

Ontario Superior Court of Justice

E.E. Gareau J.

Heard: December 2, 2009
Judgment: January 7, 2010
Docket: 16124/08

Counsel: D. Contant for Plaintiff

K. Groulx for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Civil practice and procedure --- Third party procedure — Practice — Instituting third party proceedings — Third party notice or claim

Multiple actions arose from large construction project — Plaintiffs brought motion for order to sever main action commenced by C from third party claim commenced by defendants against NL Inc. — This would allow main action to proceed as separate and distinct action — Plaintiffs' motion dismissed — Possibility of future delays which may prejudice plaintiff, C, if main action was not severed off from third party claim, could be eliminated by management of court in delineating strict timetable for completion of steps in this litigation on forward looking basis — Court-ordered timetable of steps, to be strictly adhered to by parties, eliminated possibility of undue delay to plaintiff and any resulting prejudice to plaintiff as contemplated by R. 29.09 of Rules of Civil Procedure by having main action and third party action involving NL Inc. being heard together.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Parties to action — Joinder and consolidation

Multiple actions arose from large construction project — Defendants brought motion for order that all actions relating to construction project be tried together or, alternatively, that actions be heard one immediately after other — Defendants' motion granted — Court was more than satisfied that prerequisites had been established to make order that subject actions be tried together under R. 6.01(1)(a) and (b) of Rules of Civil Procedure, and

that it was in best interest of all parties that actions be tried together to minimize expense, and to avoid multiplicity of proceedings and possibility of inconsistent findings and results.

Cases considered by *E.E. Gareau J.*:

Justwork Construction Ltd. v. Groomes (1991), 48 C.L.R. 183, 1991 CarswellOnt 806 (Ont. Gen. Div.) — followed

Marco v. Levy (1999), 1999 CarswellOnt 832 (Ont. Master) — considered

Taylor v. Georgina (Town) (1992), 1992 CarswellOnt 3791 (Ont. Gen. Div.) — followed

Wood v. Farr Ford Ltd. (2008), 2008 CarswellOnt 6116, 67 C.P.C. (6th) 23 (Ont. S.C.J.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 107(1) — considered

s. 138 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 6 — referred to

R. 6.01 — considered

R. 6.01(1) — considered

R. 6.01(1)(a) — referred to

R. 6.01(1)(b) — referred to

R. 6.02 — referred to

R. 29.09 — considered

MOTION by plaintiffs for order to sever main action commenced by C from third party claim commenced by defendants against NL Inc; MOTION by defendants for order that all actions relating to construction project be tried together or, alternatively, that actions be heard one immediately after other.

***E.E. Gareau J.*:**

1 There were two motions before me which were heard on December 2, 2009 in Timmins, Ontario.

2 The first motion brought by the plaintiffs is for an order to sever the main action commenced by Chartrand from the third party claim commenced by the defendants against Northern Logistics Inc. This would allow the main action to proceed as a separate and distinct action.

3 The second motion is brought by the defendants for an order that all actions relating to this construction project, being this action 16124/08 and actions numbered 15642/08 and 15804/08 be tried together or, alternatively, that the actions be heard one immediately after the other.

4 The aforementioned actions are complex in nature and arise from a large construction project in Timmins, Ontario. It is useful to set out the background in this matter to create a context to the issues that have arisen in the various court actions.

5 This case involves the Rona/Shoppers Drug Mart development on property owned by the defendant, 1602724 Ontario Inc. The plaintiff, Chartrand Equipment, was the supplier of certain services on the project. Northern Logistics Inc. was the project manager and Gatrem Ltd. was the construction supervisor of the project. There are court actions by all parties involved creating a multiplicity of proceedings, all of which are proceedings under the *Construction Lien Act,* with the exception of the proceeding commenced by Chartrand Equipment against the Feldmans, 1602724 Ontario Inc. and Feldman Timber Company Limited.

6 Northern Logistics Inc. commenced its action under the *Construction Lien Act* against the defendants and 1602724 Ontario Inc. on January 16, 2008 in Cochrane, Ontario alleging unpaid invoices owing to it as project manager. This action has been defended and a counterclaim issued alleging negligence and breach of contract.

7 Gatrem Ltd. commenced its action under the *Construction Lien Act* against the defendants, 1602724 Ontario Inc. and Feldman Timber on April 16, 2008 in Cochrane, Ontario alleging monies owing to it for unpaid invoices submitted by it as construction supervisor for the property. That action has been defended and a counterclaim issued alleging negligence and breach of contract.

8 Chartrand commenced its action against the Feldmans, 1602724 Ontario Inc. and Feldman Timber Company Limited on October 23, 2009 in Timmins, Ontario. A statement of defence was delivered on January 13, 2009 and a third party claim by the defendant, 1602724 Ontario Inc. against Northern Logistics Inc. was delivered on May 29, 2009 seeking contribution and indemnity with respect to any damages or costs the numbered company may be liable to pay the plaintiff Chartrand.

The motion by Chartrand to sever its action from the third party action commenced by 1602724 Ontario Inc. against Northern Logistics Inc.

9 The motion for bifurcation or severance is brought under Rule 29.09 of the Rules of Civil Procedure. That Rule reads as follows:

> 29.09 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party.

10 It is the plaintiff's position that the claim by Chartrand is distinct and different from the claims of the other parties, including the third party claim. Chartrand's position is that its claim is a contract claim for money

and, therefore, more simplistic in nature than the other claims involving the other parties. It is suggested by Chartrand that the other claims and actions are more broad scope than the Chartrand claim which, therefore, should be dealt with separately and severed off. Chartrand feels that it is a distinct possibility that its claim will be unduly delayed and its costs will escalate if it is wrapped up in the claims involving Northern Logistics Inc. or the other litigants.

11 It is useful to closely examine the statement of claim issued by Chartrand against the defendants. It is a lengthy 8-page claim with 32 paragraphs. Paragraph 25 raises a breach of trust claim. Paragraph 28 raises a breach of fiduciary duty claim. Paragraph 31 raises an unjust enrichment claim. I do not share the view of the plaintiff that its claim is a simple contract claim for money owing. A review of the statement of defence indicates that there are issues raised of negligence by the plaintiff and compensation to the plaintiff on the basis of quantum merit. A review of the statement of defence reinforces the court's view that the claims involving the parties are complex in nature and are much broader in scope than a claim for money owing under a contract.

12 As noted in the case of *Dupont Canada Inc. v. Russel Metals Inc.*, 1999 Carswell Ont 2748, Rule 29.09 requires the court to look forward not backward in considering whether the plaintiff will be prejudiced or unnecessarily delayed if the main action were to be kept with the third party action. The issue of delay and prejudice was considered in the case of *Marco v. Levy*, 1999 CarswellOnt 832 (Ont. Master), where the court was persuaded to bifurcate the proceedings and have the third party proceeding separate from the main action. The cases are clear that there is no mechanism to eliminate the prejudice or delay to the plaintiff moving forward in the proceedings than there is a sound basis to order the third party claim to proceed as a separate action from the main action.

13 In the view of this court, the possibility of future delays which may prejudice the plaintiff, Chartrand, if the main action is not severed off from the third party claim can be eliminated by the management of the court in delineating a strict timetable for the completion of the steps in this litigation on a forward looking basis. This court will make an order for a timetable of steps to be strictly adhered to by the parties which, in my view, will eliminate the possibility of undue delay to the plaintiff and any resulting prejudice to the plaintiff as contemplated by Rule 29.09 by having the main action and third party action involving Northern Logistics Inc. being heard together. The particulars of this timetable will follow later in this judgment.

14 Accordingly, the motion brought by the plaintiff to sever the main action from the third party action and to bifurcate the proceeding is dismissed.

The motion by the defendants to have all actions, being actions 16128/08, 15642/08 and 15804/08, tried together:

15 The applicable rule relied upon by counsel for the defendants is Rule 6.01(1) of the *Rules of Civil Procedure*. That rule reads as follows:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceeding be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

16 Section 138 of the *Courts of Justice Act* provides that "as far as possible, multiplicity of proceedings shall be avoided...". Section 107(1) of the C.J.A. provides for the same test as set out in Rule 6.01(1) when two proceedings are pending in two different courts and reads as follows:

107(1) Consolidation of proceedings in different courts — Where two or more proceedings are pending in two or more different courts, and the proceedings,

(a) have a question of law or fact in common;

(b) claim relief arising out of the same transaction or occurrence or series of transactions or occur- rences; or

(c) for any other reason ought to be the subject of an order under this section, an order may, on motion, be made,

(d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or

(e) requiring any of the proceedings to be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

17 The underlying purpose of Rule 6 is set out by Quinn, J. in the case of *Wood v. Farr Ford Ltd.*, 2008 CarswellOnt 6116 (Ont. S.C.J.) where in paragraph 23, the following is stated:

The customarily expressed purpose of Rule 6 is to avoid multiplicity of proceedings, thereby preventing inconsistent dispositions, protecting the scarce resources of the court and saving expense to the parties. However, it also safeguards against a tactical decision to subject a party or parties to more than one action and, therefore, it promotes fairness.

18 The *Wood v. Farr Ford Ltd.*. case also provides a useful explanation between what is meant by the "consolidation" of actions as opposed to actions "being tried together". In the case at bar, the defendants seek an or-

der that the actions be "tried together", not "consolidated".

19 The fact that some of the actions involve the *Construction Lien Act* does not prevent the court from making an order that the actions be tried together. The cases of *Justwork Construction Ltd. v. Groomes*, 1991 CarswellOnt 806 (Ont. Gen. Div.) and *Taylor v. Georgina (Town)*, [1992] O.J. No. 1240 (Ont. Gen. Div.), are clear authority for the proposition that the court may order actions to be tried together in construction lien cases despite the fact that there is no specific section in the *Construction Lien Act* that permits this. The principle that the court is not to be deprived of its jurisdiction to control its own processes, is well founded and sound.

20 All the subject actions arise from the same construction project. The involvement in the construction project is contemporaneous in time in that Northern Logistics Inc. was involved in the project from the Fall of 2006 to the Fall of 2007. Gatrem Ltd. was involved in the project from May, 2007 to September, 2007 and Chartrand Equipment was involved in the project from June, 2007 to February, 2008. The Feldmans are alleged to be the operating minds of the corporation, 1602724 Ontario Inc., who is the owner of the property on which the construction project was undertaken. In my view, the common facts, the nature of the claims in dispute and the relationships between the parties are inextricably interwoven. Separate proceedings creates a risk of possible inconsistent findings or results which should be avoided. The various claims before the court also have similar questions of law and fact. The development of the facts will be the same for all of the parties in that their involvement is with the same defendants, the Feldmans, 6022724 Ontario Inc. and Feldman Timber Company Limited and on the same construction project on the same piece of property, 681 Algonquin Boulevard East, Timmins, Ontario. As noted in the various pleadings in the various actions, the questions of law in each case are similarly connected and couched in claims of breach of contract and breach of trust, with the defence similarly based on allegations of negligence and failure to perform duties in a competent and timely manner.

21 This court is more than satisfied that the prerequisites to make an order that the subject actions be tried together under Rule 6.01(1)(a) and (b) have been established and that it is in the best interest of all the parties that the actions be tried together to minimize expense, to avoid multiplicity of proceedings and the possibility of inconsistent findings and results.

22 For the reasons indicated above, an order shall issue as follows:

a) that this action 16124/08 and actions numbered 15642/08 and 15804/08 be tried together in Timmins, Ontario subject to the trial judge's discretion under Rule 6.02 of the *Rules of Civil Procedure*;

b) that there be a timetable for the completion of the steps to be taken to ready this matter for trial as fol- lows:

(i) exchange of sworn affidavit of documents that have not otherwise been exchanged shall be exchanged by February 15, 2010;

(ii) examinations for discovery in each of the aforementioned actions are to take place simultaneously or consecutively and that each shall stand as discovery for each of the actions. The examinations for discovery shall be completed by April 30, 2010;

(iii) all undertakings arising from the examinations for discovery shall be fulfilled by June 30, 2010;

(iv) the aforementioned actions shall be set down for trial by August 3, 2010;

(v) the aforementioned actions shall be placed on the civil assignment court in Timmins, Ontario in September, 2010 to set a date for a settlement conference.

23 If the costs of these motions are in issue between the parties, an appointment can be made with the trial co-ordinator in Timmins to have this issue determined by the court, which can include a request for a schedule for written submissions if that is more convenient to counsel.

Order accordingly.

END OF DOCUMENT

TAB 6

N/M/17/10

2011 NBQB 100

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL DISTRICT OF MIRAMICHI

IN THE MATTER OF RECEIVERSHIP OF:

ATCON GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC., ATCON LOGISTICS INC., ATCON CONSTRUCTION INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. AND ENVIREM TECHNOLOGIES INC.

PURSUANT TO Section 33 of The Judicature Act, R.S.N.B. 1973, Ch. J-2, Rule 41, Rules of Court, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

BETWEEN:

THE BANK OF NOVA SCOTIA, a Canadian chartered bank with a registered office in the City of Saint John, Province of New Brunswick

APPLICANT

-and-

ATCON GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC., ATCON LOGISTICS INC., ATCON CONSTRUCTION INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC., AND ENVIREM TECHNOLOGIES INC., all of which are carrying on business in the Province of New Brunswick

RESPONDENTS

Before: Thomas W. Riordon
Date of hearing: March 18, 2011
Date of decision: April 12, 2011

Appearances (in person):

Mr. Sam Rappos	-on behalf of Ernst & Young Inc. along with Mr. George Kinsman of Ernst & Young Inc.
Mr. Joshua McElman	-on behalf of the Bank of Nova Scotia
Ms. Natalie LeBlanc	-on behalf of the Province of NB
Mr. Gerald Smith	-on behalf of Mr. Robert W. Tozer along with Mr. Tozer

Appearances (via telephone conference call):

Mr. James Mosher	-on behalf of PriceWaterhouseCoopers Inc.
Mr. Shawn Goguen	-on behalf of PriceWaterhouseCoopers Inc.
Mr. Paul Hickey	-on behalf of Ernst & Young Inc.

Mr. Robert Creamer -on behalf of Caterpillar Financial Services Inc.

Mr. William Kean -on behalf of GE Canada Equipment Financing G.P., General Electric Canada Equipment Financing G.P., GE Canada Leasing Services Company, GE VFS Canada Limited Partnership, General Electric Canada Real Estate Finance Inc. and GE Vehicle and Equipment Leasing

, J. Riordon

[1] The present motion is brought on behalf of Ernst & Young Inc. The Receiver, Receiver Manager of the respondent companies, the Atcon companies.

[2] Ernst & Young Inc. ask for two orders:

1) (a) authorizing and directing Sun Life Financial (Sunlife) to terminate a life insurance policy on the life of Robert W. Tozer and pay its cash surrender value to the Receiver;
(b) authorizing and empowering the Receiver to utilize the cash surrender value of the Sunlife policy for the purpose of making payments required or permitted by the receivership order; and

2) A declaration
(a) that Atcon Group is the owner of all issued shares of a Swedish company known as OPI. Aktiebolag (OPI);

(b) that the only physical share certificates received by Atcon Group with respect to OPI were those issued in December 2000 and that no such certificates were issued in regard to a November 2003 share issuance;

(c) that Robert Tozer and other officers of any of the respondent companies assist the Receiver in matters involving OPI and its efforts in selling the interests of the Atcon companies in OPI and its wholly owned subsidiary, Vanerply AB, another Swedish company, and;

(d) to direct that authorities in Sweden assist and aid the Receiver in regard to the possession, control and sale of the Atcon Groups interests in the Swedish companies.

Background Information

[3] Following applications made by the Bank of Nova Scotia brought pursuant to Section 33 of the Judicature Act, the Rules of Court and the Bankruptcy and Insolvency Act (Canada), Ernst & Young Inc. were appointed as Receiver, Receiver Manager of the respondent companies. The receivership orders appointing them as Receiver, Receiver Manager were issued on March 2nd and 30th 2010.

[4] The receivership orders authorized Ernst & Young Inc. to take possession of the property of the Atcon companies, to take any steps reasonably necessary to the exercise of its powers and to apply to the court for advice and directions among other things. In that regard the present motion was brought on behalf of Ernst & Young Inc. in mid November and although originally scheduled for hearing in late November, was rescheduled for March 18, 2011.

[5] I will address the two different issues separately.

[79] In all the present circumstances I am not convinced that the present issue should or need be determined by a trial. I therefore exercise the discretion which I understand I have and deny the request made on behalf of Mr. Tozer to direct the trial of an issue. In so doing I see no procedural unfairness in that Mr. Tozer has had a full opportunity to be heard and to respond to the applications brought on behalf of the Receiver of the respondent companies. He has had a full opportunity to provide relevant evidence in regard to the matters in issue.

Receivers Evidence By Way Of Reports

[80] It is argued on behalf of Mr. Tozer that as this issue is one that is contentious, that the evidence of the Receiver should be in the form of a sworn affidavit rather than in the form of Reports.

[81] In the motion which is dated November 18th, the documentary evidence relied upon by Ernst & Young Inc. includes Reports prepared by the Receiver. Those are the Eleventh Report dated November 17th, 2010 (Sun Life Policy) and the Twelfth Report of the same date (the OPI AB shares). Later, on February 24th, 2011, counsel for Mr. Tozer asked for clarification concerning the Eleventh Report. To respond

to that request and answer the questions raised, a Supplement to the Eleventh and Twelfth Report dated February 28th, 2011 was prepared and delivered by the Receiver. Later, a Second Supplement to the Eleventh and Twelfth report was completed on March 7th, 2011. This dealt mainly with a number of comments contained in Mr. Tozer's affidavit which was sworn on March 1st, 2011.

[82] Finally, a Third Supplement to the Eleventh and Twelfth Report of the Receiver was prepared on March 14th, 2011, delivered and filed. This short report addresses how the insurance premiums on the policy had been paid.

[83] In support of the argument that sworn affidavit evidence rather than the Receiver's Reports should be filed in support of the present motion, counsel for Mr. Tozer relied upon the decision of Farley J in Bell Canada International Inc. 2003 CanLii 22640 (ON). The following paragraph of that decision was quoted:

> **" I raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same."**

[84] From my reading of the Bell Canada International Inc. (BCI) decision of Justice Farley, he did not say that sworn evidence from a court officer must be filed to support a motion in contentious matters. In that case, BCI brought a motion to authorize entering into a voting agreement to vote it's interests in shares of a third corporation to approve a sale agreement.

[85] The only evidence before the court was the report of the court appointed monitor. One of the minority shareholders of the subsidiary company raised concerns about the evidence in support of the application, the monitor's report. It was in that context that Judge Farley said it would be desirable to have a sworn affidavit if the matter was expected to be reasonably contested. He did not say that the court appointed officer of the monitor must file an affidavit.

[86] At paragraph 6 of the BCI case, the following is written:

> **"L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, Evidence in Trials at Common Law (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of**

reports being received as admissible evidence, stating at p. 791:

> •A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> •Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra)."

[87] In the case of **Re Impact Tools & Mould Inc.** ***(2007), 2007 CarswellOnt 9136, 41 C.B.R. (5th) 112***, the Court had to deal with several motions, one by a trustee in Bankruptcy to examine a court appointed Receiver. At paragraph 15 Justice Brockenshire said:

> "While s. 163(1) of the *Bankruptcy and Insolvency Act* gives broad powers to a trustee to carry out examinations, that power is directed primarily against the bankrupt and then other persons. What is sought here is an order for the examination of a court appointed Receiver. The case law, quoted by counsel on both sides, of *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), *Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]) and *Bell Canada International Inc.*, Re, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]), all decisions of Farley J., plus the appeal decision in *Confectionately Yours Inc.*, Re at (2002), 36 C.B.R. (4th) 200 (Ont. C.A.), all make it clear that a court appointed Receiver is an officer of the court, whose reports are to be accepted and do not have to be supported by affidavit except in the most unusual of circumstances, and that such court officer is, again except in the most unusual circumstances not to be subjected to an examination. The one exception is when the Receiver's own accounts for fees and disbursements are brought before the court. The Receiver is then not acting in the general interest of the estate, and should support the claim by affidavit and with leave, be subject to examination. I see nothing exceptional in the circumstances here, and was not

> pointed to any area in which Mr. Bennett could point to a lack of information or a refusal to provide information which would in any way support his application. I rule that a court appointed Receiver cannot be examined except by leave, which leave should only be granted in the most unusual of circumstances, which have not been demonstrated here."

[88] The subject of reports prepared by a court appointed Receiver and whether such person ought to be questioned by way of cross-examination on a report that is made to the court was addressed in the case of Re: ***Ravelston Corp 2007 CarswellOnt 661, 29 C.B.R (5th) 1***. The majority shareholder of the company in that matter opposed the relief sought by the Receiver and had submitted questions to the Receiver which were responded to.

[89] At paragraphs 37 to 40 of the decision Justice Cumming said:

> " Issue #1 Is an examination of the Receiver appropriate in the circumstances?
>
> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed Receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Re Bakemates International Inc* (alternate.: *Re Confectionately Yours, Inc.*) (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society,* [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilites v. Aboriginal Partners & Youth Society,* [2004] A.J. No. 710 at paras. 17-22 (Q.B.)

> 38 In *Bell Canada International Inc.*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:
>
> • [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.*, (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* [*Re Confectionately Yours*] clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination. [emphasis added.]
>
> 39 CBCC submits that the Receiver is not acting in an objective and neutral manner in dealing with CBCC's questions or the interests of its stakeholders.
>
> 40 In my view, the evidentiary record did not support the allegation that the Receiver was not acting in an objective and neutral manner. There was no good reason to depart from the norm that a court-appointed Receiver is not subject to cross-examination on its reports."

[90] On appeal of that decision to the Ontario Court of Appeal that court concluded that it saw no reason to interfere with the thorough and balanced decision of the motions judge, ***Re Ravelston Corp. 2007 CarswellOnt 1115, 29 C.B.R. (5th) 45, 85 O.R. (3d) 175.***

[91] In the present matter I see nothing that is exceptional here that would require a departure from the normal practice and procedure. The Receiver, Ernst & Young Inc., as a court

appointed Receiver is an officer of the court. Their reports can be accepted as evidence and do not have to be supported by affidavit. That is unless or except if there are unusual circumstances.

[92] I do not find any unusual circumstances. Basically the Receiver reported on its ongoing work as the Receiver for the Atcon companies and its involvement with the Sun Life policy along with what information it obtained in regard to that policy. Ernst & Young Inc. reported on its investigations and inquiries and provided the details about the policy that it obtained. They include the background, history, who it dealt with, relevant documents, copies of the documents and related matters. This was and is all part of its ongoing responsibility in regard to the property of the respondent, Atcon companies.

[93] Several questions were put to the Receiver in writing by counsel for Mr. Tozer and those questions were answered by the Receiver in a spirit of co-operation. There was no refusal to provide information and I have not been made aware of any relevant information that has not been disclosed, nor has it been established that the Receiver did not act objectively. The role of the court appointed

Receiver was summarized by Justice Cumming in the **Ravelston** decision in the following terms:

> "The role of the court-appointed Receiver
>
> 60 A court-appointed Receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, [1913] A.C. 160 at 167 (J.C.P.C.).
>
> 61 When a court-appointed Receiver is appointed in the normal course, "the Receiver-Manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a Receiver's power is to settle liabilities and liquidate assets.
>
> 62 It is well established that a court-appointed Receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].
>
> 63 A Receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A Receiver's duty is to discharge the Receiver's powers honestly and in good faith. A Receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.
>
> 64 It is appropriate for a Receiver to consider negative economic factors such as cost, time and risk. See generally *National Trust Company v. Massey Combines Corporation* (1988), 69 C.B.R. (N.S.) 171 at 179 dealing with the test to be employed in considering whether to approve a sale of assets."

[94] It is my conclusion for reasons as above set out that there are no exceptional or unusual circumstances here that would require that the application be supported by way of a sworn affidavit of the Receiver.

Is the Sun Life Policy Trust Property?

[95] I have above quoted from the **Ravelston** decision as to the role of the court appointed Receiver who must preserve the assets of a debtor company and realize on those assets for the benefit of all creditors.

[96] The evidence establishes that Atcon Group Inc. is the documented owner and beneficiary of the Sun Life Policy.

[97] Mr. Tozer challenges the legal recorded ownership of the policy. He says that he is the owner, that is he is the beneficial owner and that the policy was always held by Atcon Group Inc. and predecessor companies in trust for his benefit. Essentially, it is advanced that the policy was held in trust for him until retirement at which time the policy would be transferred to him.

[98] There are no documents or written records that in any way confirm or suggest that the policy was held in trust for Mr. Tozer. According to Mr. Tozer, when arrangements were made to obtain the life insurance policies back in 1992 it was decided that the corporation would hold each policy and be named as a revocable beneficiary. Although not

TAB 7

Westlaw

2006 CarswellAlta 383, 2006 ABQB 236, [2006] A.W.L.D. 1798, 21 C.B.R. (5th) 57, 62 Alta. L.R. (4th) 168, 393 A.R. 340

2006 CarswellAlta 383, 2006 ABQB 236, [2006] A.W.L.D. 1798, 21 C.B.R. (5th) 57, 62 Alta. L.R. (4th) 168, 393 A.R. 340

Residential Warranty Co. of Canada Inc., Re

In the Matter of the Bankruptcy of Residential Warranty Company of Canada Inc.

In the matter of the Bankruptcy of Residential Warranty Insurance Services Ltd.

Alberta Court of Queen's Bench

Topolniski J.

Judgment: March 24, 2006[FN*]
Docket: Edmonton 24-112232, 24-112233

Counsel: John I. McLean for Kingsway General Insurance Company

Kent Rowan for Deloitte & Touche Inc.

Subject: Insolvency; Estates and Trusts

Bankruptcy and insolvency --- Administration of estate — Trustees — Remuneration of trustee — General principles

Bankrupts were in process of winding up home warranty business — Trustee was appointed interim receiver in context of minority shareholder's oppression remedy — Creditor was insurance underwriter of home warranty policies brokered or administered by bankrupts — Creditor filed proofs of claim in estates for approximately $11 million pursuant to contractual, statutory and common law trusts and brought related concurrent action against bankrupts — Trustee gave notice that trust claim was disputed — Trustee maintained that all or substantially all insurance premiums collected by bankrupts for insurance policies were paid to creditor and that balance of estate of bankrupts was income derived from business operations — Creditor appealed trustee's decision — Creditor brought application for order that trustee was not entitled to utilize realizations of assets and property of bankrupts for purpose of fees and expenses — Application dismissed — Trustee was entitled to retrospective charge on assets under administration for fees and expenses in undertaking work on estate to date — Common sense dictated trustees in bankruptcy receive reasonable compensation when called upon to exercise duties and judgment — If compensation were commonly withdrawn in such instances, trustees would be inclined to shy away from problems and few would be willing to take on role — Creditor had not discharged onus of establishing valid trust on date of bankruptcy — Creditor's action had been stayed and creditor had not been vigilant in pursuing other grievances — No evidence was presented illustrating trustee's actions favoured any party to

bankruptcy.

Cases considered by *Topolniski J.*:

A. Marquette & fils Inc. v. Mercure (1975), [1977] 1 S.C.R. 547, 10 N.R. 239, 65 D.L.R. (3d) 136, 1975 CarswellQue 51, 1975 CarswellQue 51F (S.C.C.) — referred to

Beetown Honey Products Inc., Re (2003), 46 C.B.R. (4th) 195, 67 O.R. (3d) 511, 2003 CarswellOnt 3755 (Ont. S.C.J.) — referred to

Beetown Honey Products Inc., Re (2004), 3 C.B.R. (5th) 204, 2004 CarswellOnt 4316 (Ont. C.A.) — referred to

C.J. Wilkinson Ford Mercury Sales Ltd., Re (1986), 60 C.B.R. (N.S.) 289, 1986 CarswellOnt 211 (Ont. S.C.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 1994 CarswellOnt 3851 (Ont. Gen. Div. [Commercial List]) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 1994 CarswellOnt 3853 (Ont. Gen. Div. [Commercial List]) — considered

Cheerio Toys & Games Ltd., Re (1971), [1971] 3 O.R. 721, 21 D.L.R. (3d) 533, 15 C.B.R. (N.S.) 77, 1971 CarswellOnt 58 (Ont. S.C.) — referred to

Cheerio Toys & Games Ltd., Re (1972), [1972] 2 O.R. 845, 1972 CarswellOnt 894 (Ont. C.A.) — referred to

Engels v. Richard Killen & Associates Ltd. (2002), 2002 CarswellOnt 2435, 35 C.B.R. (4th) 77, 60 O.R. (3d) 572 (Ont. S.C.J.) — referred to

Eron Mortgage Corp., Re (1998), 1998 CarswellBC 102, 2 C.B.R. (4th) 184, 53 B.C.L.R. (3d) 24 (B.C. S.C.) — distinguished

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271, 2005 CarswellOnt 1963 (Ont. S.C.J.) — referred to

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 10 C.B.R. (5th) 201, 2005 CarswellOnt 1834 (Ont. C.A. [In Chambers]) — referred to

Genometrics Corp., Re (2005), 2005 SKQB 488, 2005 CarswellSask 790, 17 C.B.R. (5th) 114 (Sask. Q.B.) — referred to

Gill, Re (2002), 2002 BCSC 1401, 2002 CarswellBC 2294, 37 C.B.R. (4th) 257 (B.C. S.C.) — distinguished

Grant v. Ste. Marie (2005), 2005 ABQB 35, 2005 CarswellAlta 71, 8 C.B.R. (5th) 81, [2005] 5 W.W.R. 187, 39 Alta. L.R. (4th) 71, 375 A.R. 33 (Alta. Q.B.) — considered

Harris v. Conway (1987), (sub nom. *Bekeley Applegate (Investment Consultants) Ltd. (In Liquidation), Re)* [1989] 1 Ch. 32, (sub nom. *Berkeley Applegate (Investment Consultants) Ltd., Re)* [1988] 3 All E.R. 71, [1989] B.C.L.C. 28 (Eng. Ch. Div.) — referred to

Kenny, Re (1997), 149 D.L.R. (4th) 508, (sub nom. *Kenny (Bankrupt), Re)* 34 O.T.C. 321, 1997 CarswellOnt 6031, 37 C.B.R. (4th) 291 (Ont. Gen. Div. [Commercial List]) — referred to

McLeod, Re (1949), 1949 CarswellOnt 88, 29 C.B.R. 163 (Ont. S.C.) — considered

Multiple Access Ltd. v. McCutcheon (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — considered

Nagy, Re (1997), 49 Alta. L.R. (3d) 203, 45 C.B.R. (3d) 160, (sub nom. *Nagy (Bankrupt), Re)* 199 A.R. 146, 48 C.B.R. (3d) 261, 54 Alta. L.R. (3d) 197, [1997] 10 W.W.R. 348, 1997 CarswellAlta 105 (Alta. Q.B.) — referred to

Nagy, Re (1999), 1999 CarswellAlta 358, (sub nom. *Nagy (Bankrupt), Re)* 232 A.R. 399, (sub nom. *Nagy (Bankrupt), Re)* 195 W.A.C. 399, 70 Alta. L.R. (3d) 360, [1999] 11 W.W.R. 48, 13 C.B.R. (4th) 1 (Alta. C.A.) — referred to

Nakashidze, Re (1948), 29 C.B.R. 35, [1948] O.R. 254, [1948] 2 D.L.R. 522, 1948 CarswellOnt 98 (Ont. H.C.) — considered

NRS Rosewood Real Estate Ltd., Re (1992), 9 C.B.R. (3d) 163, 1992 CarswellOnt 204 (Ont. Bktcy.) — considered

Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. (1993), 106 D.L.R. (4th) 132, 67 O.A.C. 49, 1993 CarswellOnt 1844 (Ont. C.A.) — referred to

Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241, 1992 CarswellOnt 176 (Ont. C.A.) — referred to

P.A.T., Local 1590 v. Broome (1986), 61 C.B.R. (N.S.) 233, 1986 CarswellOnt 219 (Ont. S.C.) — con- sidered

Pugsley, Re (1988), 67 C.B.R. (N.S.) 98, 63 O.R. (2d) 635, 1988 CarswellOnt 130 (Ont. Bktcy.) — con- sidered

Ramgotra (Trustee of) v. North American Life Assurance Co. (1996), [1996] 3 W.W.R. 457, 37 C.B.R. (3d) 141, 10 C.C.P.B. 113, 13 E.T.R. (2d) 1, [1996] 1 C.T.C. 356, (sub nom. *Ramgotra (Bankrupt), Re)* 193 N.R. 186, (sub nom. *Ramgotra (Bankrupt), Re)* 141 Sask. R. 81, (sub nom. *Ramgotra (Bankrupt), Re)* 114 W.A.C. 81, (sub nom. *Royal Bank v. North American Life Assurance Co.)* 132 D.L.R. (4th) 193, (sub nom. *Royal Bank v. North American Life Assurance Co.)* [1996] 1 S.C.R. 325, (sub nom. *Royal Bank v. North American Life Assurance Co.)* 96 D.T.C. 6157, 1996 CarswellSask 212F, 1996 CarswellSask 418 (S.C.C.) — referred to

Rassell, Re (1999), (sub nom. *Rassell (Bankrupt), Re)* 237 A.R. 136, (sub nom. *Rassell (Bankrupt), Re)* 197

W.A.C. 136, 1999 CarswellAlta 718, 71 Alta. L.R. (3d) 85, 177 D.L.R. (4th) 396, 12 C.B.R. (4th) 316, 1999 ABCA 232 (Alta. C.A.) — referred to

Ridout Real Estate Ltd., Re (1957), 36 C.B.R. 111, 1957 CarswellOnt 34 (Ont. S.C.) — considered

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — referred to

Shirt-Man Inc., Re (1987), 65 C.B.R. (N.S.) 309, 19 C.C.E.L. 148, 1987 CarswellOnt 199 (Ont. S.C.) — referred to

Sproule v. Montreal Trust Co. (1979), [1979] 2 W.W.R. 289, (sub nom. *Sproule Estate, Re)* 13 A.R. 420, 95 D.L.R. (3d) 458, 5 E.T.R. 1, 1979 CarswellAlta 194 (Alta. C.A.) — considered

Tlustie, Re (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — referred to

Walter Davidson Ltd., Re (1957), 36 C.B.R. 65, [1957] O.W.N. 223, 10 D.L.R. (2d) 77, 1957 CarswellOnt 32 (Ont. S.C.) — considered

Westar Mining Ltd., Re (1999), 13 C.B.R. (4th) 289, 1999 CarswellBC 2149 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 59 — referred to

s. 107 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 38 — referred to

s. 39(1) — referred to

s. 39(2) — referred to

s. 41(4) — referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

s. 47.2 [en. 1992, c. 27, s. 16(1)] — referred to

s. 67(1)(a) — referred to

s. 72(1) — referred to

s. 81 — referred to

s. 81(2) — considered

s. 183(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Trustee Act, R.S.A. 2000, c. T-8

Generally — referred to

s. 1 "trustee" (b) — referred to

s. 44 — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 34-53 — referred to

APPLICATION by creditor for order that trustee was not entitled to utilize realizations of assets for fees and expenses.

***Topolniski J.*:**

I. Nature of the Application

1 This Decision concerns retrospective and prospective funding of a trustee in bankruptcy from assets under administration when all of the assets are subject to a disputed trust claim that is far from being resolved.

2 Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Bankrupts) are Alberta companies that operated a home warranty business. They were in the process of winding up when, in late 2004, Deloitte & Touche LLP was appointed their interim receiver (IR) in the context of a minority shareholder's oppression action. On the companies' deemed bankruptcy in May 2005 (Bankruptcies), Deloitte & Touche LLP became their trustee in bankruptcy (Trustee).

3 The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Bankrupts in Alberta and British Columbia. Kingsway filed proofs of claim in the estates pursuant to s. 81 of the *Bankruptcy and Insolvency Act (BIA)*[FN1] claiming approximately $11,200,000.00 pursuant to contractual, statutory and common law trusts. The Trustee gave notice under s. 81(2) that the trust claim was disputed. It maintains that all or substantially all of the insurance premiums collected by the Bankrupts for insurance policies on which Kingsway is liable have been paid to Kingsway

and that the balance of the estate of the Bankrupts is income derived from the operation of their home warranty business. Kingsway has appealed the Trustee's decision (Appeal).

4 Kingsway's trust claim arises from a series of transactions that are detailed in a broadly drafted Amended Statement of Claim (BC Action) which it filed in the British Columbia Supreme Court in June 2004, prior to the Bankruptcies. The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages and contains allegations of breach of contract, fraud, conversion, breach of trust, breach of fiduciary duty. The Bankrupts, along with certain of their directors, officers, and employees, are named as defendants in the lawsuit.

5 Kingsway now applies for an order:

> 1. declaring that the Trustee is not entitled to use the realizations of any assets and property of the Bankrupts for the purpose of paying its fees and expenses, both past and future, pending the hearing of the Appeal and the disposition of the BC Action;
>
> 2. directing that the Trustee return all fees paid after notice of its trust claim, subject to deduction for reasonable fees directly attributable to preservation of the alleged trust property;
>
> 3. appointing the Trustee as Interim Receiver of the Bankrupts' assets under s. 47.1 of the *BIA* (*BIA* IR) for preservation purposes pending determination of the Appeal and the BC Action; and
>
> 4. requiring the Trustee to post security for costs in respect of its defence of the Appeal and the BC Ac- tion;

6 The Trustee's position is that resolution of the Appeal to finally determine the validity of Kingsway's claim is central to administration of the Bankruptcies. The Trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to the Appeal for lack of funding.

7 In response to Kingsway's application, the Trustee asks for a retrospective and prospective charge on all of the estate assets under its administration in order to pay its fees and disbursements, including legal fees and disbursements. The Canada Revenue Agency (CRA), an unsecured creditor, and a builder, Nucon Developments, support the Trustee's request.

8 The parties on this application focussed squarely on the issue of Trustee funding. Kingsway did not pursue its request for security for costs and, while mention was made of its request for the appointment of the Trustee as a *BIA* IR in Kingsway's written submissions, no evidence or argument was offered to support the relief requested. In supplemental written submissions, Kingsway argued that 'super-priority' funding for a *BIA* IR under s. 47.2 of the *BIA* is not applicable in a "straight bankruptcy" like this. I took this submission to mean that it had abandoned this arm of its application.

9 Kingsway has applied for an order transferring the Appeal to the British Columbia Supreme Court (In Bankruptcy) and for an order granting it leave to continue the BC Action "to be heard at the same time as the Appeal, subject to the direction of the Judge of the British Columbia Supreme Court hearing the BC Action". The applications and the Appeal were adjourned at the parties' suggestion. The applications are now set to be heard in mid May. Kingsway wants to await the outcome of its applications before scheduling the Appeal.

10 As Kingsway's application to have the Court in British Columbia deal with the Appeal has not been de-

cided, my Ruling on the present application presumes that the Appeal will proceed in the ordinary course of events in this Court.

II. Background

A. The Bankrupts, the Builders and Kingsway

11 The Bankrupts brokered and administered residential warranty policies sold in Alberta and British Columbia to builders which were underwritten by Kingsway as the insurer of record. The builders paid for membership in the programs. Each of them also paid money by way of cash deposit or letters of credit as security for repairs covered by the warranty policies. The Bankrupts held the cash deposits in a segregated account. Provided a builder did not owe any money on expiry of the warranty period, the deposit would be repaid to the builder. Letters of credit were treated in a similar fashion.

12 Relations between Kingsway and the Bankrupts soured to the point where Kingsway terminated its contracts with them in August 2003, alleging that the Bankrupts had sold unauthorized products and had failed to remit certain premiums. The Bankrupts denied the allegations and the fight was on.

13 In the spring of 2004, Kingsway complained to the British Columbia Financial Institutions Commission (FICOM), British Columbia's insurance regulatory authority, about the Bankrupts' conduct. FICOM investigated the companies and RWI responded by surrendering its broker's license for three weeks. The Insurance Council of British Columbia subsequently allowed reinstatement of its license on conditions, one of which was that RWI hold approximately $3,100,000.00 in trust with its lawyers for premiums allegedly owed to Kingsway.

14 Kingsway commenced the BC Action in June 2004, claiming a minimum of $2,108,576.35 plus additional unascertained damages. It started a similar lawsuit in Alberta, but did not prosecute it. About three weeks after the BC Action was commenced, RWC paid $3,092,612.50 to Kingsway, unconditionally.

15 By the date of the Bankruptcies in May 2005, the defendants to the BC Action had defended and counter-claimed (alleging outstanding commissions, expenses, third party costs, lost income, lost opportunity, and loss of reputation) and Kingsway had demanded document production. Kingsway's forensic accountant apparently calculated the amount that remained owing to Kingsway from the Bankrupts as at June 7, 2005 to be $3,786,606.00. In late June 2005, after receiving certain financial information from the Trustee, Kingsway's forensic accountant determined that $11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, was still owing from the Bankrupts.

16 Kingsway filed proofs of claim in the Bankruptcies on September 2, 2005 and put the Trustee on notice of its claim and of the position that it was taking with respect to the Trustee's fees and expenses on October 4, 2005.

17 In late 2005, the police charged the Bankrupts, one of their former directors, and a former employee with fraud, theft, uttering a forged document and drawing a document without authority. An Information was sworn and warrants were held until December 15, 2005. I was not provided with any additional information on this application as to the current status of the criminal proceedings.

B. The Interim Receiver, The Trustee and Stakeholders

18 The order appointing the IR granted the IR a 'super-priority' charge over the companies' assets, giving it

priority over all security, charges and encumbrances affecting the assets.

19 The IR, which is also the Bankrupts' Trustee, complied with the Court's directions to investigate the Bankrupts' affairs, dispose of certain assets and report on numerous concerns, including the BC Action and the builders' deposits. It prepared three reports for the Court. Kingsway contends that the IR's mention of the BC Action in its first report, dated December 21, 2004, constitutes evidence of notice to Deloitte & Touche LLP of Kingsway's trust claim, and that funding for the Trustee from alleged trust assets, which comprise the entire estate of both Bankrupts, should not be allowed after that date. It asserts that funding should not extend beyond October 4, 2005 at the very latest, when its counsel particularized its trust claim and formally put the Trustee on notice of the position which it now advances.

20 The assets under the Trustee's administration include bank accounts and claims against various parties, but the vagaries of the Bankrupts' business and their relationships with others have somewhat complicated the Trustee's work. Apart from the typical issues arising in any bankruptcy (financial analysis, securing assets, reviewing proofs of claim, reporting to and meeting with creditors and inspectors, and acting as the point person coordinating court matters), the Trustee has instructed litigation and dealt with winding up business operations. It has also addressed enquiries from policyholders and builder claimants about warranties and the refund of deposits relating to 550 properties.

21 Kingsway has referred some policyholders to the Trustee on denying coverage under various policies and it has jointly instructed some litigation with the Trustee. The Trustee has provided it with financial analyses and other information, including information concerning the Trustee's findings on premium payments.

22 The Trustee predicts that its future work will entail continued realization of assets through litigation efforts, including intended litigation against Kingsway to recover $1,500,000.00 in allegedly overdue profit sharing, and resolution of creditor and proprietary claims. In due course, it will wind up the estates, return property rightfully belonging to others, and distribute residual property to the creditors.

23 There are 627 persons interested in the builders' deposit fund and letters of credit (Builder Claimants). The builders' deposit fund is worth approximately $1,000,000.00 while the letters of credit are valued at approximately $5,000,000.00. Both Kingsway and the Trustee concede that many of the Builder Claimants have trust claims against the cash builders' deposits. The method by which builders' claims are to be proved in the bankruptcy and a claims bar date were set by Order in December 2005. Kingsway has agreed to that process.

24 Kingsway has participated in case management meetings and applications relating to the claims of the Builder Claimants. It has requested that it be given notice of claims that the Trustee disallows. It also wants to participate in the Trustee's application for directions as to whether the letters of credit are impressed with a trust and appeals of the disallowance by the Trustee of some builders' claims. Kingsway maintains that it is entitled to all of the value of the letters of credit, although it has not indicated how these can be considered traceable trust assets. It also claims approximately $300,000.00 of the builders' cash deposit fund as a result of alleged setoffs owed to it by builders for the cost of repairs. Kingsway takes the position that once the claims of the Builder Claimants who are seeking access to the cash fund have been resolved in these bankruptcy proceedings, the Builder Claimants must "duke it out" with Kingsway in the ordinary courts to determine who is entitled to the funds.

III. Analysis

A. Fairness, Practicality and Neutrality

25 A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

26 The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers.[FN2] Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.[FN3]

27 Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard.[FN4] What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*[FN5]:

> While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

28 Neutrality is the necessary mantra of trustees in bankruptcy. They are neither an agent of the creditors nor of the debtor, but rather are administrative officials and officers of the court charged with the responsibility of looking after all parties' interests. Trustees are obliged to comply with the procedures and rules of conduct set out in the *BIA*, the code of ethics in the *BIA General Rules*[FN6] and with professional codes of conduct, and cannot enter the fray between competing stakeholders.[FN7] They must present the facts in a dispassionate, non-adversarial manner in matters before the court.[FN8] Their job is to act as an independent voice of reason and to provide discipline in the oft-chaotic circumstances created on bankruptcy.

B. Trust Property

29 Unless otherwise provided by legislation, trustees in bankruptcy have no greater interest in the property they are responsible for administering than the bankrupt does.

30 The property held by a bankrupt in trust for another is not divisible among the creditors of the bankrupt. [FN9] However, this does not mean that the res of the trust is not subject to administration by the trustee in

to the creditors can be avoided and Kingsway can be offered some assurance deductions from the assets over which it is claiming a trust will be minimized. I appreciate, however, that some litigation may be time sensitive. Therefore, the Trustee is granted leave to revisit this restriction on evidence of prejudice to the creditors by delaying litigation.

82 A prospective charge will be granted on the Trustee filing a report with the Court confirming that the Inspectors in these Bankruptcies have approved the actions which the Trustee proposes to take, including its involvement in the Appeal and all of the preliminary applications filed by Kingsway that may be heard prior to the Appeal. On the filing of that report, the prospective charge will cover the preliminary applications, the Appeal *per se*, and all steps to readying the Appeal for hearing, whether it is a "paper Appeal" or a directed trial of an issue. Conservative measures for asset maintenance and preservation also are covered by this prospective charge. However, the Trustee may not pursue new asset realization without leave of the Court or Kingsway's consent.

83 The Appeal will proceed on an expedited basis after the hearing of Kingsway's preliminary jurisdictional applications. Any application to have the Appeal dealt with by way of a trial of an issue is to be filed within 14 days of these Reasons and made returnable on May 12, 2005. If there is no such application, a case management meeting will be held May 12, 2005 for the purpose of setting deadlines for the exchange of affidavits, cross-examinations on affidavit and the filing of written submissions.

84 If, as a result of the Appeal, Kingsway establishes a recoverable trust of the magnitude claimed, it will have suffered a loss by virtue of the charge. Nevertheless, that loss will have been incurred, broadly speaking, to benefit the trust in realizing assets and to determine entitlements. If it is held that all of the assets under administration are not impressed with the trust claimed by Kingsway, a hearing is to be held in order to determine out of which funds (i.e. any trust monies owing to Kingsway, any trust monies owing to the Builder Claimants or other parties with a proven trust claim, and the monies to be distributed to creditors), and in what proportion the Trustees' fees and expenses (once approved) are to be taken.

3. Builder Claimants

85 The retrospective and prospective charges which I have granted have the potential to affect the Builder Claimants if they are successful at the end of the day in establishing entitlement to some of the assets under administration. There is no evidence that the Builder Claimants have been given notice of this application. Accordingly, I direct that the Trustee serve the Builder Claimants with notice of my decision. The charges which I am granting will not take effect on any monies claimed by the Builder Claimants until 14 days after the Trustee has filed proof with the Court of service of these Reasons on all of the Builder Claimants. Prior to that time, the Builder Claimants may challenge the charges which I am granting the Trustee over that portion of the assets to which they claim an interest.

4. Costs

86 Costs of this application will be determined following the Appeal. If the Appeal does not proceed for some reason, the parties may return on notice to settle the issue of costs.

Application dismissed.

FN* Affirmed *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABCA 293, 2006 CarswellAlta 1354

(Alta. C.A.).

FN1 R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27

FN2 s. 183(1)

FN3 *Tlustie, Re* (1923), 3 C.B.R. 654, 23 O.W.N. 622 (Ont. S.C.); *Cheerio Toys & Games Ltd., Re*, [1971] 3 O.R. 721, 15 C.B.R. (N.S.) 77 (Ont. S.C.); varied [1972] 2 O.R. 845 (Ont. C.A.)

FN4 *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.), at 556

FN5 (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]), at 185 D.L.R.

FN6 Rules 34-53

FN7 *Rassell, Re* (1999), 177 D.L.R. (4th) 396, 237 A.R. 136, 12 C.B.R. (4th) 316 (Alta. C.A.); *Nagy, Re*, [1997] 10 W.W.R. 348, 199 A.R. 146, 45 C.B.R. (3d) 160 (Alta. Q.B.); reversed on other grounds [1999] 11 W.W.R. 48, 232 A.R. 399, 13 C.B.R. (4th) 1 (Alta. C.A.); *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572, 35 C.B.R. (4th) 77 (Ont. S.C.J.) at para. 150.

FN8 *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195 (Ont. S.C.J.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.)

FN9 s. 67(1)(a)

FN10 *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, 37 C.B.R. (3d) 141 (S.C.C.) at para. 61

FN11 s. 81(3); *Kenny, Re* (1997), 149 D.L.R. (4th) 508, 37 C.B.R. (4th) 291, 1997 CarswellOnt 6031, 34 O.T.C. 321 (Ont. Gen. Div. [Commercial List])

FN12 *Gill, Re* (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 (B.C. S.C.), at para. 23; *Grant v. Ste. Marie* (2005), 39 Alta. L.R. (4th) 71, 8 C.B.R. (5th) 81, 2005 ABQB 35 (Alta. Q.B.) at paras. 30 and 31; *Westar Mining Ltd., Re* (1999), 13 C.B.R. (4th) 289, 1999 CarswellBC 2149 (B.C. S.C.); *P.A.T., Local 1590 v. Broome* (1986), 61 C.B.R. (N.S.) 233 (Ont. S.C.); *C.J. Wilkinson Ford Mercury Sales Ltd., Re* (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.); *Shirt-Man Inc., Re* (1987), 65 C.B.R. (N.S.) 309, 19 C.C.E.L. 148 (Ont. S.C.); *Genometrics Corp., Re*, 2005 CarswellSask 790, 2005 SKQB 488 (Sask. Q.B.); *McLeod, Re*, 1949 CarswellOnt 88, 29 C.B.R. 163 (Ont. S.C.)

FN13 (1998), 53 B.C.L.R. (3d) 24, 2 C.B.R. (4th) 184 (B.C. S.C.)

FN14 *Eron Mortgage Corp., Re*, footnote 14; *Harris v. Conway* (1987), [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. Ch. Div.); *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6 (Ont. C.A.); *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.)

FN15 *Ridout Real Estate Ltd., Re* (1957), 36 C.B.R. 111 (Ont. S.C.); *NRS Rosewood Real Estate Ltd., Re* (1992), 9 C.B.R. (3d) 163 (Ont. Bktcy.); *Nakashidze, Re*, [1948] O.R. 254, 29 C.B.R. 35 (Ont. H.C.); *Walter Davidson Ltd., Re* (1957), 10 D.L.R. (2d) 77, 36 C.B.R. 65 (Ont. S.C.)

FN16 R.S.A. 2000, c. T-8, s. 44. The Act expressly permits charging of trust assets for the fees of judicial trustees, but otherwise is silent.

FN17 *Trustee Act*, footnote 16, s. 1(b)

FN18 *BIA*, footnote 1, s. 72(1); see also the discussion concerning operational conflict in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at 190: "[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament." In my view, the overarching principle to be derived from *Multiple Access Ltd.* and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. Impossibility of dual compliance is sufficient but not the only test for inconsistency.

FN19 (1979), 95 D.L.R. (3d) 458, 13 A.R. 420 (Alta. C.A.)

FN20 *Sproule v. Montreal Trust Co.*, footnote 20, para. 11

FN21 *P.A.T., Local 1590 v. Broome*, footnote 12, pp. 236 tp 237

FN22 (1988), 63 O.R. (2d) 635, 67 C.B.R. (N.S.) 98 (Ont. Bktcy.)

FN23 footnote 12

FN24 footnote 12

FN25 D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315 at 321

FN26 footnote 12 at para. 31

FN27 footnote 12

FN28 footnote 15

FN29 footnote 15

FN30 footnote 15

FN31 footnote 12

FN32 footnote 15

FN33 [1994] O.J. No. 1917 (Ont. Gen. Div. [Commercial List])

FN34 1994 CarswellOnt 3853 (Ont. Gen. Div. [Commercial List]) at paras. 8 and 9

FN35 footnote 34 at para. 8

FN36 footnote 14

2006 CarswellAlta 383, 2006 ABQB 236, [2006] A.W.L.D. 1798, 21 C.B.R. (5th) 57, 62 Alta. L.R. (4th) 168, 393 A.R. 340

FN37 footnote 14

FN38 R.S.C. 1985, c. C-36

FN39 *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271, 2005 CarswellOnt 1963 (Ont. S.C.J.), leave to appeal to Ont. C.A. granted (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

FN40 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]); David B. Light, "Involuntary Subordination of Security Interests to Charges for DIP Financing under the *Companies' Creditors Arrangement Act*," (2005) 30 C.B.R. (4th) 245.

FN41 (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.), at 205-206

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