COURT FILE NUMBER **Q.B.G. No. 1694 of 2020**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE **REGINA**

APPLICANTS	101297277 SASKATCHEWAN LTD. and INDUSTRIAL PROPERTIES REGINA LIMITED
RESPONDENTS	COPPER SANDS LAND CORP.

IN THE MATTER OF THE RECEIVERSHIP OF COPPER SANDS LAND CORP.

SUPPLEMENTAL BRIEF OF LAW
FILED ON BEHALF OF THE RECEIVER, MNP LTD.,

Prepared By:

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File Number: WP95774

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COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE REGINA

PLAINTIFFS 101297277 SASKATCHEWAN LTD. and INDUSTRIAL PROPERTIES REGINA LIMITED

DEFENDANTS COPPER SANDS LAND CORP. and MDI UTILITY CORP.

SUPPLEMENTAL BRIEF OF LAW

FILED ON BEHALF OF MNP LTD.

I. INTRODUCTION

1. MNP Ltd. (the "Receiver") was appointed as the receiver of the assets, undertakings and properties of Copper Sands Land Corp. ("Copper Sands") pursuant to an Order of the Honourable Mr. Justice N. G. Gabrielson issued October 27, 2020 (the "Receivership Order"). Old Kent Road Financial Inc. ("OKR"), which purports to be a creditor of Copper Sands, has filed a Notice of Application (the "OKR Application") seeking a wide range of remedies, including, *inter alia*, an order varying the Receivership Order by way of the following:

1) removing paragraphs 3(q), paragraph 12A, 12C (together the "Utility Provisions");

2) adding a provision authorizing OKR to terminate a lease with MDI utility Corp. ("MDI") dated December 22, 2020 (the "OKR Land Lease"), terminate the Revised Servicing Agreement dated February 6, 2019 (the "Revised Services Agreement"), and decommission the water and waste water facilities (the "Utilities") located on LSD 4 25-17-18 W2 Ext 37 (the "OKR Land");

3) adding a provision requiring the Receiver to pay OKR amounts owing pursuant to the Revised Servicing Agreement without setoff for professional fees; and

4) adding a provision that OKR shall not be liable to any person in relation to the operation of the Utility or the delivery of services under the Revised Servicing Agreement.

II. FACTS

2. The Receiver relies upon the facts set out in the First Report of the Receiver dated December 7, 2021 (the "First Report"), the Confidential Addendum to the First Report of the Receiver (the "Confidential Addendum"), the Supplement to the First Report of the Receiver dated December 16, 2021 (the "Supplement"), and the Affidavit of Muir Barber sworn December 10, 2021 (the "Barber Affidavit"), as well as certain facts alleged in the Affidavit Randy Stewart Thompson sworn December 9, 2021 (the "Thompson Affidavit"). Unless otherwise noted, this Brief of Law adopts the abbreviated terms used in the Receiver's Brief of Law dated December 7, 2021.

3. There are two particularly important factual issues raised in the OKR Application and the Thompson Affidavit: 1) the issue of whether OKR had notice of the application for the Receivership Order and the Receivership Order itself, and 2) the issue of whether OKR has had control of the Utility.

4. The Receiver takes the position that OKR had notice of both the application for the Receivership Order and the Receivership Order itself. Muir Barber discussed the application with Doug Saxon ("Saxon") of OKR before the application for the Receivership Order was made. On October 22, 2020, Miller Thomson LLP served the application materials by email on Kevin Mellor ("Mellor"), then counsel for OKR. Then, on October 27, 20, Miller Thomson LLP served a copy of the Receivership Order on Mellor.[1] The emails found at Schedule 10 of the First Report also show that OKR was aware of the receivership proceedings from the outset. In an email dated October 27, 2020 (the day the Receivership Order was granted), the Receiver advised Doug Saxon of OKR ("Saxon") of the Receiver's appointment. Saxon responded to the Receiver by email that same day, confirming that he would be the contact person at OKR.

5. OKR is or at least was a secured creditor of MDI. MDI defaulted on its loan obligations to OKR in November 2019.[2] OKR held a mortgage against what is now the OKR Land pursuant to a mortgage agreement dated February 8, 2019 (the "Mortgage"), and held and/ or holds a security

[1] Barber Affidavit at para 29.
[2] Thompson Affidavit at para 14.

interest in all of the personal property assets of MDI pursuant to a General Security Agreement with MDI dated February 8, 2019 (the "GSA").[3] MDI defaulted on its loan obligations to OKR in November 2019.

6. The Mortgage, which is found at Exhibit "J" to the Thompson Affidavit, provides, *inter alia*, that:

1) all fixtures form part of the mortgaged land (at paragraph 9);

2) on default, OKR may "make such arrangements for completing the construction, repairing or putting in order of any buildings or other improvements on the Land" (at paragraph 24(b));

3) on default, OKR is entitled to possession of the mortgaged land;

7. The GSA, which is found at Exhibit "L" to the Thompson Affidavit, provides, *inter alia*, that:

1) OKR has a security interest in all of the present and after-acquired personal property of MDI except for consumer goods or items described in Schedule 1(e)(ii) of the GSA, and Schedule 1(e)(ii) of the GSA states that there are no excluded assets (at paragraph 1(e));

2) the collateral secured by the GSA includes items identified in Schedule 1(e), which identifies equipment for the potable water system, assets to be installed to complete the potable water facility, assets to be installed to complete the waste treatment facility; and

3) on default, OKR is entitled to enter onto the premises of MDI to take possession of the collateral (at paragraph 9(a));

4) on default, MDI is entitled to preserve and maintain the collateral, including making replacements and additions to the collateral (at paragraph 9(c)).

8. OKR denies that it has ever operated the Utility,[4] but OKR consistently represented to the Receiver that it was taking steps to improve the quality of the water and waste water services provided by the Utility. The email correspondence between OKR and the Receiver, found at Schedules 10-12 and 14 of the First Report, includes the following:

[3] Thompson Affidavit at para 13.
[4] Thompson Affidavit at para 23.

(a) Email from OKR to the Receiver dated October 30, 2020: OKR advises that it is making arrangements to enter into a contract with Ken Bender ("Bender") to operate the Utility;
(b) Email from the Receiver to OKR dated November 9, 2020: the Receiver advises he has been informed that quality of the water has deteriorated, and asks whether Bender is performing daily testing or whether OKR intends to replace him;
(c) Email from OKR to the Receiver dated November 9, 2020: OKR advises that "we're currently in the process of hiring a new operator/ operator service. In the meantime I'm working with the engineers on getting the missing equipment on site to be installed."
(d) Email from the Receiver to OKR dated November 17, 2020: the Receiver advises that the water supply situation is urgent;
(e) Email from OKR to the Receiver dated November 17, 2020: OKR advises that filters and equipment for the Utility are being shipped from Edmonton, and that it is working with "SaskWater" (the WSA) on putting an operator in place;
(f) Emails from the Receiver to OKR dated December 22, 2020; January 4, 2021, and January 22, 2021: the Receiver asks whether OKR has reached an agreement with "Sask Water" with regard to the daily testing and monitoring of the Utlity; and
(g) Email from OKR to the Receiver dated January 28, 2021: OKR has delivered materials to "SaskWater" and is waiting for an assessment and draft agreement;

9. OKR's position only changed when it concluded that it may have some difficulties in obtaining payments for amounts that might be payable to MDI. On June 2, 2021, Don Turner ("Turner") of the WSA sent an email to Saxon and Kirby Hui ("Hui") of OKR regarding a problem affecting the Utility, and Hui in turn advised the Receiver that "We got indication from our Board that if we are not collecting any money, we shouldn't be spending any money on this."[5]

10. The WSA has proceeded on the understanding that OKR is responsible for operating the Utility. In an email dated March 4, 2021,Turner of the WSA provided Saxon with a copy of its draft inspection report, requesting as follows: "Doug, as OKR is the responsible party for MDI Utility (emphasis added), please review the inspection and respond to this email if OKR authorizes

[5] Supplement at Schedule 9.

Water Security Agency to sign off on the inspection on OKR's behalf."[6] Turner sent a follow-up email dated March 4, 2021, and in a reply email dated March 17, 2021, Saxon advised Turner that "yes we authorize the final inspection" (emphasis added).[7] The WSA's Waterworks Compliance Inspection dated June 8, 2021, indicates that the person interviewed for the inspection was Doug Saxon, and states that "OKR FINANCIAL HAS BEEN WORKING ON FINDING A CERTIFIED OPERATOR TO OVERSEE THE SYSTEM BUT HASN'T FOUND ANY ONE AS OF INSPECTION".[8]

11. The Saskatchewan Health Authority ("SHA") has also proceeded on the understanding that OKR is responsible for operating the Utility. The SHA's Order to Remedy a Health Hazard dated June 24, 2021 (the "SHA Order"), is addressed to "MDI Utility Corporation in care of Old Kent Road Financial Incorporated".[9] If OKR ever replied to the SHA or otherwise took any steps to comply with the SHA Order, the Receiver is unaware of such reply or compliance.

12. In a letter dated June 25, 2021, counsel for the Receiver wrote to OKR requesting that OKR advise as to how and when it would comply with the SHA Order.[10] OKR did not reply to that letter, and in a letter to (newly retained) counsel for OKR dated August 30, 2021, counsel for the Receiver raised the same issue.[11] In a letter to counsel for the Receiver dated September 29, 2021, counsel for OKR advised that OKR is not the operator of the Utility and that MDI continues to be the operator of the Utility.[12]

13. OKR's contention that MDI is in control of the Utility is not tenable in light of the steps taken by OKR to take control over MDI and its assets. In early December 2020 OKR arranged for the transfer of what is now the OKR Land (formerly MDI's land) to OKR, and title did transfer to OKR on December 22, 2020.[13] OKR also purports to have taken title to all of the personal property assets of MDI pursuant to a Transfer Deed (the "Transfer Date") dated December 22, 2020. OKR

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[6] Supplement at Schedule 4.
[7] *Ibid.*
[8] Thompson Affidavit at Exhibit "F".
[9] First Report at Schedule 13.
[10] Thompson Affidavit at Exhibit "T".
[11] *Ibid.*
[12] Thompson Affidavit at Exhibit "U".
[13] Barber Affidavit at para 17(b).

has also been the controlling mind of MDI since December 2020. Saxon became a director of MDI on December 7, 2020,[14] and Mellor became the registered Power of Attorney for MDI on December 7, 2020. Randy Stewart Thompson ("Thompson") became a director of MDI on or about August 16, 2021.[15]

14. The Receiver has taken certain steps to operate the Utility in order to meet the pressing need to provide water and waste water services to the residents of the Copper Sands Park. The Receiver has, however, taken such steps with caution, as it has sought to respect OKR's property rights, take into account OKR's representations, and allow OKR an opportunity to operate the Utility.

III. ISSUES

15. This Supplemental Brief of Law is concerned with the following five issues:

1) Should the Court exercise its discretion to remove the Utility Provisions from the Receivership Order?;

2) Should the Court exercise its discretion to authorize OKR to terminate the Utility Land Lease?;

3) Should the Court exercise its discretion to authorize OKR to terminate the Revised Servicing Agreement and decommission the Utility?;

4) Should the Court exercise its discretion to order that the Receiver to pay $241,708.14 pursuant to the Revised Servicing Agreement without setoff for professional fees?; and

5) Should the Court exercise its discretion to order that OKR shall not be liable to any person in relation to the operation of the Utility or the delivery of services under the Revised Servicing Agreement?

IV. ARGUMENT

[14] Barber Affidavit at para 17(a).
[15] Barber Affidavit at para 17(d).

16. Section 187(5) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the "*BIA*"), provides that:

> Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

17. The jurisdiction of the Courts to vary orders pursuant to s. 187(5) of the *BIA* should be exercised sparingly, and "must be carefully guarded and invoked only in appropriate circumstances".[16] Section 187(5) of the *BIA* cannot be used purely for the purpose of bringing an appeal that is out of time.[17]

18. The courts may exercise their discretion to vary an order pursuant to s. 187(5) of the *BIA* where a change in circumstances so warrants the exercise of such discretion, but should not vary the order merely on the basis that the order at issue is considered unfair by the party seeking to have it varied.[18]

(1) Issue One: Removal of the Utilities Provisions

19. It is respectfully submitted that this Honourable Court should not exercise its discretion to vary the Receivership Order by removing the Utility Provisions. In sum, the Utilities Provisions 1) authorize the Receiver to deal with MDI, a anyone acting on rights or security interests against MDI for the purpose of receiving the water and waste water services, 2) authorize the Receiver to cause the continuation of the water, waste water and other services under the Revised Servicing Agreement, 3) require that the Receiver hold back funds payable to MDI under the Revised Servicing Agreement, 4) authorize the Receiver to deduct capital and operating expenditures from any amounts payable to MDI, and 5) provide that the Receiver shall not be liable to MDI, OKR or any other person in relation to the operation of the Utility. There has been no change in circumstance since the Receivership Order was granted that would justify the wholesale removal

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[16] *Carlson, Re*, 2012 ABCA 173 at para 36, [2012] 9 WWR 43.
[17] *Impact Tool & Mould Inc., Re*, 2008 ONCA 187 at para 8, [2008] OJ No 962 [*Impact Tool*]
[18] *Black v Ernst & Young*, 1997 NSCA 67 at para 51, [1997] NSJ No 195.

of the Utility Provisions. OKR may now regard the Utility Provisions as being unfair, but it should not be permitted to use s. 187(5) of the *BIA* to bring an appeal that is out of time.

(2) Issue Two: Termination of the Utility Land Lease

20. Without admitting that the Utility Land Lease is valid or enforceable, the Receiver submits that OKR's right to terminate Utility Land Lease lies beyond the scope of these receivership proceedings. MDI is not generally subject to the Receiver's powers, and Copper Sands, the entity that is subject to such powers, is not a party to the Utility Land Lease.

(3) Issue Three: Termination of the Revised Servicing Agreement

21. The Receiver submits that the Court should not exercise its discretion to authorize OKR to terminate the Revised Servicing Agreement in accordance with the Draft Order filed by OKR. There are several reasons for this.

22. First, in considering the issue of whether OKR should be authorized to terminate the Revised Servicing Agreement, the starting point is paragraph is paragraph 11(b) of the Receivership Order, which provides that:

> . . . no Person shall discontinue the supply of the Utility Services as herein defined to be delivered to the Debtor, the Copper Sands Trailer Park or the residents thereof without the prior written consent of the Receiver or without Order of this Court.

23. It follows that an order authorizing OKR to terminate the Revised Servicing Agreement would constitute a variation of the Receivership Order pursuant to s. 187(5) of the *BIA*, and the Receiver submits that there is no change of circumstances that would justify termination of the Revised Services Agreement. Indeed, while the Receiver does have a contingency plan for the delivery of water and waste water services to the Copper Sand Park, the pressing need to deliver these services remains and the Receiver would not prefer to rely on its contingency plan at this time.

24. Second, there is no default by Copper Sands and/ or the Receiver under the Revised Servicing Agreement. OKR complains that it has not been paid, but OKR is only entitled to amounts payable to MDI under the Revised Servicing Agreement, and paragraph 12A of the Receivership Order requires the Receiver to hold back the amounts otherwise payable to MDI and permits the Receiver to deduct capital and operating expenditures from such amounts otherwise payable to MDI.

25. Third, even if Copper Sands and/ or the Receiver is in breach of the Revised Servicing Agreement, OKR cannot terminate without submitting to mandatory arbitration. Paragraph 16 of the Revised Servicing Agreement provides that:

> In the event of a dispute between the Parties with respect to the interpretation of this Servicing Agreement as amended, or any other matter arising out of the Servicing Agreement (emphasis added), the dispute shall be referred to a single arbitrator . . .

26. Fourth, even if OKR is able to avoid the mandatory arbitration clause, OKR does not have a contractual right to terminate the Revised Servicing Agreement in the manner contemplated in OKR's Draft Order. Paragraph 3(b) of the Draft Order authorizes OKR to terminate the Utility Land Lease on 45 days notice to MDI and the Receiver, and then terminate its obligations under the Revised Services Agreement. This manner of termination plainly contravenes the Amendment to the Revised Servicing Agreement, which provides that "MDI shall not terminate this Servicing Agreement except upon written notice of no less than twelve (12) months."[19]

(4) Issue Four: the Order for Payment to OKR

27. The Receiver submits that this Honourable Court has no jurisdiction to make an Order requiring the Receiver to pay OKR $241,708.14 or any other amount.

28. Section 215 of the *BIA* provides that:

[19] First Report at Schedule 8.

> Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

29. In accordance with s. 215 of the *BIA*, a party seeking to recover against a receiver for breach of contract must first obtain leave to commence proceedings against the Receiver.[20]

30. Paragraph 9 of the Receivership Order, which rests on s. 215 of the *BIA*, provides that:

> All rights and remedies (including, without limitation, set-off rights) against the Debtor or the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court . . .

31. It is submitted that OKR is seeking to enforce a claim for breach of contract, and that OKR must therefore obtain leave of this Court to commence proceedings against the Receiver and then initiate those proceedings, whether by arbitration or otherwise. The Receivership Order does not contain any order that the Receiver pay any amounts to MDI or OKR, and OKR cannot therefore maintain that its position is akin to that of a judgment creditor. Thus, what OKR is now seeking to obtain is tantamount to summary judgment, but s. 215 of the *BIA* and paragraph 9 of the Receivership Order do not permit a creditor such as OKR to proceed in this manner.

32. For the following reasons, the Receiver further takes the position that OKR is not entitled to the amounts it now claims and that OKR may not be entitled to any payment at all from the Receiver:

(a) MDI (and OKR since it took an assignment of the Revised Servicing Agreement) has been in continual breach of its obligations under the Servicing Agreements;

(b) the Receivership Order expressly permits the Receiver to deduct capital and operating expenditures from any amounts otherwise payable to MDI;

(c) the Receiver may also be in a position to argue entitlement to legal or equitable set-off as described by the Supreme Court of Canada in *Telford v Holt*,[21] and the Receiver's loss to be set off against OKR's claim may be measured by a) lost rental revenue, and by b) the

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[20] *1416088 Ontario Ltd v Deloitte & Touche*, 2010 ONSC 1011 at para 1, 185 ACWS (3d) 560.
[21] *Telford v Holt*, [1987] 2 SCR 193, 1987 CarswellAlta 188 at paras 26-27.

reduction of its land value or the expense required to connect the Copper Sands Park to municipal water and sewage lines;

(d) the late payment fees provided for in the Revised Servicing Agreement may not be enforceable in the face of the holdback requirement under Paragraph 12A of the Receivership Order; and

(e) OKR has claimed interest on all amounts payable under the Revised Services Agreement, but the Revised Services Agreement only provides for payment of interest on any recoverable legal costs arising from the enforcement of the terms of this agreement.

(5) Issue Five: OKR's entitlement to Liability Protection

33. Section 14.06 of the *BIA* provides receivers appointed under the *BIA* with significant protections against environmental liabilities. Section 14.06(2) in particular provides that:

> Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred (a) before the trustee's appointment; or (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

34. The protections afforded by s. 14.06 of the *BIA* are reflected in paragraph 15 of the Receivership Order.

35. Paragraph 16 of the Receivership Order provides that:

> Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Sections 14.06, 81.4(5) or 81.6(3) of the *BIA*.

36. The Receiver submits that there is no basis in law or in fact for OKR's claim to an order exempting it from any and all liability arising from the operation of the Utility by MDI or the Receiver. Generally, the Receiver's liability protections are limited insofar as such protections do

not exclude claims for gross negligence and wilful misconduct. OKR is asking this Honourable Court to grant it a level of liability protection not even afforded to the Court-appointed Receiver, and there is no authority whatsoever for such protection to be granted to an unsecured creditor, which would be OKR's status at best. Further, OKR has held itself out to be in control of the Utility and has been in *de jure* control over MDI and all of its assets since December 2020, such that OKR may have liability arising from its failure to operate the Utility. In such circumstances, it would not be appropriate for this Court to grant OKR any sort of liability protection.

V. RELIEF REQUESTED

37. For all of the reasons set out above, the Receiver respectfully requests that this Honourable Court dismiss the application of Old Kent Road Financial Inc.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2021.

LELAND KIMPINSKI LLLP

Per: _____
Solicitors for the Receiver,
MNP Ltd.

This document was delivered by:

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VI. AUTHORITIES

1. *1416088 Ontario Ltd v Deloitte & Touche*, 2010 ONSC 1011, 185 ACWS (3d) 560.
2. *Black v Ernst & Young*, 1997 NSCA 67, [1997] NSJ No 195.
3. *Carlson, Re*, 2012 ABCA 173, [2012] 9 WWR 43.
4. *Impact Tool & Mould Inc., Re*, 2008 ONCA 187, [2008] OJ No 962.
5. *Telford v Holt*, [1987] 2 SCR 193, 1987 CarswellAlta 188.

TAB 1

H **1416088 Ontario Ltd. v. Deloitte & Touche**
2010 ONSC 1011, 2010 CarswellOnt 871 Ontario Superior Court of Justice Ontario February 11, 2010 *(Approx. 5 pages)*

1416088 Ontario Ltd. v. Deloitte & Touche

2010 CarswellOnt 871, 2010 ONSC 1011, [2010] O.J. No. 626, 185 A.C.W.S. (3d) 560, 64 C.B.R. (5th) 185

1416088 Ontario Limited, carrying on business as Danbury Industrial (Applicant) and Deloitte & Touche and HSBC Bank Canada (Respondents)

Heard: February 3, 2010
Judgment: February 11, 2010
Docket: CV-09-385 806 0000

Counsel: Jack Berkow, Angel Hewko for Applicant
Brian Casey, David Gadsden for Respondents
Sean Zweig for Creditor, George Vassello

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

IV **Receivers**
IV.3 Powers, duties and liabilities

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Receiver was appointed over assets of bankrupt company (bankrupt) — Applicant company (applicant) and **receiver** signed second proposal, which required **receiver** to conduct inventory of bankrupt at shared cost (inventory requirement) — Same parties also signed third proposal — Applicant alleged that **receiver** concealed material facts about bankrupt's inventory records — Applicant further alleged that **receiver** breached inventory requirement — Applicant brought motion for leave to commence action against **receiver** for misrepresentation and **breach** of **contract** — Motion granted — Applicant's misrepresentation claim met threshold for granting leave — Applicant's evidence supported prima facie case in misrepresentation and demonstrated that claim was not frivolous or vexatious — Applicant's evidence included letter from **receiver's** counsel to bankrupt referring to discrepancies with inventory and fact that inventory totals were revised after **receiver** was appointed — Disclaimer statements by **receiver** that it had not audited or verified inventory did not bar misrepresentation claim — With regard to contractual claim, there was confusion as to whether court had approved second or third proposal — Claim for **breach** of **contract** was without merit if third proposal governed — **Breach** of **contract** claim was to be severed if it was determined that third proposal was approved.

Table of Authorities

Cases considered by *Karakatsanis J.*:

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — referred to

Mancini (Trustee of) v. Falconi (1993), (sub nom. *Mancini (Bankrupt) v. Falconi)* 61 O.A.C. 332, 1993 CarswellOnt 1861 (Ont. C.A.) — referred to

Mautner v. Metcalfe (2008), 2008 CarswellOnt 559, 42 B.L.R. (4th) 309 (Ont. S.C.J.) — referred to

McGowan v. Mulrooney (1992), 2 C.L.R. (2d) 219, 1992 CarswellOnt 849 (Ont. Gen. Div.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 215 — considered

MOTION by party to bankruptcy proposal for leave to bring action against **receiver**.

***Karakatsanis J.*:**

1 This is a motion by Danbury for leave to commence an action against the **Receiver**. Both the Order appointing the **Receiver** and s. 215 of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, provide that no action lies against the **Receiver** except with leave of the court.

2 The threshold for granting leave is not a high one and is designed to protect the **receiver** or trustee only against frivolous or vexatious actions, or actions which have no basis in fact. The test is well settled. The action must not be frivolous or vexatious. The evidence filed in support of the motion, including the intended action as pleaded, must disclose a cause of action against the trustee and supply facts to support the claim. The Court is not required to make a final assessment of the merits of the claim; leave should be granted if the evidence filed on the motion is sufficient to establish there is a factual basis for the proposed claim. *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] S.C.J. No. 36 (S.C.C.) at paras. 55-61; *Mancini (Trustee of) v. Falconi*, [1993] O.J. No. 146 (Ont. C.A.).

3 The action is based upon misrepresentation and **breach** of **contract**. Counsel agreed that the claims are severable. The motion was argued primarily on the basis of fraudulent misrepresentation. The essential elements of fraudulent misrepresentation are:

a. A false representation;

b. Made by the defendant with knowledge of its falsity or with recklessness;

c. With the intention that it should be acted upon by the plaintiff; and

d. Actually inducing the plaintiff to act on the representation.

4 In this case, it is not claimed that the **Receiver** made a false representation but rather actively concealed a material fact. Non-disclosure of a defect that is not discoverable by inspection and ordinary vigilance is tantamount to active concealment. *Mautner v. Metcalfe*, [2008] O.J. No. 424 (Ont. S.C.J.), at pp. 4-5.

5 With respect to the factual basis for this claim, the Applicant relies upon evidence from which it can be inferred that the **Receiver** was aware that the records were completely misleading:

a. a letter by the **Receiver's** counsel to the company advising that a prior interested purchaser was withdrawing because of "material discrepancies with the inventory of the company;"

b. the evidence of the company's ex-purchasing agent that numerous employees were aware that the prices contained in the company's inventory record were substantially incorrect and not up to date; and that she maintained records as to price;

c. that the inventory count as at February 27, 2009 shows that some of the totals were revised after the **Receiver** was appointed; the **Receiver** was a monitor prior to the appointment; and

d. the **Receiver** refused to do an inventory check notwithstanding the term in the Second Proposal.

6 The various disclaimer statements by the **Receiver** that it had not audited or verified the inventory do not bar the claim of fraudulent misrepresentation, even one based upon active concealment of the truth. *McGowan v. Mulrooney*, [1992] O.J. No. 1838 (Ont. Gen. Div.) at p. 10.

7 The **Receiver** argues that there is no evidence of reliance on the facts before me. The Second Proposal was contingent upon "an inventory to verify the quantity, cost and the wholesale values of the inventory" and the net minimum guarantee was to be adjusted if the value at cost was adjusted. The Second Proposal provided that the deposit would be paid "upon acceptance and verification of the inventory count". As a result, the **Receiver** submits Danbury was not relying upon the representations regarding inventory.

8 The Third Proposal was made after Danbury had conducted its due diligence, showing a percentage error of almost 57% relating to quantity in the inventory count. In an email to the **Receiver**, Danbury stated: "Obviously the inventory is significantly overstated and we must decide how to proceed as we cannot rely on the current reports."

9 The Third Proposal provides for a net minimum guarantee "based on the asset listing supplied." It provided that Danbury had "completed its due diligence," was "satisfied with the inventory count." Finally, the Third Proposal provides that the deposit will be paid upon Court Approval.

10 The alleged misrepresentation relates to the value of the inventory. Although Danbury was able to verify the accuracy of the count through its due diligence, it was not able to verify the accuracy of the prices. Danbury led evidence that through its long association with Danbury, the **Receiver** knew that it would base its net minimum guarantee on book value of the inventory and the **Receiver** knew that Danbury was unable to access the Company's computer records or costing information. The affidavit evidence is that when the computer system became operational it became clear that the records were completely unreliable. Although the pricing formula would result in initially offering the goods at about 10% less than book value, ultimately the goods were sold at about 80% less than the represented cost of the inventory.

11 In my view, Danbury meets the relatively low threshold for a claim in misrepresentation. The evidence presented is capable of supporting a prima facie case and demonstrates that this is not a frivolous or vexatious claim.

12 However, the action based upon a claim of **breach** of **contract** is without merit if in fact the Third Proposal signed by the parties governs. Counsel conceded that **breach** of **contract** only arises if the parties are governed by the Second Proposal. The alleged breach is the failure of the **Receiver** to agree to conduct an inventory at shared cost as required by the terms of that proposal. There is, however, some confusion about which proposal was approved by the Court. Counsel advises as an officer of the Court that the Third Proposal signed by the parties was provided to Pepall J and sealed as an exhibit to the Order approving the sale agreement. He says that unfortunately he forgot to amend the Order so that it continues to refer to the Second Proposal. The Court file cannot be located at this time and therefore it could not be verified which Proposal was filed as the exhibit at this time. If it is determined that the Third Proposal was approved, the cause of action for **breach** of **contract** should be severed.

13 Leave is granted. This matter should be scheduled at a 9:30 a.m. appointment on the Commercial List to expedite the hearing of the action.

14 If the parties are unable to agree on costs, the moving party may make brief written submissions within 10 days. The responding party may respond within 10 days following. Reply, if any, to follow within 5 days.

Motion granted.

End of Document

TAB 2

H **Black v. Ernst & Young Inc.**
1997 NSCA 67, 1997 CarswellNS 239 Nova Scotia Court of Appeal Nova Scotia May 6, 1997 *(Approx. 10 pages)*

Black v. Ernst & Young Inc.

1997 CarswellNS 239, 1997 NSCA 67, [1997] N.S.J. No. 195, 159 N.S.R. (2d) 378, 468 A.P.R. 378, 47 C.B.R. (3d) 129, 71 A.C.W.S. (3d) 829

In The Matter of the Bankruptcy of NsC Diesel Power Incorporated

Freeman, Matthews and Finn JJ.A.

Heard: April 10, 1997
Judgment: May 6, 1997
Docket: C.A. 127649

Counsel: *Frederick W.L. Black*, for the Appellants.
Tim Hill, for the Respondent Ernst & Young Inc. (Trustee).
Robert W. Wright, Q.C., for the Respondent Ernst & Young Inc. in its personal capacity.
David G. Coles, for the Respondent ABN Amro Bank Canada.
D. Bruce Clarke, for the Respondent the Superintendent in Bankruptcy.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.6 Discovery and examinations
XVII.6.c By others

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.9 Miscellaneous

Headnote

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — By others

Principal of bankrupt company applied for order for examination of witnesses under s. 163(2) of Act — Case Management Judge refused to read affidavits in support of application and refused to grant order on basis that applicant was engaged in fishing expedition — Case Management Judge did not exercise his discretion judicially as he had not considered all evidence before him — Applicant's appeal allowed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 163(2).

Bankruptcy --- Practice and procedure in courts — Practice in miscellaneous proceedings

Appellant's appeal from order requiring him to have counsel dismissed on ground that appellant had failed to comply with order respecting posting of security for costs — Appellant applied under s. 187(5) of Act for order reviewing and rescinding order — Appellant attempted to use s. 187(5) of Act as method of launching further appeal — Section 187(5) not designed as appellate provision — Appellant's appeal from dismissal of application under s. 187(5) dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, s. 187(5).

The appellant, the principal operating officer, a director, and the driving force of the bankrupt company, applied for an order for examination of witnesses under s.163 of the *Bankruptcy and Insolvency Act*. The application was supported by two affidavits, one by the appellant and one by the Inspectors. Both affidavits indicated that the Trustee in Bankruptcy may have conducted informal examinations when it was authorized to conduct formal examinations, and may have received information and documents that it did not disclose to the Inspectors or the creditors of the estatem among other irregularities. The Case Management Judge refused to consider the affidavit of the Inspectors and concluded that the appellant was on a fishing expedition. The application was dismissed. The appellant appealed.

that case, it would be appropriate to request a variation order, under s. 187(5) of the *Bankruptcy Act*, to enable the examinations to proceed.

51 However, Mr. Black's application, as it was presented to Justice Goodfellow, had no merit. It was an application to rescind a prior order because that Order was alleged to be unfair, rather than alleging a change of circumstances. Further, the application followed shortly after Mr. Black's appeal of that Order, to this Court, had been dismissed. Mr. Black was, essentially, using s. 187(5) of the *Bankruptcy Act* as a method of launching a further appeal. Section 187(5) is not an appeal provision, and Mr. Black's application was, therefore, without merit.

52 In my opinion Mr. Black has no basis for an appeal of Justice Goodfellow's dismissal of this application. I would, therefore, dismiss the appeal with respect to this issue.

53 Success on this appeal has been divided; and considering all of the circumstances I would make no order as to costs.

Appeal allowed in part.

End of Document

TAB 3

Carlson, Re
2012 ABCA 173, 2012 CarswellAlta 1032 Alberta Court of Appeal Alberta June 13, 2012 *(Approx. 15 pages)*

2012 ABCA 173
Alberta Court of Appeal

Carlson, Re

(5th) 328

Jack Carlson (Appellant / Applicant / Cross Respondent) and Jane Carlson (Respondent / Respondent / Cross Appellant)

Ronald Berger, Peter Martin, Patricia Rowbotham JJ.A.

Heard: November 10, 2011
Judgment: June 13, 2012
Docket: Calgary Appeal 1101-0092-AC

Proceedings: reversing *Carlson, Re* (2010), 36 Alta. L.R. (5th) 385, (sub nom. *Carlson (Bankrupt), Re v.)* 497 A.R. 146, [2011] 4 W.W.R. 756, 2010 ABQB 701, 2010 CarswellAlta 2197, 73 C.B.R. (5th) 112 (Alta. Q.B.)

Counsel: P.R. Leveque for Appellant
G.N. Kent for Respondent

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency

VIII Property of bankrupt
VIII.19 Miscellaneous

Bankruptcy and insolvency

XI Avoidance of transactions prior to bankruptcy
XI.10 Miscellaneous

Bankruptcy and insolvency

XV Discharge of bankrupt
XV.12 Annulment or rescission of discharge

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Miscellaneous

Bankrupt transferred property in British Columbia to brother and sister-in-law and received promissory note and security agreement in exchange — Several years later, bankrupt began bankruptcy proceedings — Potential interest in BC property was not disclosed — Bankrupt was discharged — Bankrupt approached sister-in-law to discuss compensation for BC property — No money was paid — Bankrupt commenced action to enforce alleged written agreement and sister-in-law countersued to enforce alleged oral agreement — Sister-in-law applied for summary judgment arguing that because bankrupt's property had vested in bankruptcy trustee, it was only trustee that could enforce rights attached to BC property — Bankrupt and sister-in-law both applied for order reappointing trustee — Bankrupt sought assignment of right to BC action in exchange for sum equal to full amount owing to his creditors and sister-in-law sought release in exchange for same sum — Chambers judge concluded that bankrupt abused Court's process and denied bankrupt's application, granting relief sought by sister-in-law — Bankrupt appealed — Sister-in-law cross-appealed chambers judge's failure to apply doctrine of judicial estoppel — Appeal allowed and cross-appeal dismissed — Result of refusing to approve bankrupt's application was to prevent bankrupt from taking carriage of BC action and that conclusion failed to take into account express provisions of Bankruptcy and Insolvency Act and in

36 Houlden, et al. explain that the jurisdiction given by s. 187(5) should be sparingly exercised; it must be carefully guarded and invoked only in appropriate circumstances: *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.). See also *Fackler v. Patterson* (1948), 14 C.B.R. (N.S.) 152 (Ont. Bktcy.) confirming the jurisdiction of the Registrar to rescind on the authority of s. 187(5).

37 In the light of the uncontradicted factual underpinnings, mindful of the aforementioned provisions of the *Act*, and the applicable principles set out in this judgment, it seems to me that the order made in the Court below should be set aside. It does not follow, however, that Jack Carlson is entitled, given his malfeasance, to unconditionally benefit were the recommendation of the trustee implemented. Jack Carlson is entitled to an assignment of the action in British Columbia where the competing claim of Jane Carlson will concurrently be considered upon payment to the trustee by Jack Carlson of the sum of $139,973.49, the amount required to make existing creditors whole. The trustee is authorized to pay out existing creditors forthwith upon receipt of those funds.

38 Mindful of the factual underpinnings, it is likely that the British Columbia litigation will be of some duration and complexity and will be quite expensive. Should Jack Carlson be unsuccessful, he may face an award of costs of some magnitude.

39 In my opinion, should that occur, keeping in mind that the disputed asset was not disclosed by Jack Carlson when it should have been, his discharge as a bankrupt should now be annulled and in the event that Mr. Carlson's litigation is unsuccessful and he is subject to an award of costs in British Columbia, the Registrar, upon an application by Mr. Carlson for a discharge, would then properly take account of whether Mr. Carlson had paid those costs.

40 The appeal is allowed. The order of the chambers judge is set aside. In the result, the order of this Court, pursuant to s. 180(2) or, in the alternative, s. 187(5) of the *Act*, is that the discharge granted to Jack Carlson be annulled. An order shall go assigning the British Columbia cause of action to Jack Carlson subject to the conditions set out in paras. 37 and 39 above.

41 In the light of the failure of the Appellant to disclose the disputed asset in the bankruptcy proceedings, the Respondent, whose cross-appeal is also dismissed, shall be entitled to one set of costs to be taxed. The assignment of the British Columbia action shall not be perfected until Jack Carlson has paid those costs.

Peter Martin J.A.:

I concur:

Patricia Rowbotham J.A.:

I concur:

Appeal and cross-appeal dismissed.

End of Document

TAB 4

H **Impact Tool & Mould Inc., Re**
2008 ONCA 187, 2008 CarswellOnt 1360 | Ontario Court of Appeal | Ontario | March 14, 2008 *(Approx. 6 pages)*

Impact Tool & Mould Inc., Re

2008 CarswellOnt 1360, 2008 ONCA 187, [2008] O.J. No. 962, 165 A.C.W.S. (3d) 597, 234 O.A.C. 377, 41 C.B.R. (5th) 1

In the Matter of the Bankruptcy of Impact Tool & Mould Inc., of the City of Windsor, County of Essex

And In the Matter of the Interim Receivership of Impact Tool & Mould Inc., carrying on business in the City of Windsor, County of Essex, Province of Ontario

BDO Dunwoody Limited, Trustee of the Estate of Impact Tool & Mould Inc., a bankrupt (Applicant / Appellant) and Doyle Salewski Inc., in its capacity as Court-Appointed Interim Receiver of Impact Tool & Mould Inc. (Respondent / Respondent)

K. Feldman, S.E. Lang, J. MacFarland JJ.A.

Heard: February 27, 2008
Judgment: March 14, 2008
Docket: CA C47464

Proceedings: affirming *Impact Tool & Mould Inc., Re* (2007), 2007 CarswellOnt 9136 (Ont. S.C.J.)

Counsel: Frank Bennett for Appellant
Justin R. Fogarty, Renée Brosseau for Respondent
David Moore for Moving Party, Windsor Precision Gundrill Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.6 Discovery and examinations
XVII.6.a By trustee

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — By trustee

Debtor business manufactured injection moulds — Debtor owed $4.9 million to several creditors, and had 210 unsecured creditors — Secured shareholder creditor offered to buy assets of business for outstanding debt — Offer approved by court — New company started with assets failed — New business petitioned into bankruptcy — Unsecured creditor who was also competitor appointed its financial advisor as trustee — Before bankruptcy, financial information was given to competitor creditor on court approval in very general terms for fear information would be misused — On appeal, full disclosure ordered for competitor creditor — Trustee's motion to examine receiver was dismissed, receiver's motion to dismiss examination and to vary sale order was dismissed — Trial judge found four years had passed since sale approved — Trial judge found receiver had already responded to questions and had provided more information than reasonable — Trustee appealed — Appeal dismissed — Trial judge made no error — All information was provided — Varying vesting order would be improper, and would constitute seeking reversal on appeal by way of variation.

Table of Authorities

Cases considered:

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — referred to

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of) (2006), 2006 CarswellOnt 1523, 20 C.B.R. (5th) 220, (sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 208 O.A.C. 133, (sub nom. *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 79 O.R. (3d) 241, (sub nom. *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 266 D.L.R. (4th) 192 (Ont. C.A.) — referred to

Pearson v. Inco Ltd. (2005), 2005 CarswellOnt 826, 195 O.A.C. 77, 21 C.E.L.R. (3d) 270 (Ont. C.A.) — referred to

R. v. Palmer (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) — followed

Statutes considered:

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

s. 163 — referred to

s. 163(1) — referred to

s. 164 — referred to

s. 187(5) — considered

Rules considered:

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

Generally — referred to

APPEAL by trustee from judgment reported at *Impact Tool & Mould Inc., Re* (2007), 2007 CarswellOnt 9136, 41 C.B.R. (5th) 111 (Ont. S.C.J.), dismissing motion by trustee for examination for discovery of receiver, and dismissing motion by trustee opposing order and requesting variation of sale document.

***Per curiam*:**

1 This is an appeal by the trustee in bankruptcy from the decision of Brockenshire J., which dismissed the trustee's motion to examine the court-appointed interim receiver under ss. 163 and 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). The trustee's motion had also sought to vary the sale approval and vesting order made by Brockenshire J. on April 23, 2003, approving the interim receiver's sale of the assets of Impact Tool and Mould Inc. The basis for the trustee's motion was its stated concern regarding the propriety of selling Impact's assets to a new company formed by two of Impact's former principals.

2 As a preliminary matter on the appeal, Windsor Precision Gundrill Inc. sought to review the order of LaForme J.A. dated February 13, 2008, which dismissed its motion to intervene in this appeal. Following oral argument, we dismissed the motion for review. We agree with LaForme J.A. that the proposed intervener would add nothing to the argument to be made by the trustee: *Pearson v. Inco Ltd.* (2005), 195 O.A.C. 77 (Ont. C.A.) at para. 6.

3 The trustee also applied to admit fresh evidence. Following oral argument, we dismissed that application because the proposed evidence does not meet the test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.).

4 The motion judge dismissed the trustee's motion to examine the interim receiver for two reasons: first, because four years had passed since the sale was approved and implemented; and second, because the interim receiver had already responded to the trustee's questions, providing "much more information than unsecured creditors, hoping to receive something from the bankruptcy, could reasonably expect." The motion judge also took into account the fact that the trustee had succeeded in obtaining confidential information from the National Bank, another of Impact's secured creditors, so that the trustee "may now know more than the Receiver about Impact."

5 The three legal issues raised by the trustee on the appeal are: (1) whether a trustee in bankruptcy is entitled to examine a court-appointed receiver as of right under s. 163(1) of the *BIA*, (2) alternatively, if leave of the court is required for such an examination, whether the unusual circumstances of this sale justify granting leave; and (3) whether paragraph 15 of the sale approval and vesting order should be varied.

6 Dealing with issues (1) and (2) together, we do not need to decide whether there is an absolute right for a trustee to examine a court-appointed receiver, or whether leave is required, because we see no error in the motion judge's conclusion that, through the informal question and answer process, the interim receiver has provided all the information requested and required by the trustee. As the motion judge said,

the trustee was not able to "point to a lack of information or a refusal to provide information which would in any way support his application." Counsel for the trustee was given the further opportunity to point to any area of deficiency in the interim receiver's responses on oral argument of the appeal, but was unable to do so. Accordingly, we would dismiss the trustee's appeal on these issues.

7 Turning to issue (3), paragraph 15 of the sale approval and vesting order reads as follows:

> THIS COURT ORDERS that, notwithstanding:
>
> (a) the pendency of these proceedings;
>
> (b) the bankruptcy of Impact Tool & Mould Inc.; and
>
> (c) the provisions of any federal or provincial statute,
>
> neither the Purchase Agreement and the Transactions nor the vesting provisions of this Order will be void or voidable at the instance of creditors and claimants and do not constitute nor shall they be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances or other reviewable transactions under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, and they do not constitute conduct meriting an oppression remedy and shall be binding on the trustee in bankruptcy of the Estate of Impact Tool & Mould Inc.

8 The motion judge refused to vary this paragraph on the basis of delay and because the trustee failed to establish any error or omission in the order. We see no error in the motion judge's conclusions. Under s. 187(5) of the *BIA*, a party may move to vary an order. However, that section cannot be used purely for the purpose of bringing an appeal out of time: *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), at 102-103. That is essentially what the trustee was attempting to do in this case. No appeal was taken from the sale approval and vesting order issued on April 23, 2003, although the trustee was appointed within a month of that date. In an earlier matter on this bankruptcy that came before this court in 2006, the court noted that no appeal had been taken from the sale approval and vesting order: (2006), 79 O.R. (3d) 241 (Ont. C.A.) at para. 19. The trustee is now seeking to appeal the order under the guise of a variation. Eliminating a critical paragraph of a vesting order four or five years after the transaction took place is not a variation, and cannot be accomplished under s. 187(5) of the *BIA* or the *Rules of Civil Procedure*.

9 Accordingly, the appeal is dismissed. The interim receiver is entitled to partial indemnity costs as claimed against Gundrill in the amount of $9,498.30, inclusive of disbursements and G.S.T. The interim receiver is entitled to partial indemnity costs of $5,000, inclusive of disbursements and G.S.T., against the trustee for the trustee's fresh evidence application. The interim receiver is entitled to costs of the appeal in the amount of $15,000, inclusive of disbursements and G.S.T. The costs against the trustee are awarded against the trustee personally because it was acknowledged that this is currently a no-asset bankruptcy.

Appeal dismissed.

End of Document

TAB 5

Telford v. Holt
1987 CarswellAlta 188 | Supreme Court of Canada | Alberta | September 17, 1987 *(Approx. 20 pages)*

1987 CarswellAlta 188
Supreme Court of Canada

Telford v. Holt

168, 78 N.R. 321, 81 A.R. 385, J.E. 87-1005, EYB 1987-66910

TELFORD and TELFORD v. HOLT and HOLT

Dickson C.J.C., Estey, McIntyre, Wilson and Le Dain JJ.

Heard: February 27 and March 2, 1987
Judgment: September 17, 1987
Docket: No. 19175

Counsel: *D.E. Jermyn*, for appellants.
J.P. Low, for respondents.

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

Related Abridgment Classifications

Civil practice and procedure

X Pleadings
X.6 Counterclaim, crossclaim and set-off
X.6.b Set-off

Personal property

III Choses in action
III.8 Equities to which assignments subject
III.8.a Right of set-off

Headnote

Bankruptcy

Choses in Action --- Equities to which assignments subject — Right of set-off

Practice --- Pleadings — Counterclaim, crossclaim and set-off — Set-off

Creditors and debtors — Set-off — Set-off in equity — Equitable set-off available for money sum whether liquidated or unliquidated and mutuality of debts not required — Assignment not barring right to equitable set-off — Set-off available where sum due prior to notice of assignment being given or where sum due arising out of or closely connected to same contract or series of events — Debt to be set off must be enforceable — Reciprocal mortgages subject to equitable set-off despite unenforceability of personal covenant in one mortgage — Foreclosure available and equitable set-off not requiring symmetry of remedies or amounts.

Creditors and debtors — Set-off — Set-off at law — Set-off available for debts being mutual cross obligations — Assignment of debt destroying mutuality — Set-off at law not available.

Mortgages — Action on covenant to pay — Personal judgment — Availability — Statutory restrictions — Section 41 of Law of Property Act barring action on personal covenant but not creating unenforceable debt as mortgagee still able to pursue foreclosure remedy.

Mortgages — Payment of mortgage — Set-off — Defendant and third party swapping land and exchanging mortgages — Third party assigning mortgage to plaintiff — Plaintiff seeking judgment on

> might have been differently framed in a way which would have permitted such a set-off. Where a claim for a liquidated debt was joined by a plaintiff with a claim for damages, set-off at law might only be pleaded in defence to the former claim. Set-off at law operates as a defence.

Thus, as was stated by the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, [1983] 5 W.W.R. 602 at 604, 46 B.C.L.R. 8, 48 C.B.R. (N.S.) 1, 149 D.L.R. (3d) 172, statutory set-off (or set-off at law) "requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations". The claim in this case is a debt. The major hurdle the appellant faces is the requirement of "mutuality".

26 How has this mutuality requirement been interpreted by the courts? In *Royal Trust Co. v. Holden* (1915), 21 B.C.R. 185, 8 W.W.R. 500, 22 D.L.R. 660 (C.A.), the British Columbia Court of Appeal discussed the meaning of the phrase "mutual debts" at pp. 662-63:

> The expression "mutual debts" is somewhat hard to understand according to the old cases, but when we see in the ancient and approved form of plea given in *Bullen v. Leake*, 3rd ed. 682, viz.: —
>
> > That the plaintiff, at the commencement of the suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim ...
>
> we are relieved to find that "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading — *per* Kennedy, L.J., in *Bennett v. White*, [1910] 2 K.B. at 648, 79 L.J.K.B. 1133.

It seems that under this definition any assignment would destroy mutuality and hence destroy the possibility of set-off at law. This was the view taken by the British Columbia Court of Appeal in *Coba In dust. Ltd. v. Millie's Hldgs. (Can.) Ltd.*, [1985] 6 W.W.R. 14, 65 B.C.L.R. 31, 36 R.P.R. 259 , at pp. 28-29:

> None of the authorities cited by the appellant is applicable to the case before us and none of them detracts in any way from the authority of the *Nfld.* case. Each of them is an example of a set-off at law. In such cases the assignment of a debt prevents fulfilment of the requirement that the debts sought to be set off against each other must be mutual. Once a debt is assigned, it is owed to a third party and the debts are no longer mutual cross-claims: see *C.I.B.C. v. Tuckerr Indust. Inc.*, 46 B.C.L.R. 8, [1983] 5 W.W.R. 602 at 605, 48 C.B.R. (N.S.) 1, 149 D.L.R. (3d) 172 (C.A.).

Since there was an assignment in this case, it appears that a set-off at law is not available to the Telfords. It is necessary, therefore, to decide whether a set-off is available in equity.

(2) Set-off in equity

27 The distinction between set-off at law and set-off in equity was canvassed by the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, supra, at p. 605:

> Such a set-off has its origin in equity and does not rest on the statute of 1728. It can apply where mutuality is lost or never existed. It can apply where the cross obligations are not debts.

Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see *Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660, 39 C.B.R. (N.S.) 1, 124 D.L.R. (3d) 150, 29 A.R. 607 (C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

28 The first case to consider is *Watson v. Mid Wales Ry. Co.* (1867), L.R. 2 C.P. 593. In that case the assignees of a Lloyd's bond sued the makers of the bond in the name of the original bondholder. The makers sought to set off arrears of rent due from the original bondholder which had accrued due since the notice of the assignment under a lease entered into prior to the notice of assignment. The question was whether a debtor had, in equity, a right to set off against the assignee of his debt a debt to him from his original creditor which has accrued due subsequent to the notice to him of the assignment. The three judges, in separate reasons, answered that a debtor had no right to set-off in such a case. Montague Smith J. said at pp. 600-601:

> If the debt sought to be set off in an action brought on behalf of the assignee of a debt had existed at the time of the transfer, equity would not interfere to restrain the legal set-off which the parties had. But here, at the time of transfer and notice, no debt existed to be set off. It is said that if debts are accruing mutually under independent contracts, neither of which is due at the time of the transfer, the right of set-off exists, if at the time of action brought upon one of them the liability of the other has ripened into a debt actually due. But the time to be looked at is, not the time of action brought, but the time when the transfer was made and notice given, and the rights of parties must be determined by the state of things then existing.