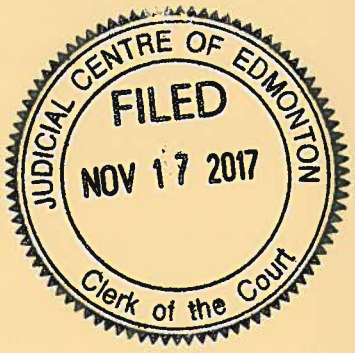

COURT FILE NUMBER	1703 21274
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	REID-BUILT HOMES LTD., 1679775 ALBERTA LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., REID CAPITAL CORP. AND EMILIE REID
DOCUMENT	**WRITTEN BRIEF OF STANDARD GENERAL INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DANIEL R. PESKETT /CHRIS YOUNG Brownlee LLP #2200 Commerce Place 10155-102 Street Edmonton, Alberta T5J 4G8 Telephone: (780) 497-4800 Facsimile: (780) 424-3254 File #: 74270-0107

SPECIAL CHAMBERS WRITTEN BRIEF OF STANDARD GENERAL INC.
BEFORE THE HONOURABLE JUSTICE S.D. Hillier
SCHEDULED FOR November 29, 2017

Brownlee LLP
Barristers & Solicitors
2200, 10155 – 102 Street
Edmonton, AB T5J 4G8

Attention: Daniel R. Peskett/Chris Young
Telephone: (780)497-4800
Facsimile: (780)424-3254
Email: dpeskett@brownleelaw.com/mcoombs@brownleelaw.com
Solicitors for Canada ICI Capital Corporation

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1. Standard General was not given notice of the Hearing that lead to the Consent Receivership Order and nor has the Receiver or RBC contacted it regarding the Receiver's intentions with respect to the lands which are the subject of Standard Generals lien.

2. Standard General performed the work on the lands that were liened and registered a Builders Lien against those lands claiming amounts owed of $890,022.12.

3. It is unknown at present why there is a need for the Receivership to apply to the liened lands or how such additional costs and expenses associated with such a broad scope of receivership, involving different companies and different projects and lands will benefit there with Security Agreement the liened lands.

4. The subject lands liened by Standard General are understood to be in part development lands which are in part serviced and planned to have 38 residential lots. At present there are no buildings or houses on the lands liened by Standard General.

5. Section 11(1) of the *Builders Lien Act* provides that a lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

TAB 1 Section 11(1) of the *Builders Lien Act*

6. Therefore the Builders Lien Act provides that the lien registration has priority over receiving orders.

7. The BC Court of Appeal in Yorkshire Trust Company, relying upon the Baxter decision from the Supreme Court of Canada, questions the jurisdiction to apply the borrowings of a receiver in priority to the claims of lienholders given the provisions of the British Columbia Builders Lien Act.

TAB 2 *Yorkshire Trust Co v. Kinesa Construction Ltd.* (1984) Carswell BC 564, see paragraphs 4, 5, 10, 12, 13 and 14

8. The Alberta Court of Appeal has indicated that the Courts inherent jurisdiction is not without limits. In relation to a bankruptcy trustee obtaining a charge for its fees on property that was subject to undetermined trust claims, the Court stated that inherent jurisdiction cannot be used to negate the unambiguous expression of the legislature. Inherent jurisdiction is a special and extraordinary power which should be exercised sparingly and only in a clear case and the Alberta Court of Appeal made reference again to the Baxter Supreme Court of Canada decision.

TAB 3 Residential Warranty Co. Canada Inc., RE Alberta Court of Appeal 2006 ABCA Paragraphs 18, 19 and 20

9. In a decision of Sulphur Corp of Canada Limited, RE, the Alberta Court of Queen's Bench found that DIP Financing could be granted under CCAA proceedings in priority to all other secured creditors, including lienholders under the Builders Lien Act of British Columbia. However, in conclusion in this matter, the Court did state that future Applications that seek to amend or very

the DIP Financing will receive the Courts careful scrutiny and evidence will need to be filed demonstrating that the DIP Financing would have the impact of increasing the value of the property so as to avoid any further erosion of lienholders position.

TAB 4 Sulphur Corp of Canada Limited, RE 2002 ABQB

10. Dilution of Standard General's lien position is a concern, especially when receivership costs and borrowings can be attributed at present to the lands liened by Standard General which have no bearing directly on the lands liened and, furthermore, the Courts clearly are sensitive to the position of lien holders in relation to priority of receivership costs.

All of which is respectively submitted.

Brownlee LLP
PER:

DANIEL R. PESKETT/CHRIS YOUNG

Legal Counsel for Standard General Inc.

TAB 1

which it is to be used or on such land or in such place in the immediate vicinity of that land as is designated by the owner or the owner's agent or by the contractor or the subcontractor.

(2) Notwithstanding that material to be used in an improvement may not have been delivered in strict accordance with subsection (1), if the material is incorporated in the improvement the person furnishing the material has a lien as set out in section 6.

RSA 1980 cB-12 s7

Date of lien

10 The lien created by this Act arises when the work is begun or the first material is furnished.

RSA 1980 cB-12 s8

Priorities

11(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Notwithstanding subsection (1), a payment made pursuant to an assignment, attachment, garnishment or receiving order that is paid, before a lien is registered, to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, takes priority over the lien.

(3) Notwithstanding subsection (2), no judgment, execution, assignment, attachment, garnishment or receiving order shall affect the amount required to be retained under sections 18(1) or (1.1) and 23(1) or (1.1).

(4) A registered mortgage or a mortgage registered by way of a caveat has priority over a lien to the extent of the mortgage money in good faith secured or advanced in money prior to the registration of the statement of lien.

(5) Advances or payments made under a mortgage after a statement of lien has been registered rank after the lien, but a mortgagee who has applied mortgage money in payment of a statement of lien that has been registered is subrogated to the rights and priority of the lienholder who has been so paid to the extent of the money so applied.

(6) An agreement for sale of land in respect of which a caveat has been filed and any money in good faith secured or payable under the agreement has the same priority over a lien as is provided for a mortgage and mortgage money in subsections (1) and (2), and for the purposes of this Act,

TAB 2

1984 CarswellBC 564
British Columbia Court of Appeal

Yorkshire Trust Co. v. Canusa Construction Ltd.

1984 CarswellBC 564, [1984] B.C.W.L.D. 1735, 10 D.L.R. (4th) 45, 26 A.C.W.S. (2d) 169, 52 C.B.R. (N.S.) 63, 54 B.C.L.R. 75

YORKSHIRE TRUST COMPANY and TORONTO DOMINION BANK v. CANUSA CONSTRUCTION LTD. et al.

Hinkson, Macdonald and Macfarlane JJ.A.

Heard: May 8, 1984
Judgment: May 30, 1984
Docket: Vancouver No. CA002035

Counsel: *C.O.D. Branson* and *B.G. McLean*, for appellants.
L.M. Candido, for respondent Bakgaard.
H. Tomyn and *P.T. McGivern*, for respondent Panorama Building.

Subject: Contracts; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.9 Priorities
IV.9.b Between types of creditors
IV.9.b.ii Subsequent mortgagees and lienholders

Headnote

Construction Law --- Construction and builders' liens — Priorities — Between types of creditors — Subsequent mortgagees and lienholders

Receivers — Court-appointed receivers — Order appointing receiver — Petitioners commencing foreclosure proceedings and seeking appointment of receiver-manager with power to borrow fresh moneys for completion of building project with borrowings to have priority over lien claims — Order refused — Appeal by petitioners dismissed — Equitable jurisdiction not to be exercised to benefit petitioners to detriment of lienholders.

The appellants held a first mortgage under which they were to advance moneys to the registered owners of certain lands to finance the construction of a project on those lands. A demand for payment was made when the loans fell into default. Several lien claims were registered. The appellants commenced foreclosure proceedings and applied for appointment of a receiver-manager with power to borrow fresh moneys to complete the building project, such borrowings to have priority over the claims of lienholders. The chambers judge held that he was without jurisdiction to make an order granting such priority under ss. 6 and 11 of the Builders Lien Act. Alternatively, if the court had jurisdiction, he would not have exercised the discretion under s. 36 of the British Columbia Law and Equity Act to make the appointment on the terms requested. The petitioners appealed.

Held:

Appeal dismissed.

Section 36 was not intended to empower the court to negate the unambiguous expression of the legislative will found in ss. 4, 6, 8, 11 and 18 of the British Columbia Builders Lien Act, which create the right to a lien, its enforcement and its priority. The order sought would have preserved the appellant's priority while subjecting the lienholders to a loss or diminution of their security. It was not just or convenient to grant the order as the only persons who stood to gain from

the making of the order were the appellants. The advancement of such narrow and selfish interests was not a reason for exercising equitable jurisdiction.

Table of Authorities

Cases considered:

Baxter Student Housing Ltd. v. College Housing Co-op Ltd., [1976] 2 S.C.R. 475, 20 C.B.R. (N.S.) 240, [1976] 1 W.W.R. 1, 57 D.L.R. (3d) 1, 5 N.R. 515, reversing [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122 — *applied*

R. v. Markin, 68 W.W.R. 611, 7 C.R.N.S. 135, 6 D.L.R. (3d) 497, [1970] 1 C.C.C. 14 (B.C.C.A.) — *considered*

Statutes considered:

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

Builders Lien Act, R.S.B.C. 1979, c. 40, ss. 4, 6, 8, 11, 18.

Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36.

Mechanics' Liens Act, C.C.S.M. c. M80, s. 11(1).

Authorities considered:

Maxwell on Interpretation of Statutes, 11th ed. (1962), p. 321.

Words and phrases considered:

RECEIVING ORDER

I am unable to conclude that an order appointing a receiver is not capable of being included within the description of a receiving order [in s. 11 of the *Builders' Lien Act*, R.S.B.C. 1979, c. 40]. Judgments, executions, attachments and orders appointing receivers all have a common quality. Furthermore, it is likely that a provincial legislature, keeping within its jurisdiction, would direct its attention to process issued under provincial legislation rather than under federal legislation, such as the *Bankruptcy Act* [R.S.C. 1970, c. B-3].

Appeal from order refusing to appoint receiver-manager with power to borrow to complete building project, such borrowings to rank in priority to claims of holders of builders' liens.

The judgment of the court was delivered by *Macfarlane J.A.*:

1 This is an appeal from a refusal by a chambers judge to appoint a receiver-manager with power to borrow and complete construction of a project, such borrowings to rank as a first charge, and, in particular, in priority to the claims of holders of builders' liens.

2 Briefly stated, the facts are that the appellants are the holders of a first mortgage under which they were to advance $7,500,000 to Canusa Construction Ltd. and Devmon Developments Ltd., the registered owners of certain lands, to finance the construction of a project on those lands. The mortgage was executed on 30th November 1981 and was registered on 21st December 1981. The mortgage provided that the whole of the principal and interest would be payable upon demand. Demand was made on 15th February 1984 when Canusa and Devmon had fallen into default. The amount advanced under the mortgage date was $5,271,852. It then appeared that the estimated cost of the project had been exceeded by $851,000. It was estimated that the cost to complete the project would be $2,203,855. A petition for foreclosure and an application to appoint a receiver-manager was filed on 20th February 1984. Two claims for builders' liens had been filed prior to that date, and before the petition was heard at least one other lien claim was registered. The appellants sought an order which would give the receiver-manager power to borrow fresh moneys to complete the project, such borrowings to have priority over the claims of lienholders. It was proposed that the receiver-manager be empowered to borrow up to $2,500,000. It was estimated that the property could then be completed at a cost of $13,948,545.62, and that the property might be sold at a gross price of $14,407,000.

3 The appellants had put before the chambers judge a draft order and it contained, inter alia, this provision:

> AND THIS COURT FURTHER ORDERS that the said Receiver-Manager be at liberty and is hereby empowered to borrow monies from time to time as it may consider necessary, not exceeding the principal amount of *$2,500,000.00* for the purposes of protecting and preserving the subject lands and premises and completing construction of the buildings and improvements situated thereon and that as security therefor and for every part thereof the whole of the undertaking, property and assets charged by the mortgage of the Petitioner herein together with all other assets and property which may hereafter be in the custody or control of the said Receiver-Manager do stand charged with the payment of the monies so borrowed by the said Receiver-Manager with interest thereon in priority to all other charges save statutory charges which cannot be placed subsequent in priority to this charge ...

In seeking that order the appellants relied upon s. 36 of the Law and Equity Act, R.S.B.C. 1979, c. 224, which reads as follows:

> 36. A mandamus or an injunction may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made, and the order may be made either unconditionally or on terms and conditions the court thinks just ...

But the question here is not whether the court has the power to appoint a receiver or a receiver-manager, but whether the court can make an order which has the effect of giving priority to the receiver-manager for amounts borrowed to complete the project over the claims of lienholders registered against the title to the lands prior to the appointment of the receiver-manager.

4 The chambers judge held that he did not have the jurisdiction to make an order granting such priority. He held, in effect, that ss. 6 and 11 of the Builders Lien Act, R.S.B.C. 1979, c. 40, determined the question of priorities and that the court did not have any jurisdiction to override the legislative will in that respect. Those sections read, in part, as follows:

> 6.(1) A registered mortgage has priority over a lien to the extent of the mortgage money bona fide secured or advanced in money prior to the filing of the claim of lien ...
>
> (2) Advances or payments made under a mortgage after a claim of lien has been filed shall rank after the lien ...
>
> 11. Subject to this Act, when a claim of lien has been filed in the land title office or gold commissioner's office where applicable, it takes effect from the date of commencement of the work or when the first materials are furnished or placed for which the lien is claimed, and it takes priority over all judgments, executions, attachments and receiving orders recovered, issued or made after the lien take effect.

5 Applying what was said by the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-op Ltd.*, [1976] 2 S.C.R. 475, 20 C.B.R. (N.S.) 240, [1976] 1 W.W.R. 1, 57 D.L.R. (3d) 1, 5 N.R. 515, the chambers judge held that those provisions of the Builders Lien Act prevented the making of the order which had been requested. He held, in the alternative, that if the court had jurisdiction to make such an order he would not exercise his discretion under s. 36 of the Law and Equity Act to make the appointment with the power to borrow fresh funds in priority to the claims of the lienholders.

6 The submission of the appellants may be summarized in this way. *Baxter* is not authority for the proposition that s. 11 prevents the making of such an order. The words "receiving orders" in s. 11 refer to orders made under the Bankruptcy Act, R.S.C. 1970, c. B-3, and do not include an order to appoint a receiver, with power to protect and preserve property for the benefit of persons who have an interest in it. Neither s. 6 nor s. 11 of the Builders Lien Act prevents the exercise of the equitable jurisdiction of the court under s. 36 of the Law and Equity Act. In the alternative, it was a wrongful exercise of discretion by the chambers judge to refuse to make an order under s. 36 without the consent of the existing holders of encumbrances on the ground that it was unlikely that the claims of those encumbrancers could be satisfied if the order was made and the project completed in the manner proposed by the appellants.

7 In *Baxter* the owner of a construction project sought the appointment of a receiver with power to advance the balance of moneys on a mortgage in priority to liens which had taken effect before the order was made. In that case, as here, a lien had been filed and the mortgagee had refused to advance any further moneys under the mortgage. The chambers judge made an order. The following extract from the judgment of Dickson J. (as he then was) will reveal the essential circumstances, and the reasons why that order was quashed by the Supreme Court of Canada [pp. 478-80]:

> That order contained the following provision, inserted no doubt in the hope that C.M.H.C., relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:
>
> > 2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage and Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.
>
> Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of *The Mechanics' Liens Act* of Manitoba, R.S.M. 1970, c. M80, reading:
>
> > 11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiver orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.
>
> Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See *Boake v. Guild*, [1932] O.R. 617, [1932] 4 D.L.R. 217, affirmed (sub nom. *Carrel v. Hart)* [1934] S.C.R. 10, 26, [1933] 4 D.L.R. 401, [1934] 1 D.L.R. 537, and Rand J. in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd.*, [1958] S.C.R. 361, 14 D.L.R. (2d) 609, affirmed 29 W.W.R. 638, at p. 364. Section 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of *The Mechanics' Liens Act*, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.
>
> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

8 It is to be noted that s. 11(1) of the Manitoba Act, C.C.S.M., c. M80, is a combination of part of s. 11 and of s. 6(2) of the Builders Lien Act in this province. It was unnecessary for Dickson J. to rest his decision on the first part of s. 11(1) (which is the counterpart of s. 11 of our Act) because the case fell squarely within the provisions of the latter part of s. 11(1) (which is the counterpart of our s. 6(2)). In short, the order in the *Baxter* case would have permitted advances on the mortgage by the receiver to have priority over the claims of lienholders. The Supreme Court of Canada held such an order could not be granted.

9 It is the submission of counsel for the appellants that the question of the meaning of the words "receiving orders" having been left open in *Baxter* we may proceed to adopt his submission that the words ought to be interpreted as not including an order appointing a receiver.

10 But Dickson J. said, in obiter, that the power to appoint a receiver cannot afford comfort to an owner because a lien created by the Act has priority over all receiving orders made after the lien takes effect. The view of Dickson J., as I understand it, was that an order appointing a receiver fell within the description "receiving orders" mentioned in s. 11. It appears that he did not feel compelled to express the basis for that opinion in any more detail, because it was not necessary in the circumstances. The opinion, however, must be given considerable weight.

11 Counsel for the appellants submits that by implication Matas J.A. held in the *Baxter* case ([1975] 1 W.W.R. 311 at 320-321, 50 D.L.R. (3d) 122) that the words "receiving orders" did not encompass an order for the appointment of a receiver. In asking us to interpret the words in that way he submits that we ought to apply the test proposed by Maxwell on Interpretation of Statutes, 11th ed. (1962), p. 321, as adopted by Tysoe J.A. in *R. v. Markin*, 68 W.W.R. 611 at 613, 7 C.R.N.S. 135, 6 D.L.R. (3d) 497, [1970] 1 C.C.C. 14 (B.C.C.A.), as follows:

> When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis* [sic]. They are understood to be used in their cognate sense. They take, as it were, their color from each other, that is, the more general is restricted to a sense analogous to the less general.

12 I am unable to conclude that an order appointing a receiver is not capable of being included within the description of a receiving order. Judgments, executions, attachments and orders appointing receivers all have a common quality. Furthermore, it is likely that a provincial legislature, keeping within its jurisdiction, would direct its attention to process issued under provincial legislation rather than under federal legislation, such as the Bankruptcy Act. Such an interpretation is in accord with the intent of the legislation to provide security for the persons protected by the statute, and in doing so to direct that court orders or other judicial process ought not to have the effect of depriving those persons of their security.

13 Paraphrasing what Dickson J. had to say in *Baxter*, s. 36 of the Law and Equity Act was not intended to empower the court to negate the unambiguous expression of the legislative will found in the provisions of the Builders Lien Act, and in particular ss. 4, 6, 8, 11 and 18, which create the right to a lien, its enforcement and its priority. The order which was sought in this case would have preserved the priority of the appellants while, in the end result, subjecting the lienholders to a loss or diminution of their security. The first submission of the appellants must therefore fail.

14 I agree with the chambers judge that if the court did have jurisdiction to make an order appointing a receiver-manager with the powers in question that it would be appropriate in the circumstances not to exercise a discretion in favour of making such an order. However, I would have chosen a different basis for exercising my discretion. I do not think that the order is one which can be had only by consent of the lienholders. I think that their positions must be taken into account but that the order will be made or refused depending upon all of the circumstances of the case. Section 36 of the Law and Equity Act provides that the order may be made if it is just or convenient to do so, and it may be made with or without terms and conditions. The order is a form of equitable relief. Essentially it is an order to be made for the purpose of the protection or preservation of property for the benefit of persons who have an interest in it. Here, it appears, the only persons who stand to gain from the making of the order are the appellants. In the circumstances of this case the application appears to be but a device by which the mortgagees, who have refused to advance any further moneys, and to take any further risk, seek to have the project completed for the purposes of preserving and protecting their own financial position, rather than that of others having an interest in the project. The advancement of such narrow and selfish interests does not appeal as a reason for exercising equitable jurisdiction. In such circumstances a court of equity might well leave it to the parties to work out a more equitable way of achieving a result which would be advantageous to a larger segment of those affected than appears to be the case. On the material before us I would not have considered it either just or convenient to grant the order in the terms in which it was sought.

Appeal dismissed.

End of Document

TAB 3

2006 ABCA 293
Alberta Court of Appeal

Residential Warranty Co. of Canada Inc., Re

2006 CarswellAlta 1354, 2006 ABCA 293, [2006] 12 W.W.R. 213, [2006] I.L.R. I-4552, [2006] A.W.L.D. 3143, 153 A.C.W.S. (3d) 273, 25 C.B.R. (5th) 38, 275 D.L.R. (4th) 498, 410 W.A.C. 153, 417 A.R. 153, 65 Alta. L.R. (4th) 32

Kingsway General Insurance Company (Appellant / Applicant) and Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd. (Respondent)

J. Côté, M. Paperny JJ.A., D. Sulyma J. (ad hoc)

Heard: September 5, 2006
Judgment: October 10, 2006 *
Docket: Edmonton Appeal 0603-0093-AC

Proceedings: affirming *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.)

Counsel: E.A. Dolden, B.D. Rhodes for Appellant
K.A. Rowan for Respondent

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.k Remuneration of trustee
XIV.2.k.i General principles
Headnote
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 also 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 was dismissed and charge for trustee's fees was granted against property that was subject to conflicting, undetermined trust claims — Creditor appealed — Appeal dismissed — There was no basis to disturb case management judge's exercise of discretion — Inherent jurisdiction exists to grant charge on property subject to undetermined trust claims in appropriate circumstances — Case management judge considered relevant factors and applicable law, and carefully constructed limited charge that she viewed as suitable in circumstances — Unique circumstances of case and centrality of trust claims to bankruptcies underscored necessity of trustee's involvement and payment of its fees from property subject to disputed trusts.

Table of Authorities

Cases considered by *M. Paperny J.A.*:

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 85, 1975 CarswellMan 3, [1976] 2 S.C.R. 475 (S.C.C.) — considered

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

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

City Construction Co., Re (1961), 29 D.L.R. (2d) 568, 1961 CarswellBC 21, 35 W.W.R. 557, 2 C.B.R. (N.S.) 245 (B.C. C.A.) — considered

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

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 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — considered

Kern Agencies Ltd. (No. 3), Re (1932), 1932 CarswellSask 2, 13 C.B.R. 333, [1932] 1 W.W.R. 585 (Sask. K.B.) — referred to

Murphy Oil Co. v. Predator Corp. (2006), [2006] 5 W.W.R. 385, 384 A.R. 251, 367 W.A.C. 251, 2006 ABCA 69, 2006 CarswellAlta 233, 55 Alta. L.R. (4th) 1 (Alta. C.A.) — considered

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

Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 317 A.R. 192, 284 W.A.C. 192, 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272 (Alta. C.A.) — considered

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

Olympia & York Developments Ltd., Re (1997), 1997 CarswellOnt 1600, 18 C.B.R. (4th) 243, 146 D.L.R. (4th) 382, (sub nom. *Olympia & York Developments Ltd. (Bankrupt), Re)* 39 O.T.C. 396 (Ont. Bktcy.) — considered

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

Ramgotra (Trustee of) v. North American Life Assurance Co. (1996), 1996 CarswellSask 212F, 1996 CarswellSask 418, [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 (S.C.C.) — followed

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

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

Wasserman, Arsenault Ltd. v. Sone (2002), 33 C.B.R. (4th) 145, 157 O.A.C. 183, 2002 CarswellOnt 989 (Ont. C.A.) — considered

Statutes considered:

Insurance Act, R.S.A. 2000, c. I-3

Generally — referred to

s. 504 — considered

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

Generally — referred to

s. 38 — referred to

s. 41(4) — referred to

s. 67 — referred to

s. 67(1) — considered

s. 67(1)(a) — considered

s. 81 — referred to

s. 81(2) — referred to

s. 183(1)(d) — considered

Rules considered:

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

R. 128 — referred to

APPEAL by creditor from judgment, reported at *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.), granting charge for trustee's fees against property subject to undetermined trust claims.

***M. Paperny J.A.*:**

Introduction

1 This is an appeal from a case management judge, sitting in bankruptcy, granting a charge for trustee's fees against property subject to conflicting, undetermined trust claims.

Background

2 The bankruptcy judge reviewed the facts in her reasons: (2006), 21 C.B.R. (5th) 57, 2006 ABQB 236 (Alta. Q.B.). The following is a summary.

3 Residential Warranty Company of Canada ("RWC") and Residential Warranty Insurance Services ("RWI") operated a home warranty business in Alberta and British Columbia. The appellant Kingsway General Insurance ("Kingsway") underwrote warranty policies sold by RWI and RWC.

4 RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies.

5 RWC and RWI became bankrupt on May 31, 2005. The respondent, Deloitte & Touche, is the trustee in bankruptcy of their estates.

6 Kingsway filed proofs of claim pursuant to s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") asserting that all property in the bankrupt estates is subject to a trust in Kingsway's favour. Unsecured creditors, Canada Revenue Agency and other competing trust claimants (home builders) also claim interests in the property.

7 Kingsway claims that the entirety of the bankrupts' estates is comprised of premiums which the bankrupts collected on its behalf and therefore is impressed with a trust under the *Insurance Act*, R.S.A. 2000, c. I-3 and corresponding legislation in British Columbia. Section 504 (formerly 124) of the Alberta statute provides that an insurance agent who

acts for an insurer in negotiating, renewing or continuing a contract of insurance and who receives insurance premiums from an insured, is deemed to hold the premiums in trust for the insurer. Kingsway submits that these premiums cannot be subject to the charge granted because as trust funds they do not form part of the bankrupts' estates. Kingsway also asserts an express trust by virtue of the broker agreement and a constructive or resulting trust. The broker agreement between Kingsway and RWI provides that "[a]ll money received by the Broker [RWI] on behalf of the Company [Kingsway] less the Broker commission shall be the property of the Company and shall be held...as Trust Funds...".

8 The trustee disallowed Kingsway's trust claim and notified Kingsway pursuant to s. 81(2) of the *BIA*. The trustee's review of the records indicated to it that all premiums owing had been paid to Kingsway and that the funds in the estate represent other income from the operation of the business.

9 Kingsway appealed the trustee's decision to the Court of Queen's Bench, a summary proceeding under s. 81(2) of the *BIA*. That appeal is pending.

10 Kingsway applied to the bankruptcy judge seeking that Deloitte & Touche be prohibited from accessing any property in the estates for any purpose, including paying its past and future fees and expenses for appearing on the appeal and otherwise, pending the determination of Kingsway's trust claim.

11 The trustee opposed Kingsway's application and sought a retrospective and prospective charge against all assets under its administration.

12 The trustee has been administering the estates of RWC and RWI in accordance with the *BIA*, including: conducting financial analysis; securing and retaining possession of property of RWC and RWI; communicating with Kingsway and builders who are also advancing trust claims; establishing and executing a process to deal with builder claims to cash security deposits held by RWC and RWI; communicating with home owners claiming insurance coverage pursuant to policies issued by Kingsway; and administering insurance claims on a limited basis.

13 The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

14 The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

15 The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge, subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

16 This appeal raises the following issues:

1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust claims?

2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?

3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?

4. If jurisdiction exists, did the case management judge properly exercise the discretion?

Standard of Review

17 The first three issues raise a question of law, subject to the standard of correctness: *Murphy Oil Co. v. Predator Corp.* (2006), 384 A.R. 251, 2006 ABCA 69 (Alta. C.A.). The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.* (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201 (Alta. C.A.).

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

18 The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

19 Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . . . .
>
> (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

20 Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480; *Wasserman, Arsenault Ltd. v. Sone* (2002), 33 C.B.R. (4th) 145 (Ont. C.A.). In *Wasserman*, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the *BIA* Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

21 Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]). It has also been used where there is no other alternative available: *Olympia & York Developments Ltd., Re* (1997), 18 C.B.R. (4th) 243 (Ont. Bktcy.); *City Construction Co., Re* (1961), 2 C.B.R. (N.S.) 245 (B.C. C.A.) and to accomplish what justice and practicality require: *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*.

22 Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person...

23 Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

24 The Supreme Court of Canada addressed this issue in *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.) at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
>
> (Emphasis added)

25 In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

26 Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing *P.A.T., Local 1590 v. Broome* (1986), 61 C.B.R. (N.S.) 233 (Ont. S.C.) and *C.J. Wilkinson Ford Mercury Sales Ltd., Re* (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

27 In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

28 Kingsway also relies on *Gill, Re* (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 (B.C. S.C.), at paras. 29-32 in support of its statutory trust argument. In that case, however, Sigurdson J. recognized the jurisdiction to grant a charge for trustee fees over assets subject to trust claims. He determined on the distinct facts before him not to grant the charge requested.

29 I therefore accept that inherent jurisdiction exists to grant a charge on property subject to undetermined trust claims.

2. Permitting trustee costs involved in determining the validity of the trust to be paid out of trust property

30 Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.

31 I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the *BIA*. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see *Beetown Honey Products Inc., Re* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), aff'd (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and *BIA*, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in

this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

32 There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example, *Nakashidze, Re* (1948), 29 C.B.R. 35 (Ont. H.C.); *Ridout Real Estate Ltd., Re* (1957), 36 C.B.R. 111 (Ont. S.C.); *Kern Agencies Ltd. (No. 3), Re* (1932), 13 C.B.R. 333 (Sask. K.B.); *NRS Rosewood Real Estate Ltd., Re* (1992), 9 C.B.R. (3d) 163 (Ont. Bktcy.). In *NRS Rosewood*, for example, Austin J. faced the same argument made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".

33 I do not suggest that a trustee will in every case be entitled to be paid from trust property. On the contrary, such an order, based on inherent jurisdiction, must be granted sparingly. The situation before us is unique in many respects:

1. Kingsway asserts a trust on various grounds, none of which are obvious. Kingsway has delayed determination of its claim, resulting in additional work by the trustee;

2. Kingsway's claim encompasses the entirety of the estate;

3. There are other trust claimants making claims to the same funds;

4. There are significant sums in dispute;

5. This bankruptcy occurred as a result of a failed proposal. Deloitte & Touche went from interim receiver to trustee and the typical guarantee of the trustee's fees is not in place;

6. There is no other reasonable and more expeditious alternative but to have the trustee participate in the appeal process as part of its administration of these bankruptcies. Most of the other creditors are owed small amounts, aside from a government claim;

7. There is no suggestion that the trustee is acting improperly in disputing the claims; and

8. Kingsway seeks to link the appeal from the trustee's disallowance with the trial of other unrelated issues.

These circumstances and the centrality of the trust claims to the bankruptcies underscore the necessity of the trustee's involvement and the payment of its fees from the property subject to the disputed trusts.

34 Even if Kingsway is ultimately successful in its appeal of the trustee's disallowance, the trustee has been administering the property and a significant part of its work will likely have benefited Kingsway. The trustee has expended and will continue to expend considerable effort in sorting out other claims on the property, including the formulation of a plan that Kingsway has joined in for resolving builder claims. It has offered assistance to Kingsway in related proceedings concerning proposals made by directors and officers of the bankrupts. It has also formulated, coordinated and attended case management meetings throughout the course of its administration.

35 Kingsway suggests its claim will not go unchallenged if the trustee is not funded to defend the litigation on behalf of the estates; it asserts that one or more of the creditors can pursue the litigation at their own cost pursuant to s. 38 of the *BIA*. However, the litigation is central to these bankruptcies and not merely an action that interests select creditors. The validity and priority of Kingsway's trust claims must be determined and follows from the claims review process mandated by the *BIA*. That process is designed to ensure that only proper claimants share in the bankrupt's property and in these circumstances, the trustee plays an integral part.

36 Kingsway also submits that the appeal to the Queen's Bench from the trustee's disallowance will be complex, as it intends to bring other solvent parties into the action. Accordingly, Kingsway argues, the *res* of the estates could be frittered away with fees. However, the appeal to the Queen's Bench is intended to be a summary and efficient process to determine the issue relevant to the bankruptcy. To the extent that Kingsway chooses to increase the scope and complexity of the appeal, it must similarly accept the increased costs of the trustee in dealing with that action.

3. Factors in exercise of discretion

37 Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:

> 1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in *C.J. Wilkinson*, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
>
> 2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
>
> 3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see *GMAC* [*GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 CarswellOnt 4621 (S.C.C.)] at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation;
>
> 4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;
>
> 5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is important to consider whether the determination would proceed by default if the trustee were not fully funded;
>
> 6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;
>
> 7. The limits that can be placed on the fees or charge; and
>
> 8. The role that the trustee will take in the determination process.

4. Exercise of discretion by the case management judge

38 The case management judge considered the relevant factors and the applicable law. She carefully constructed a limited charge that she viewed as suitable in the circumstances. The order for a prospective charge is subject to the trustee filing a report confirming the bankruptcy inspectors had approved the steps the trustee proposed to take. She delayed the operation of her order to give builder claimants an opportunity to challenge it. She held that if all the property was not ultimately found to be impressed with a trust in Kingsway's favour, that a further hearing be held in order to prorate the trustee's fees between estate and trust assets. Further, she directed that the trustee only address urgent matters of general administration, and that Kingsway's claim be addressed as quickly and efficiently as possible. I see no basis to disturb her exercise of discretion.

39 One of the fundamental purposes of the *BIA* is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: *Ramgotra* at para. 15, citing *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Determination of the validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

40 The ultimate purpose of the administrative powers granted a trustee under the *BIA* is to manage the estate in order to provide equitable satisfaction of the creditors' claims: *Ramgotra* at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.

Conclusion

41 There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case. The appeal is therefore dismissed.

***J. Côté J.A.*:**

I concur.

***D. Sulyma J.* (ad hoc):**

I concur.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on October 18, 2006 has been incorporated herein.

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Danielson v. Calgary (City) | 2005 ABQB 55, 2005 CarswellAlta 123, [2005] A.W.L.D. 1023, 28 M.P.L.R. (4th) 103, 29 M.P.L.R. (4th) 103, 364 A.R. 334, [2005] A.J. No. 84, 137 A.C.W.S. (3d) 95 | (Alta. Q.B., Jan 27, 2005)

2002 ABQB 682
Alberta Court of Queen's Bench

Sulphur Corp. of Canada Ltd., Re

2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, [2002] A.W.L.D. 345, [2002] A.J. No. 918, 319 A.R. 152, 35 C.B.R. (4th) 304, 5 Alta. L.R. (4th) 251

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.A. 2000, c. B-9

AND IN THE MATTER OF SULPHUR CORPORATION OF CANADA LTD.

Lovecchio J.

Heard: June 19, 2002
Judgment: July 16, 2002
Docket: Calgary 0201-06610

Counsel: *Brian P. O'Leary, Q.C.*, for Applicants
Karen Horner, for Sulphur Corporation of Canada Ltd.
Howard A. Gorman, for Proprietary Industries Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Company had working capital shortfall of almost $10 million and approximately $9 million of builders' liens had been registered against its assets — Company obtained protection under Companies' Creditors Arrangement Act — Order under Act stayed all actions by creditors and authorized company to borrow $200,000 in debtor in possession financing from major shareholder which would rank in priority to all other creditors — Several builders' lienholders brought application for determination of jurisdiction of court to grant debtor in possession financing charge ranking ahead of registered liens — Company brought application for extension of stay and increase in amount of financing — Court has jurisdiction to grant charge for debtor in possession financing which ranks in priority to liens under Builders Lien Act — Section 11 of Companies' Creditors Arrangement Act provides courts with broad and liberal power to be used to help achieve overall objective of Act, which is to foster restructuring of insolvent companies to preserve and enhance their value for mutual benefit of companies and creditors — No specific limitations were placed on exercise of courts' discretion

under s. 11 — Provisions of federal Companies' Creditors Arrangement Act were in conflict with provisions of provincial Builders Lien Act and Companies' Creditors Arrangement Act should prevail — Major shareholder's increased debtor in possession financing proposal was only plan that could result in creation of greater value — Given magnitude of amounts involved, prejudice to lienholders was outweighed by potential benefit for all parties — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11 — Builders Lien Act, S.B.C. 1997, c. 45.

Table of Authorities

Cases considered by *Lovecchio J.*:

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — distinguished

Hunters Trailer & Marine Ltd., Re, 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — followed

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — followed

Royal Oak Mines Inc., Re, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — distinguished

Smoky River Coal Ltd., Re, 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — considered

United Used Auto & Truck Parts Ltd., Re, 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Statutes considered:

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

s. 11 — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

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

Generally — considered

s. 11 — considered

s. 11(3) — considered

s. 11(4) — considered

Court of Queen's Bench Act, R.S.M. 1970, c. C280

s. 59 — referred to

Legal Profession Act, S.B.C. 1987, c. 25

Generally — referred to

Mechanics' Liens Act, R.S.M. 1970, c. M80

s. 11(1) — referred to

APPLICATION by builders' lienholders for determination of jurisdiction of court under *Companies' Creditors Arrangement Act* to grant debtor in possession financing charge which would rank ahead of registered liens; APPLICATION by insolvent company for extension of stay and increase in debtor in possession financing.

Lovecchio J.:

INTRODUCTION

1 This is an application by several builders' lien claimants of Sulphur Corporation of Canada Ltd. to determine whether this Court has the jurisdiction under the *Companies' Creditors Arrangements Act* [1] to grant a debtor in possession financing charge which would rank in priority to their registered liens. In a concurrent application, Sulphur sought an extension of the stay and an increase in the DIP financing of $450,000.

BACKGROUND

2 The basic facts in the applications are not in dispute. They are briefly summarized below.

3 Sulphur is a company incorporated under the laws of the Province of Alberta and Proprietary Industries Inc. owns 79.59% of Sulphur's issued and outstanding voting shares.

4 Sulphur's only activity has been to develop and construct a sulphur terminal and processing facility in Prince Rupert, British Columbia. The facility has not been completed and it generates no cash flow.

5 On April 19, 2002, Sulphur obtained protection under the *CCAA* in an *ex parte* application. The Order stayed all actions against Sulphur by all of its creditors for a period of 30 days, named Arthur Andersen Inc. (which firm was subsequently taken over by Deloitte & Touche Inc.) as the Monitor and authorized Sulphur to borrow an amount not exceeding $200,000 from Proprietary to finance the continued activities of Sulphur. This DIP financing was to rank in priority to all other creditors of Sulphur, except those claiming under the Administrative Charge (being primarily the Monitor's fees and disbursements).

6 A number of affidavits have been filed in this matter. Based on these affidavits, it appears the financial position of Sulphur is extremely precarious.

7 Sulphur has a working capital shortfall of $9,751,435.00. On December 7, 2001, Sulphur ceased paying its trade creditors for their work and materials provided for the construction and development of the facility. The trades continued to work on the facility and were not advised by Sulphur that funding from Proprietary had ceased until around January 8, 2002.

8 Approximately $9,000,000.00 of builders' liens have been registered against Sulphur's assets. It would appear these liens were registered in early 2002, and the Applicants represent a total of $6,498,252.98 or 59% of that amount.

9 By the middle of December, 2001, Proprietary had advanced a total of $17,791,338.00 to Sulphur. Of that amount, $1,000,000.00 was advanced as consideration for a share subscription and $1,166,200.00 to exercise Share Purchase Warrants. The balance of the advances, in the amount of $15,625,138.00, was a loan. At the time the loan advances were made only one debenture, securing the first $1,180,000.00 advance under the loan, was issued and despite the requests and the demands of Proprietary, the then existing management of Sulphur failed or refused to execute debentures securing the balance of the advances under the loan, contrary to the commitment of Sulphur to secure all advances.

10 On April 18, 2002, an additional debenture to secure the balance of the indebtedness was issued. Proprietary is the only secured creditor of Sulphur.

11 The only other major creditor of Sulphur is Ridley Terminals Inc. The facility is on leased lands and Sulphur was unable to make its lease payments to Ridley under the Phase-One sublease and the Phase-two sublease for the month of April, 2002. At the time of the initial Order, the total lease arrears owed to Ridley with respect to the lands is $24,966.25. On or about March 20, 2002, Ridley issued a Notice of Default under the subleases to Sulphur.

12 It was also deposed that Proprietary is the only party willing to provide interim financing to Sulphur and that financing would not be provided unless it ranked as a first charge after the Administrative Charge.

13 Pursuant to the Order of Hart. J dated May 16, 2002, the stay of proceedings and all other terms of my initial Order were confirmed and continued until June 19, 2002.

14 On June 19, 2002, the Applicants sought an order to vary the DIP financing provisions of my initial Order, such that the DIP financing be ranked as a secured charge but after their claims.

15 During this hearing, I further extended the May 16 Order until July 19, 2002 and increased the DIP financing, allowing an additional $200,000 to be borrowed from Proprietary. Despite Proprietary's earlier position, Proprietary consented to lend this additional amount, notwithstanding my ruling that the priority of these additional funds and the original funds could be varied depending on the answer given to the jurisdictional question raised by the Applicants.

ISSUE

16 The only real issue still to be determined in this application is the following:

> Does this Court have the jurisdiction to grant a charge under the ***CCAA*** to secure a DIP financing which ranks in priority to a statutory lien under the under the ***Builders Liens Act***[2] of British Columbia?

DECISION

> This Court has the jurisdiction to grant a charge under the *CCAA* to secure a DIP financing which ranks in priority to a statutory lien under the under the *BLA* of British Columbia.

ANALYSIS

Position of the Applicants

17 The Applicants argues that s. 32(2) of the *BLA* establishes a priority for liens over all other charges, except those listed, and a charge to secure a DIP financing is not listed. As a result, the Applicants argue there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

18 The Applicants also contend that the *CCAA* contains no specifically enunciated statutory basis for the Court to grant a charge to secure a DIP financing which ranks in priority to the statutory liens of the builders' lien claimants. They do not dispute that the Court has the inherent jurisdiction to grant a security interest in certain circumstances but they maintain this contest comes down to the Court's inherent jurisdiction (an equitable power) versus an express provincial statutory provision and as such it falls outside of the limited purview of the paramountcy doctrine.

Position of the Respondent

19 The Respondent argues that s. 32(2) of the *BLA* only establishes a priority for liens over advances by a mortgagee, under a registered mortgage, and a DIP financing is not a registered mortgage. As a result, the Respondent argues there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

20 If that position is not maintained, then the Respondent disagrees with the Applicants' submission that this is a contest between the Court's equitable power versus an express statutory priority provision. The Respondent submits

there is a statutory basis for the initial Order and, as a result, if there is a conflict between the charge and the liens, then the charge created under the *CCAA* being a federal statute, is paramount to liens provided for in the *BLA* being a provincial statute. The Respondent relies on ss. 11(3) and 11(4) of the *CCAA* as the statutory provisions which empower the Court to create the charge.

Discussion

The BLA Statutory Interpretation Argument

21 Section 32 of the *BLA* states the following:

> 32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.
>
> 32(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

22 If the circumstances of this case did not give rise to a paramountcy issue, s. 32 of the *BLA* would govern. Clearly, the DIP financing is not a registered mortgage and the validly registered builders liens would have priority. (See discussion on *Baxter* below).

The Paramountcy Argument and the Jurisdiction of the Courts

23 Sections 11(3) and 11(4) of the *CCAA* read as follows:

> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Hunters Trailer & Marine Ltd., Re.*[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the *CCAA* and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

26 In discussing the objective of the *CCAA*, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors . . .

At para 18:

> I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.), at 146 that:" . . . the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad

> and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

Finally, at para. 51

> As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority granted by the Court. To deny them priority would be to frustrate the objectives of the *CCAA*.

27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Smoky River Coal Ltd., Re*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s.11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the *CCAA*. It is within this context that my initial Order and the June 19 Order were based.

29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. In that case, Farley J., held that s. 11 of the *BLA* eliminated the Court's inherent jurisdiction to grant a super-priority DIP order over validly registered builders' liens. Farley J. did not even consider s. 32 of the *BLA*. His decision was based solely on s. 11 of the *BLA*, which is not at issue in the case at hand.

30 In *Royal Oak Mines Inc.*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the ***Court of Queen's Bench Act***[7], a provincial statute which, the Supreme Court

of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the ***Mechanics' Liens Act*** [8], also a provincial statute.

32 I have the greatest of respect for my colleague from Ontario but, in this case s. 11 of the *BLA* was not invoked by the Applicants and in the final analysis I would see the matter differently. In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the *CCAA*, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

34 In *United Used Auto & Truck Parts Ltd., Re* [9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

35 Parliament's way of ensuring that the *CCAA* would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the *CCAA*, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the *BLA*.

38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal *CCAA* and the *Legal Professions Act* of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the *CCAA*, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the *CCAA* "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

The Exercise of That Discretion

39 Sulphur has a working capital deficiency of over $9,000,000. Proprietary had ceased funding construction. Given the registered liens and the security position of Proprietary, funding from any other third party, other than Proprietary, is an illusion. Sulphur would have no chance to recover or restructure but for the provision of some interim financing to permit an assessment of where it goes, if anywhere at all, other than into bankruptcy.

40 When a Court chooses to grant a stay order under s. 11 of the *CCAA*, a significant portion of the order must address how costs will be covered for ongoing operations, the assessment process and the formation of a meaningful plan of arrangement.

41 A balancing of the interests of all of the stakeholders is involved. The Court must proceed with caution throughout this entire process.

42 Wachowich C.J.Q.B. affirmed the test set out by Tysoe J, in *United Used Auto & Truck Parts Ltd., Re* [(1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])], that there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the parties whose position is being subordinated.

43 In this case, a determination of priorities is not before me but, from the record, the following appears to be the lineup. Prior to insertion in the line of the Administrative Charge and the DIP financing, Proprietary appears to have a secured position of $1,180,000, there are registered liens of approximately $9,000,000 and then the balance of the secured position of Proprietary. In addition, the landlords position of roughly $25,000 must be fit into the equation.

44 This facility has not been completed and, until it is, any cash flow is a pipe dream. Someone must come up with a plan to reorganize this unfortunate situation as a simple sale of the unfinished facility will, in all likelihood, yield the least in dollars for all to share.

45 There is conflicting evidence on what the plant may be worth. This is partly driven by the method chosen (liquidation vs. going concern, and who is preparing the report). The highest number for a completed facility is $23.3 million to $24.2 million and on an uncompleted basis it may be as low as $1.00.

46 The best chance for the lienholder's to be paid is likely on completion as a liquidation appears to lead to a shortfall even for them. I realize that I have potentially eroded their position by $400,000 with the DIP financing in a liquidation scenario. However, that money is coming from Proprietary and they are the ones who have the greatest interest in seeing value created and at this point they are also the only ones who will finance a scheme that might see the creation of greater value.

47 In my view given the magnitude of the numbers we are dealing with, at this stage the prejudice to the lienholder's is outweighed by the potential benefit for all concerned.

48 Having said that, I wish to add that all future applications which would seek to amend or vary the DIP financing in any way will receive the Court's careful scrutiny. Sulphur will be obligated to file evidence demonstrating that the DIP financing would have the impact of increasing the value of the facility so as to avoid any further erosion of the lienholder's position.

CONCLUSION

49 For the foregoing reasons, I answer the jurisdictional question posed in the affirmative.

COSTS

50 The issue of costs may be spoken to at a latter date if Counsel wish.

Order accordingly.

Footnotes

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

2 R.S.B.C. 1997, Chapter 45.

3 (2001), 94 Alta. L.R. (3d) 389 (Alta. Q.B.).

4 (Alta. C.A.).

5 (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

6 (1975), [1976] 2 S.C.R. 475 (S.C.C.).

7 R.S.M.1970, c. C280.

8 R.S.M. 1970, c. M80.

9 (2000), 16 C.B.R. (4th) 141 (B.C. C.A.).

10 (B.C. C.A.)

TAB 5

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(iii) direct that at the trial of the action any particular issue or issues arising on the application be determined,

(d) the court may make any further order or direction that it considers necessary or desirable including, among other things, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,

(e) the court may order that any lienholder or other party be given the carriage of the proceedings, and

(f) the court may order that questioning under Part 5 of the *Alberta Rules of Court* be conducted in the action, but no questioning may be conducted without an order of the court.

RSA 2000 cB-7 s53;2009 c53 s28

Appointment of receiver and trustee

54(1) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.

(2) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee

(a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(b) with power, on approval of the court, to complete or partially complete the improvement.

(3) Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

RSA 1980 cB-12 s40;1985 c14 s24

Uncompleted or abandoned contract

55(1) Subject to subsection (2), a lienholder may enforce the lienholder's lien notwithstanding the non-completion or abandonment of any contract under which that lien arises.

(2) Subsection (1) does not apply in favour of a contractor or subcontractor whose contract provides that nothing is to be paid until completion of the contract.

RSA 1980 cB-12 s41

Consolidation of actions

56 If more than one action is commenced to enforce liens in respect of the same land, the court

(a) may, on the application of any person interested, consolidate the actions into one action, and

(b) may give the conduct of the consolidated action to any plaintiff as it considers fit.

RSA 1980 cB-12 s42

Entering action for trial

57 When a defence has been filed and no order is made on the pre-trial application for the holding of a trial, the plaintiff or any other party may enter the action for trial.

RSA 1980 cB-12 s43