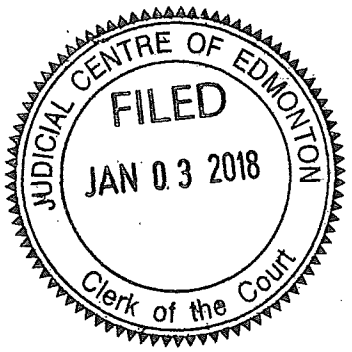

COURT FILE NO.	1703 21274
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	ALVAREZ & MARSAL CANADA INC. in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of REID-BUILT HOMES LTD., 1679775 ALBERTA LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., REID CAPITAL CORP., and EMILIE REID
APPLICANT	THE CITY OF EDMONTON
RESPONDENT	ALVAREZ & MARSAL CANADA INC. in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of 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

WRITTEN BRIEF OF THE APPLICANT, THE CITY OF EDMONTON
APPLICATION – JANUARY 9, 2018 AT 2:00 P.M.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	The City of Edmonton Law Branch 9th Floor Chancery Hall Edmonton, Alberta T5J 2C3 Lawyer: Allan Delgado / Carly Androschuk Telephone: (780) 442-0985, (780) 442-1390 Fax: (780) 496-7267
COUNSEL FOR THE RESPONDENT	Norton Rose Fulbright Canada LLP Suite 3700, 400 3rd Avenue SW Calgary, AB T2P 4H2

Lawyer: Howard Gorman / Aditya Badami
Telephone: (403) 267-8144, (403) 267-8122
Facsimile: (403) 264-5973

I. INTRODUCTION

1. The City of Edmonton (the "**City**") brings this Application in order to modify the terms of the Order granted by this Honourable Court on November 29, 2017 (the "**November 29 Order**") or the reasons for it.

2. In addition, or in the alternative, the City seeks a further Order declaring that it maintains a special lien priority ahead of any claim(s) of the Receiver, Alvarez & Marsal Canada Inc. (the "**Receiver**").

II. FACTS SURROUNDING THE NOVEMBER 29 APPLICATION AND ORDER

3. At the Application on November 29, 2017, counsel for the Receiver made the following submissions with respect to the City's priority for property taxes:

> 15 If the stakeholders in one of these buildings agreed with the receiver that we should be
> 16 paying the property tax to avoid interest, they agreed that they are a priority, we will,
> 17 upon agreement, make those payments. **It's not for us today to say we've decided**
> 18 **unilaterally the City has priority,** that the tax amount is right, and that we should pay it.
> 19 That's what your court officer does, and that's what your court officer has been
> 20 empowered and entrusted to do, and **that is what they will do, going forward, with respect**
> 21 **to each project and each property.**[1]

4. The November 29 Order explicitly contemplates at para. 3 that the Receiver will be entitled to a first charge with respect to the property at issue only where such charge ranks in priority to other claims:

> The Receiver is entitled to and hereby granted a first charge as against any specific Property so improved by exercise of the Property Powers, **where such first charge ranks in priority to all other charges and claims**, including lien claims, as against the Property so improved.[2]

5. For the reasons outlined herein, the City interprets the November 29 Order to mean that property taxes owed to the City maintain a priority over the Receiver's charge

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[1] Transcript from the Proceedings for the afternoon of November 29, 2017 at p.7, lines 15-21 [emphasis added] found at Exhibit "A" of the Affidavit of Shauna Esterer filed December 20, 2017.

[2] November 29 Order at para 3 [emphasis added].

for repair, upkeep, enhancement, completion or partial completion of an improvement to any property in which any Reid Built entity[3] has an interest.

6. It was the City's understanding that its priority with respect to property taxes would not be challenged at the November 29 Application. However, after the November 29 Application, it came to the City's attention that the Receiver interprets the November 29 Order to mean that the Receiver's first charge for improvements should be paid in priority to the municipal property taxes and, further, that the written decision of this Honourable Court with respect to the Receiver's other expenses, fees, and disbursements will address the issue of City's priority for municipal property taxes.

III. ISSUES

7. The following are the issues to be addressed:

    a. Does this Honourable Court have authority, and is it necessary and desirable, to modify the November 29 Order, hear further evidence on the issue of priorities, and/or to grant a further Order?

    b. Do the City's claims for municipal property taxes with respect to the various properties comprising the receivership estate take priority over the claim(s) of every entity (except the Crown), and does that priority include the fees and disbursements of the Receiver?

IV. LAW & ANALYSIS

1. Authority to Modify Order or Grant a Further Order

a. Rules

8. The *Alberta Rules of Court*[4] provide:

> **Correcting mistakes or errors**

[3] Including 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.

[4] *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] - **TAB 1**.

9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.

Re-opening case

9.13 At any time before a judgment or order is entered, the Court may

(a) vary the judgment or order, or
(b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

Further or other order after judgment or order entered

9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if

(a) doing so does not require the original judgment or order to be varied, and
(b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.[5]

b. Analysis

9. Rules 9.12, 9.13, and 9.14 were considered by this Honourable Court in *Evans v. Sports Corp*[6] and it was noted that the provisions thereunder "replace and appear to significantly expand the authority provided under the previous [Rules]".[7]

10. This Court noted with respect to Rule 9.13:

> Reading the plain language of *Rule* 9.13, I believe that I have extremely broad authority to do what I think is correct in these circumstances.[8]

11. The more recent decision, *Waquan v. Canada (Attorney General)*[9] provides further interpretation of Rule 9.13 with reference to *Evans* and other relevant decisions. At para. 3, Wittman J. quotes from the decision of Russell J. in *Lewis Estates Communities Inc. v. Brownlee LLP*,[10]

> **It makes sense to apply R. 9.13 to correct the sorts of errors identified in *Evans* and *Paniccia Estate.* Doing so not only averts an injustice but saves litigants the costs and delay of bringing an otherwise unnecessary appeal.** R. 9.13 is not,

[5] *Rules*, r 9.12, 9.13, & 9.14 - **TAB 1.**
[6] *Evans v Sports Corp*, 2011 ABQB 478 [*Evans*] - **TAB 2**
[7] *Evans* at para 13 - **TAB 2.**
[8] *Evans* at para 15 - **TAB 2.**
[9] *Waquan v Canada (Attorney General)*, 2016 ABQB 280 - **TAB 3.**
[10] *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731 [*Lewis Estates*]- **TAB 4.**

> however, a vehicle for seeking reconsideration of a judgment call such as the treatment of evidence or the finding of facts. An unsuccessful litigant's remedy in such a case lies only in an appeal. And, because judgments need not and often will not specifically address every argument put before the Court, where a Court is invited to reconsider under R. 9.13 a matter that it has specifically addressed in its original judgment, the putative error ought be plain and manifest. Otherwise, R. 9.13 would quickly become a vehicle for litigants seeking second kicks at the can. This concern also explains why the test for the admission of fresh evidence on appeals is so high; the trial is designed to determine the facts.[11]

12. *Lewis Estates*, in particular, notes that Rule 9.13 could apply to "correct an incorrect statement of law".[12] In *Paniccia Estate v. Toal*,[13] Shelley J identified a misstatement of the law in her written trial decision dealing with entitlement to bereavement damages but an order or judgment had yet to be entered. In relying on Rule 9.13(a) to correct the error, the Court noted that:

> the incorrect statement of law may confuse future judicial analysis and incorrectly bind lower courts. This is a potential mischief that deserves immediate attention.[14]

13. The City submits that Rule. 9.13(b) applies to the within application in that there is a risk of an error or misstatement of the law with respect to the City's priority for property taxes relative to the super priority sought by the Receiver. The Court has issued the November 29 Order but has yet to render a written decision. Considering the City's submissions below, there may be a need to either modify the November 29 Order, or issue a further order, to clarify the priority of the City's property taxes or to avoid a potential error in this Honourable Court's written decision. In all the circumstances, the City's submissions may avert an injustice by rendering a decision on the merits having heard all appropriate submissions on the issue of priorities.

14. The Court has authority to modify the November 29 Order, hear further evidence, and/or grant a further Order (if necessary) per Rules 9.12, 9.13, and 9.14. Specifically, with respect to Rule 9.14, the City submits that the Court has authority

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[11] *Lewis Estates* at para 33 [emphasis added] - **TAB 4.**
[12] *Lewis Estates* at para 32 - **TAB 4.**
[13] *Paniccia Estate v Toal*, 2012 ABQB 11 [*Paniccia Estate*]- **TAB 5.**
[14] *Paniccia Estate* at para 71 - **TAB 5.**

to grant a further order to provide relief the City would have been entitled to at the November 29 Application and under the November 29 Order.[15]

15. Given the dispute between the Receiver and the City with respect to priorities since the November 29 Application, and given the discrepancy in the way in which the parties interpret the November 29 Order, it is not only desirable but necessary to modify the November 29 Order and/or pronounce a further Order declaring that the City's priority for property taxes stands in priority to all persons save the Crown.

2. The City's Priority/Special Lien

a. The Orders Granted and the Legislation

16. The Consent Receivership Order filed November 2, 2017 ("**CRO**"), grants the Receiver, at para. 18, a "first charge on the Property [as defined therein at para. 2] in priority to all security interests, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person [as defined therein at para. 5]" with respect to its expenses and disbursements. This is defined as the "Receiver's Charge".

17. Para. 21 of the CRO effectively provides the Receiver with the same first charge priority with respect to monies borrowed to fund the Receivership. This is defined as the "Receiver's Borrowing Charge" and is subject only to the priority of the Receiver's Charge.

18. On November 24, 2017, the Receiver filed an application returnable November 29, seeking a "first-ranking super priority charge" for its Property Powers Charge (as defined therein). The November 29 Order arose from that application. Para. 3 granted the Receiver a "first charge...where such first charge ranks in priority to all other charges and claims, including lien claims..."(emphasis added). In addition, para. 4 amends the CRO where it states that:

> "the priorities and charges identified in the [CRO] are hereby amended in accordance with and to reflect the terms of the Order."

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[15] See: *Strathcona (County) v Hansen*, 2014 ABCA 17 at para 6 - **TAB 6.**

19. The priorities set out in the CRO were amended by the November 29 Order to reflect that the Receiver's Property Powers Charge takes priority, where it is shown to have that priority, rather than the clear priority to all charges, including statutory ones, as set out in the CRO.

20. The amendment to the CRO by the November 29 Order is in line with the City's priority for property taxes. According to the *Municipal Government Act* municipal property taxes take priority over the claims of every entity except the Crown:

> **Tax becomes debt to municipality**
>
> **348** Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) **take priority over the claims of every person except the Crown**, and
>
> (d) are a special lien
>
> (i) **on land and any improvements to the land, if the tax is a property tax**, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy....[16]

b. Analysis

21. It is the City's understanding that the Receiver does not agree with the City's interpretation of the November 29 Order. Rather, so far as the City is aware, the Receiver takes the position that the November 29 Order grants the Receiver a first charge super priority for its Property Powers Charge as against all other interests, including the City's property taxes. Further, it is the City's understanding that this Honourable Court will be rendering a written decision, among other things, on the Receiver's November 24, 2017 application and will address the question of priorities, including the priority of the City's property taxes.

22. The City submits that a plain reading of the November 29 Order indicates the City continues to maintain its priority for property taxes ahead of the Receiver's Property

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[16] *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], s 348 [emphasis added] - **TAB 7.**

Powers Charge. In addition, case law supports that, in a receivership, the municipal property taxes, as granted by legislation, maintain priority ahead of the expenses of a Receiver.

23. The case of *Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd*[17] hails from Ontario and is directly analogous. While it is not binding, it is persuasive.

24. In *Hamilton Wentworth* the Receiver argued that it was entitled to payment of its fees and disbursements in priority to the payment of the municipal property taxes of the Town of Flamborough. It is worth noting that these fees and disbursements included utilities, legal fees and disbursements, and receiver fees and disbursements.[18]

25. Like the case at hand, the Receiver had obtained an order allowing it to take steps that it deemed necessary or desirable for the preservation of the property at issue.

26. The relevant section of Ontario's *Municipal Act*[19] is the same in substance to s. 348 of the *MGA*. Like s 348 of the *MGA*, s. 382 (now s. 349) of Ontario's *MA* provided that municipal property taxes "are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown".[20]

27. According to Blair J., while:

> "there are circumstances in which [the fees and disbursements of the Receiver] may be ordered paid in priority to secured creditors where the assets are insufficient to cover the liabilities,"[21] this could not be so where municipal property taxes were concerned since the "statutory scheme forbids it".[22]

---

[17] *Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd*, 1995 CarswellOnt 374, [1995] OJ No 1482 [*Hamilton Wentworth*]- **TAB 8.**

[18] *Hamilton Wentworth* at para. 11 - **TAB 8.**

[19] *Municipal Act*, RSO 1990, c M-45 [*MA*] - **TAB 9.**

[20] See *Hamilton Wentworth* at para 42 quoting s.382 of the *MA* - - **TAB 8.**

[21] *Hamilton Wentworth* at paras 44 - **TAB 8** (citing *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 21 CBR (NS) 201, 9 OR (2d) 84 [*Kowal*] for the list of exceptions) & para 46; see also *Terra Nova Management Ltd v Halcyon Health Spa Ltd*, 2005 BCSC 1017 at para 30 (proceedings aff'ed in *Terra Nova Management Ltd v Halcyon Health Spa Ltd*, 2006 BCCA 458).

[22] *Hamilton Wentworth* at para 47 - **TAB 8.**

28. Blair J. held that the Court was therefore precluded from granting the Receiver an order that would allow its fees and disbursements to take priority over the claim of the municipality, "regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors".[23]

29. Blair J. also noted:

> A receiver and manager is an officer of the court. That position does not provide it with a carte blanche, however, to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets...[24]

30. Likewise, in *Toronto Dominion Bank v Usarco Ltd*,[25] Austin J.A. for the Ontario Court of Appeal found that the municipality's "claim with respect to realty is quite straightforward" in that s. 382 of the *MA* placed the "City's claim ahead of all others except the Crown".[26] Austin J.A. went a step further, noting that it was actually part of the Receiver's "normal duty to pay the taxes as part of preserving the property".[27]

31. The Receiver's Brief of Law and Argument filed November 24, 2017, provides, at paras. 49 - 55, submissions on the question of why exempting assets from the Receiver's Charges is unwarranted. The Receiver acknowledges that the general rule is that a Receiver's fees and disbursements are subject to the priorities of a security holder and then points to case law that sets out a test for exceptions to this rule.

32. None of the cases listed by the Receiver deal with granting the Receiver its priority against the the property taxes of a municipality, which is, of course, granted by the authority of provincial legislation.

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[23] *Hamilton Wentworth* at para 51 - **TAB 8.**
[24] *Hamilton Wentworth* at para 58 - **TAB 8.**
[25] *Toronto Dominion Bank v Usarco Ltd*, 2001 CarswellOnt 525, [2001] OJ No 649 (ONCA) [*Usarco*]- **TAB 10.**
[26] *Usarco* at para 39- **TAB 10.**
[27] *Usarco* at para 67; see also *Kowal* at paras 21 - 22- **TAB 10.**

33. The City adamantly maintains that it is entitled its priority for property taxes per s. 348 of the *MGA*, and that said special lien stands in priority to any claim of the Receiver for fees and disbursements, including claims for fees incurred preserving, repairing, or improving the property. *Hamilton Wentworth* included fees for utilities and the Receiver's fees were still subject to the priority of municipal property taxes.

34. This priority cannot be abrogated by any party other than the Crown, and this Honourable Court does not have the authority to make an order that would circumvent the City's priority and undermine the statutory scheme created by the Alberta legislature. The Bench Brief provided by the Receiver acknowledges at para. 12 that it has not identified a prior insolvency proceeding where a super priority charge like the one it seeks has been created. To the contrary, while not Alberta case law, cases such as *Hamilton Wentworth* and *Usarco*, provide persuasive precedent that a Receiver is not entitled to a super priority ahead of the special lien for municipal property taxes pursuant to municipal government legislation.

V. CONCLUSION & REMEDY SOUGHT

35. This Honourable Court did not err when it granted the November 29 Order. That Order specifically contemplates that there may be circumstances - presumably this very circumstance - where the claim(s) of a secured creditor may potentially continue to stand in priority to the fees and disbursements of the Receiver.

36. It is also within the Court's authority to hear further evidence and argument on the issue of priorities in order to avoid rendering a future decision that would contravene s.348 of the *MGA*.

37. The City respectfully requests that this Honourable Court:

    a. modify the November 29, 2017 Order does not grant the Receiver priority for its Property Powers Charge ahead of the municipal property taxes of the City;

b. declare that the City's special lien for property taxes stands in priority to any and all claim(s) of the Receiver; and

c. order costs in favour of the City for this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3nd DAY OF JANUARY, 2018.

THE CITY OF EDMONTON LAW BRANCH

Per: _____

Allan Delgado
Barrister & Solicitor

Per: _____

Carly Androschuk
Barrister & Solicitor

TAB 1

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 85/2016

Office Consolidation

Queen's Printer Bookstore
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

may have the judgment or order made against any person beneficially interested in the estate or trust.

Division 3
Corrections, Further Orders, Setting Aside, Varying and Discharging Judgments and Orders

Correcting mistakes or errors

9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.

Re-opening case

9.13 At any time before a judgment or order is entered, the Court may

(a) vary the judgment or order, or

(b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

Further or other order after judgment or order entered

9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if

(a) doing so does not require the original judgment or order to be varied, and

(b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.

Setting aside, varying and discharging judgments and orders

9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.

(2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of

TAB 2

2011 ABQB 478
Alberta Court of Queen's Bench

Evans v. Sports Corp.

2011 CarswellAlta 1318, 2011 ABQB 478, [2011] A.W.L.D. 3653, [2011] A.W.L.D. 3654, [2011] A.W.L.D. 3659, [2011] A.W.L.D. 3660, [2011] A.W.L.D. 3695, [2011] A.W.L.D. 3696, [2011] A.W.L.D. 3697, [2011] A.W.L.D. 3698, [2011] A.W.L.D. 3699, [2011] A.W.L.D. 3701, [2011] A.W.L.D. 3702, [2011] A.W.L.D. 3703, [2011] A.W.L.D. 3704, [2011] A.W.L.D. 3705, [2011] A.W.L.D. 3708, [2011] A.W.L.D. 3748, [2011] A.J. No. 867, [2012] 3 W.W.R. 209, 205 A.C.W.S. (3d) 835, 47 Alta. L.R. (5th) 254, 523 A.R. 80, 85 B.L.R. (4th) 313

Richard Evans, Respondent (Plaintiff / Defendant by Counterclaim) and The Sports Corporation, Applicant (Defendant / Plaintiff by Counterclaim)

Robert A. Graesser J.

Heard: May 11, 2011
Judgment: July 20, 2011
Docket: Edmonton 0603-07734

Proceedings: additional reasons to *Evans v. Sports Corp.* (2011), 2011 CarswellAlta 569, 2011 ABQB 244, 83 B.L.R. (4th) 269, 45 Alta. L.R. (5th) 139, [2011] 9 W.W.R. 772 (Alta. Q.B.)

Counsel: Stephen Livingstone, for Respondent / Plaintiff / Defendant by Counterclaim
P.D. Wilson, Q.C., for Applicant / Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Employment; Public; Contracts; International
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.b Before judgment entered
XXII.16.b.ii Miscellaneous
Contracts
XIV Remedies for breach

clients — Employee brought action against employer for unpaid salary and bonuses — Employer brought counter-claim for damages for breach of restrictive covenants — Action and counter-claim were allowed in part — Trial judge awarded employer damages resulting from employee's breaches of employment agreement — Trial judge assessed damages by looking at employer's actual loss — Trial judge reduced employer's damages by 50 per cent for failure to mitigate losses — Employer was entitled to employee's revenues generated from employer's clients during first two seasons after employee's departure — Employer was entitled to 10 per cent of employee's revenues generated from employer's clients during third and fourth seasons after employee's departure — Parties brought application to settle terms of judgment — Application granted — Damages award was varied by limiting damages to first two seasons after employee's departure — It was inappropriate to tie damages to employee's wrongful acts into future, as opposed to employer's losses during prohibited period — If employer were entitled to damages for third and fourth seasons, it would have been entitled to 90 per cent of employee's revenues generated from employer's clients.

Contracts --- Remedies for breach — Damages — Contract of employment

Breach of non-solicitation covenant — Plaintiff employee was employed as sports agent for defendant employer for two terms — Employment contract included covenants for non-solicitation of other employees and clients — Employee left employment at end of term, set up his own sports agency business and signed some of employer's clients — Employee brought action against employer for unpaid salary and bonuses — Employer brought counter-claim for damages for breach of restrictive covenants — Action and counter-claim were allowed in part — Trial judge awarded employer damages resulting from employee's breaches of employment agreement — Trial judge assessed damages by looking at employer's actual loss — Trial judge reduced employer's damages by 50 per cent for failure to mitigate losses — Employer was entitled to employee's revenues generated from employer's clients during first two seasons after employee's departure — Employer was entitled to 10 per cent of employee's revenues generated from employer's clients during third and fourth seasons after employee's departure — Parties brought application to settle terms of judgment — Application granted — Damages award was varied by limiting damages to first two seasons after employee's departure — It was inappropriate to tie damages to employee's wrongful acts into future, as opposed to employer's losses during prohibited period — If employer were entitled to damages for third and fourth seasons, it would have been entitled to 90 per cent of employee's revenues generated from employer's clients.

Remedies --- Damages — Damages in contract — Contract of employment

Breach of non-solicitation covenant — Plaintiff employee was employed as sports agent for defendant employer for two terms — Employment contract included

R. 9.13 — considered

R. 9.14 — considered

ADDITIONAL REASONS correcting errors in judgment reported at *Evans v. Sports Corp.* (2011), 2011 CarswellAlta 569, 2011 ABQB 244, 83 B.L.R. (4th) 269, 45 Alta. L.R. (5th) 139, [2011] 9 W.W.R. 772 (Alta. Q.B.), awarding damages for breach of employment agreement.

***Robert A. Graesser J.*:**

1. Introduction

1 This decision follows an application to settle the terms of the judgment arising from my decision in *Evans v. Sports Corp.*, 2011 ABQB 244 (Alta. Q.B.) [the Trial Judgment]. At para. 353 of the Trial Judgment I stated:

> [353] I reserve the right to correct any mathematical or calculation error, in the damage assessment. Counsel should address any matters they consider to be in that category within 30 days from the date of this decision.

2 When counsel appeared before me to settle the judgment, counsel for The Sports Corporation ["TSC"] pointed out that when assessing damages against Mr. Evans I had made an error with respect to the interpretation of the Standard Players Association Contract. I had noted at para. 328 that when a player left an agent and went to another one, the first agent was entitled to receive 10% of the fees remaining to be paid under any contract that continued on past the change in agency.

3 It is not in dispute that statement was incorrect. In fact, the previous agent is entitled to receive 90% of the fees for the balance of any contract. That works as a disincentive to 'poach' clients under contract, as the new agent has to service the player, but receives only 10% of the fee.

4 In assessing damages against Mr. Evans, I reversed the percentages, and awarded TSC damages based on 10% of the 'post-poaching' income from a pre-existing agency contract. TSC correctly pointed out that in such circumstances it would have been entitled to receive *90%* of the fees, and not *10%*.

5 This error affected those damages incurred after the two year restrictive covenant non-competition period imposed on Mr. Evans by his contract with TSC. I awarded TSC $7,082.63 US: 10% of $141,652.65 US (discounted by 50%

11 The formal judgment had not been finalized and entered, and as a consequence I retain a broad jurisdiction over the matter. My jurisdiction includes the correction of errors, and extends beyond just typographical or calculation errors.

12 My authority to revise the reasons for judgment flows from the *Alberta Rules Of Court*, Alta. Reg. 124/2010, ss. 9.12-9.14 [the "*Rules*", or individually a "*Rule*"]:

> **Correcting mistakes or errors**
>
> 9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission.
>
> **Re-opening case**
>
> 9.13 At any time before a judgment or order is entered, the Court may
>
> (a) vary the judgment or order, or
>
> (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.
>
> **Further or other order after judgment or order entered**
>
> 9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if
>
> (a) doing so does not require the original judgment or order to be varied, and
>
> (b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.

13 These provisions replace and appear to significantly expand the authority provided under the previous *Alberta Rules of Court*, Alta. Reg. 390/1968:

> 339 Clerical mistakes in judgments or orders, or errors therein arising from any accident, slip or omission may at any time be corrected by the court on motion.

14 I have not identified any case that has applied the new *Rules* 9.12 to 9.14.

19 In fact, TSC should have received 90% of any fees paid to Mr. Evans where the revenues to Mr. Evans resulted from contracts negotiated on the clients' behalf by TSC and the contract period extended after the clients signed with Mr. Evans. I do not know if anything turns on that.

20 I heard limited evidence on the calculation of damages, as the values identified in para. 308 came from an exhibit and was essentially agreed to represent the total amount of fees paid to Mr. Evans from the relevant players over the two periods.

21 I also heard limited evidence as to TSC's loss of profits on the revenues. Their evidence was that they could have maintained the Eastern European pipeline without increasing expenses, so the lost revenue from clients taken by Mr. Evans was essentially pure profit. I rejected that notion at Trial Judgment para. 304, holding that there would still have been considerable expenses involved with those clients, such that the gross revenues would not have been purely profit.

22 The only evidence as to the actual "profitability" of Mr. Evans' clients while he was at TSC was the memo prepared by Mr. Winter in connection with salary negotiations that demonstrated that, taking Mr. Evans' salary and expenses into account, as well as the costs of Messrs. Henys and Kadlecek, there was little profit to TSC. This calculation was, of course, used by TSC to oppose any higher salary demands by Mr. Evans. In the context of this trial it could be a basis to deny TSC any award of damages - arguably TSC lost nothing when Mr. Evans left. TSC could have simply shut the pipeline down.

23 TSC did not produce their financial statements to demonstrate their actual profit from the affected clients, nor was any expert evidence called to quantify their financial losses. TSC has essentially relied on the liquidated damages provision in the agreement, whose application I have rejected.

24 In assessing damages, I referred at para. 307 to Germain J.'s decision in *Travel Co. v. Keeling*, 2009 ABQB 399, 473 A.R. 336 (Alta. Q.B.):

> [307] As with Germain J. in The Travel Company (at paras. 36-41), I prefer the approach that looks at the loss actually sustained by the claimant so the claimant is restored to the same position as it would have been in but for the breach by the defaulting party.

25 Similarly, in *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, 1996 ABCA 7289 (Alta. C.A) at para. 41, (1996), 184 A.R. 81 (Alta. C.A.) damages were awarded on the following basis:

Fitzpatrick C.J.C. endorsed the approach to damages in *Chaplin v. Hicks*, [1911] 2 K.B. 786 (Eng. C.A.) and concluded:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.
>
> [Emphasis added.]

In short, to calculate damages the Court plays the evidentiary hand that it was dealt.

28 There is also policy basis to this approach; a party that fails to prove or challenge damages cannot argue against court exercise of that discretion. For example, in *Brown v. Silvera*, 2011 ABCA 109, 65 E.T.R. (3d) 169 (Alta. C.A.) a party who owned the corporations refused to provide information that would allow accurate valuation (para. 106). Chief Justice Fraser concluded that party then had no right to challenge the at-trial damage calculation as insufficiently accurate:

> The trial judge was entitled to determine the value of the corporate property based on that evidence, especially since Brown refused to provide relevant evidence for a more exact accounting of his gains.

29 Here, one way to approach damages is to observe that in the two year restriction period Mr. Evans generated approximately $450,000.00 in revenues from former TSC clients who followed him. Had he remained with TSC at his previous salary, he would have earned $150,000.00 per year, or $300,000.00. That would have left $150,000.00 to cover expenses and to contribute to TSC's profits. Not all of Mr. Evans' clients followed him. Arguably, TSC might well have been able to service the existing clients at a lesser cost than Mr. Evans' salary.

30 As noted in *Anderson, Smyth & Kelly*, the innocent party's damages may be evaluated from the approximate amount by which the wrongdoer has been unjustly enriched. Mr. Evans' corporation's financial statements show that his initial activities were not hugely profitable, but his expenses were not tested at trial.

over the two year prohibition period. Indeed, that amount may well be generous. However, when balanced with Mr. Evans' wrongful conduct and the amount of revenue he is still entitled to retain to pay his expenses and contribute to his profit, I do not resile from that assessment.

39 Any greater amount would, in my view, amount to a windfall to TSC. Any lesser amount would permit Mr. Evans to unfairly keep more of the revenues he should not have had in the first place. Neither party should have any windfall in these circumstances. While my approach to damages can only be an approximate balancing exercise, it is a *necessary* approximation.

5. Conclusion and Costs

40 This conclusion reduces the damage award to $181,385.20 US and $1,771.87 Can. The amount of $7,082.63 US should not have been awarded and my decision is amended to delete that amount.

41 The fee payable by Mr. Meszaros should not be reduced for mitigation issues.

42 I am grateful to counsel for pointing out the error in reasoning. I regret not spending more time on the damage assessment. Most of the trial was consumed with evidence and argument over liability. The trial ran longer than the originally scheduled time, and as a consequence there was undoubtedly some compression of the evidence to accommodate the extra time needed to finish.

43 In these circumstances, there will be no costs payable in relation to the appearance and arguments submitted to correct the judgment.

Order accordingly.

TAB 3

2016 ABQB 280
Alberta Court of Queen's Bench

Waquan v. Canada (Attorney General)

2016 CarswellAlta 893, 2016 ABQB 280, [2016] A.W.L.D. 1995, [2016] A.W.L.D. 2004, 266 A.C.W.S. (3d) 464, 37 Alta. L.R. (6th) 422, 92 C.P.C. (7th) 220

Archie Waquan, Norbert Poitras and Amanda Poitras on Their Own Behalf and on Behalf of the Members of the Mikisew Cree First Nation, Plaintiffs and The Attorney General of Canada, Former Deputy Minister of Aboriginal Affairs and Northern Development Michael Wernick, Her Majesty the Queen In Right of Alberta, Neil Reddekopp, Shaun Mellen, Ron Stevenson, Sheila Read, Robert Janes, Robert Freedman, N. Kate Kempton, Cook Roberts LLP, Olthuis, Kleer, Townshend LLP, Miller Thomson LLP, John Doe I, John Doe II, Jane Doe I, and Jane Doe II, Defendants

Neil Wittmann C.J.Q.B.

Judgment: May 16, 2016
Docket: Calgary 1501-01939

Proceedings: refusing reconsideration / rehearing *Mikisew Cree First Nation v. Canada (Attorney General)* (2016), 2016 CarswellAlta 573, 2016 ABQB 191, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: J.R.W. Rath, for Plaintiffs
D.P. Mallon, Q.C., for Mikisew Cree First Nation
M. Kindrachuk, Q.C., C. Ashcroft, for Defendants, Attorney General of Canada and Former Deputy Minister of Aboriginal Affairs and Northern Development Michael Wernick
J.J.L. Hunter, Q.C., for Defendants, Robert Janes, Robert Freedman, Cook Roberts LLP and Miller Thomson LLP
J.B.C. Champion, Q.C., for Defendants, N. Kate Kempton and Olthius, Kleer, Townshend LLP

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.vi Miscellaneous

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Miscellaneous

Decision was rendered granting application for order striking out action — Judgment was reserved — Before reasons were issued, Federal Court issued "H" decision that plaintiffs contended was applicable to present case — Plaintiffs requested that present decision be reconsidered — Request denied — H decision was from trial division of Federal Court of Canada, and it was not binding on Court of Queen's Bench — Existence of contrary, non-binding decision was insufficient to show sort of plain and manifest error that R. 9.13 of Alberta Rules of Court was intended to allow court to correct — It was not apparent that H decision had, as plaintiffs contended, "come to exact opposite conclusion" to decision in present case — H decision offered no new analysis to circumstances in present case.

Table of Authorities

Cases considered by *Neil Wittmann C.J.Q.B.*:

Evans v. Sports Corp. (2011), 2011 ABQB 478, 2011 CarswellAlta 1318, 85 B.L.R. (4th) 313, 47 Alta. L.R. (5th) 254, [2012] 3 W.W.R. 209, 523 A.R. 80 (Alta. Q.B.) — considered

Horse Lake First Nation v. R. (2015), 2015 FC 1149, 2015 CarswellNat 5461, 2015 CF 1149, 2015 CarswellNat 9094 (F.C.) — distinguished

Lewis Estates Communities Inc. v. Brownlee LLP (2013), 2013 ABQB 731, 2013 CarswellAlta 2547 (Alta. Q.B.) — considered

Moulton Contracting Ltd. v. British Columbia (2013), 2013 SCC 26, 2013 CarswellBC 1158, 2013 CarswellBC 1159, 357 D.L.R. (4th) 236, 43 B.C.L.R. (5th) 1, [2013] 7 W.W.R. 1, 443 N.R. 303, (sub nom. *Behn v. Moulton Contracting Ltd.*) [2013] 3 C.N.L.R. 125, 333 B.C.A.C. 34, 571 W.A.C. 34, (sub nom. *Behn v. Moulton Contracting Ltd.*) [2013] 2 S.C.R. 227 (S.C.C.) — referred to

Paniccia Estate v. Toal (2012), 2012 CarswellAlta 48, 2012 ABQB 11, 90 C.C.L.T. (3d) 310, 57 Alta. L.R. (5th) 124, 16 C.P.C. (7th) 18, [2012] 6 W.W.R. 162, 521 A.R. 73 (Alta. Q.B.) — considered

Soldier v. Canada (Attorney General) (2009), 2009 MBCA 12, 2009 CarswellMan 36, [2009] 4 W.W.R. 455, [2009] 2 C.N.L.R. 362, 236 Man. R. (2d) 107, 448 W.A.C. 107 (Man. C.A.) — considered

Rules considered:

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

R. 339 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.2 — considered

R. 9.13 — considered

REQUEST by plaintiffs for reconsideration of judgment reported at *Mikisew Cree First Nation v. Canada (Attorney General)* (2016), 2016 ABQB 191, 2016 CarswellAlta 573 (Alta. Q.B.), granting application to strike out action.

Neil Wittmann C.J.Q.B.:

Background

1 On March 31, 2016 I issued Reasons for Judgment in *Mikisew Cree First Nation v. Canada (Attorney General)*, 2016 ABQB 191 (Alta. Q.B.). On April 21, 2016, counsel for the Plaintiffs Archie Waquan, Norbert Poitras and Amanda Poitras referred me to paragraphs 35 - 40 of the decision of the Federal Court in *Horse Lake First Nation v. R.*, 2015 FC 1149 (F.C.), and requested that I reconsider my decision in *Waquan* prior to the entry of judgment in that matter. The decision in *Horseman* had been issued after I had reserved judgment in *Waquan*, but before my Reasons were issued. On April 27, 2016 I asked counsel for the Plaintiffs and for the Defendant Attorney General to provide me with written submissions in respect of the request for a reconsideration.

Analysis

2 Rule 9.13 of the *Alberta Rules of Court* ("ARC") provides:

> At any time before a judgment or order is entered, the Court may
>
> (a) vary the judgment or order, or
>
> (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

3 As has been noted in *Evans v. Sports Corp.*, 2011 ABQB 478 (Alta. Q.B.), *Paniccia Estate v. Toal*, 2012 ABQB 11 (Alta. Q.B.) and *Lewis Estates Communities Inc. v. Brownlee LLP*, 2013 ABQB 731 (Alta. Q.B.), ARC 9.13 represents an expansion of judicial discretion from that contained in the predecessor Rule 339,

which allowed the Court to make corrections in respect of clerical mistakes or errors arising from any "accident, slip or omission". Nevertheless, the discretion under ARC 9.13 is not boundless. In *Evans*, ARC 9.13 was applied to correct the interpretation of a contractual term that all parties agreed was in error. In *Paniccia Estate*, the Rule was applied to correct what the trial judge later concluded was an incorrect statement of the law that would have led to an untenable result. In *Lewis Estates*, Russell Brown J. held, at para.33:

> It makes sense to apply R. 9.13 to correct the sorts of errors identified in *Evans* and *Paniccia Estate*. Doing so not only averts an injustice but saves litigants the costs and delay of bringing an otherwise unnecessary appeal. R. 9.13 is not, however, a vehicle for seeking reconsideration of a judgment call such as the treatment of evidence or the finding of facts. An unsuccessful litigant's remedy in such a case lies only in an appeal. And, because judgments need not and often will not specifically address every argument put before the Court, where a Court is invited to reconsider under R. 9.13 a matter that it has specifically addressed in its original judgment, the putative error ought be plain and manifest. Otherwise, R. 9.13 would quickly become a vehicle for litigants seeking second kicks at the can. This concern also explains why the test for the admission of fresh evidence on appeals is so high; the trial is designed to determine the facts.

4 The principles of fairness, justice and efficiency set out in ARC 1.2 weigh in favour of an interpretation of ARC 9.13 that allows the Court to correct a plan and manifest error, but does not allow another "kick at the can".

5 The Plaintiffs' request for a reconsideration is denied for two reasons. First, *Horseman* is a decision of the trial division of the Federal Court of Canada. It is not binding on this Court. The existence of a contrary, non-binding decision is insufficient to show the sort of plain and manifest error that ARC 9.13 is intended to allow the Court to correct. To the extent that trial courts come to contrary decisions, it is the task of appellate courts to resolve the discrepancies.

6 That said, non-binding decisions of other Courts on the same issue and on similar facts may be persuasive. So too with decisions of other judges of this Court. I hasten to add however, that it has never been the practice for reconsideration to occur simply because a non-binding, contrary decision, is rendered.

7 Here, the second reason for denying the request for a reconsideration is that it is not apparent to me that the Federal Court Trial Division in *Horseman* has, as the Plaintiffs contend, "come to the exact opposite conclusion" to the decision

in *Waquan*. In *Horseman*, the plaintiffs applied to certify an action as a class proceeding. As in *Soldier v. Canada (Attorney General)*, 2009 MBCA 12 (Man. C.A.), the issue was whether the annuity payments to which the plaintiffs were entitled under treaty must be adjusted to reflect changes in purchasing power. Zinn J., after considering, *inter alia*, *Soldier* and the decision of the Supreme Court of Canada in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26 (S.C.C.), concluded that it is not plain and obvious that the right to an annuity payment is a collective, rather than an individual, right such that the claim could not succeed as a class action. Nevertheless, Zinn J. declined to certify the class proceeding because (at para.71) there were no common issues of fact, because (at para.82) the claim would be better advanced as a representative action and because (at para.90) the proposed representative plaintiffs were not appropriate in the proposed class proceeding.

8 In short, the circumstances in *Horseman* were, as Zinn J. acknowledged at para.39, very similar to those in *Soldier*, which was considered by this Court at length in *Waquan*. Also, the right under treaty to an annuity payment is different from the right to take land "in severalty", is distinguishable. I agree with counsel for the Defendant Attorney General that the decision in *Horseman* offers no new analysis to the circumstances in the case at bar.

9 The Plaintiffs' request for a reconsideration of the decision in *Waquan* is denied.

10 Costs in favour of the Defendants who made a written submission will be awarded against the Plaintiffs on this reconsideration application in the sum of $1,500.00 to each Defendant who made a written submission.

Request denied.

End of Document

TAB 4

2013 ABQB 731
Alberta Court of Queen's Bench

Lewis Estates Communities Inc. v. Brownlee LLP

2013 CarswellAlta 2547, 2013 ABQB 731, [2013] A.J. No. 1394, [2014] A.W.L.D. 719, 236 A.C.W.S. (3d) 504

Lewis Estates Communities Inc., Jagare Ridge Communities Inc., and Country Club Tour Corp. (Operating As Raven Crest Golf & Country Club and River Ridge Golf Club), Applicants and Brownlee LLP, Respondent

Russell Brown J.

Heard: November 14, 2013
Judgment: December 10, 2013
Docket: Edmonton 1003-16479

Counsel: Todd A. Shipley, for Applicants
Daniel Hagg, Q.C., for Respondent

Subject: Public; Torts; Civil Practice and Procedure

Related Abridgment Classifications

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.f Accounting and refunding by solicitor
IX.5.f.iv Application for assessment, review, or taxation of account
IX.5.f.iv.A Entitlement to assessment or review

Headnote

Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review

In 2006, applicant group of golf course owners retained respondent law firm to represent them in challenge to new method of valuing golf course properties for tax assessment purposes — After negotiations failed to succeed, client instructed law firm to advance complaints with respect to 2007 and 2008 assessments, appeals of resulting decisions and complaints with respect to 2009 and 2010 assessments —

Over time, law firm rendered monthly accounts totaling $1,857,649.82 — Client obtained leave to review certain accounts notwithstanding they were issued more than six months prior to client taking out appointment on basis of concerns about duplicative work for earlier and later assessment complaints — Client brought application to vary order to permit review of other accounts, specifically five issued in respect of appeals in 2009 and 2010, on basis of duplicative work from assessment complaints — Application dismissed — While R. 9.13 of Rules of Court permitted court to vary order or judgment, there no basis to do so here — Court was not required to correct any objectively demonstrable error of fact or law — Proposed extension did not logically follow from reasons regarding duplication between complaints.

Table of Authorities

Cases considered by *Russell Brown J.*:

Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.) (2009), 2009 ABCA 258, 2009 CarswellAlta 1103, [2009] 11 W.W.R. 450, 70 R.F.L. (6th) 32, 9 Alta. L.R. (5th) 225, 462 W.A.C. 188, 94 Admin. L.R. (4th) 295, 460 A.R. 188, 246 C.C.C. (3d) 170 (Alta. C.A.) — considered

Beier v. Proper Cat Construction Ltd. (2013), 35 R.P.R. (5th) 105, 2013 ABQB 351, 2013 CarswellAlta 1141 (Alta. Q.B.) — referred to

Evans v. Sports Corp. (2011), 2011 ABQB 478, 2011 CarswellAlta 1318, 47 Alta. L.R. (5th) 254, 523 A.R. 80, 85 B.L.R. (4th) 313, [2012] 3 W.W.R. 209 (Alta. Q.B.) — considered

Lewis Estates Communities Inc. v. Brownlee LLP (2013), 2013 ABQB 508, 2013 CarswellAlta 1704 (Alta. Q.B.) — referred to

O'Hanlon Paving Ltd. v. Serengetti Developments Ltd. (2013), 2013 ABQB 428, 2013 CarswellAlta 1426 (Alta. Q.B.) — referred to

Paniccia Estate v. Toal (2012), 2012 CarswellAlta 48, 2012 ABQB 11, [2012] 6 W.W.R. 162, 16 C.P.C. (7th) 18, 521 A.R. 73, 57 Alta. L.R. (5th) 124, 90 C.C.L.T. (3d) 310 (Alta. Q.B.) — considered

Paniccia Estate v. Toal (2012), 99 C.C.L.T. (3d) 50, 2012 CarswellAlta 2159, 2012 ABCA 397, 71 Alta. L.R. (5th) 411, [2013] 3 W.W.R. 1, 539 A.R. 349, 561 W.A.C. 349 (Alta. C.A.) — referred to

Peters v. Wilson Estate (2011), 2011 CarswellAlta 1979, 2011 ABQB 689, 528 A.R. 362 (Alta. Q.B.) — considered

R. (A.) v. Alberta (Director, Child, Youth & Family Enhancement Act) (2013), 2013 ABQB 715, 2013 CarswellAlta 2495 (Alta. Q.B.) — considered

Statutes considered:

Fatal Accidents Act, R.S.A. 2000, c. F-8

Generally — referred to

Rules considered:

III. Analysis

17 Rule 9.13 provides:

> Re-opening case
>
> At any time before a judgment or order is entered, the Court may
>
> (a) vary the judgment or order, or
>
> (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.

18 The predecessor Rule 339, contained in the *Alberta Rules of Court*, AR 390/1968, provided that "[c]lerical mistakes in judgments or orders, or errors therein arising from any accident, slip or omission may at any time be corrected by the court on motion." In *Evans v. Sports Corp.*, 2011 ABQB 478 (Alta. Q.B.) at paras 13 and 15 [*Evans*], my colleague Graesser J said that Rule 9.13 "appear[s] to significantly expand the authority" from that provided under predecessor Rule 390, leaving the Court with "extremely broad authority to do what [it thinks] is correct in the circumstances." In *Evans*, both parties agreed that the Court had misread a provision of the parties' contract and Graesser J, having determined that this affected the calculation of damages, reconsidered and revised his damages award accordingly.

19 My colleague Shelley J relied upon *Evans* in *Paniccia Estate v. Toal*, 2012 ABQB 11 (Alta. Q.B.), aff'd 2012 ABCA 397 (Alta. C.A.) [*Paniccia Estate*] in deciding to correct an incorrect statement of law regarding claims under the *Fatal Accidents Act*, RSA 2000, c F-8. In doing so, she invoked Rule 1.2, which describes the purpose of the *Rules of Court* as provision of a fair and just judicial resolution of disputes in a timely and cost effective way and, in particular (*inter alia*) to facilitate the quickest means of resolving a claim at the least expense. In light of the explicit authority contained in Rule 9.13 and the purpose of the *Rules of Court* as contained in Rule 1.2, Shelley J decided that a judge may investigate whether error exists in a judgment and, when an error is identified, consider whether the defect warrants correction. She identified the benefits of such judicial intervention as including the avoidance of an otherwise unnecessary and costly appeal; and, where an appeal is nonetheless pursued, the benefit of the appeal court having a more fully developed trial consideration of the facts and law. The circumstances in which that later

benefit might arise, she said, include where an issue had not been fully apprehended during preparation of the judgment.

20 I agree with my colleagues Graesser and Shelley JJ that Rule 9.13 represents a considerable expansion of judicial discretion from that contained in the predecessor Rule 339. My discretion is, however, not boundless. Whether I *can* undertake the reconsideration sought by the Applicants is governed by the limits of Rule 9.13. And, even if those limits allow for such reconsideration, there remains the question of whether I *should* do so.

21 As to whether I *can* reconsider my decision, Rule 9.13 confers two powers on me.

22 As to the first power — to vary a judgment or order under R. 9.13(a) — the following can be said:

1. The Court may act on an application by a party, or *sua sponte* (that is, on its own application); and

2. The Court is limited to "varying" its "judgment or order".

23 As to the second power — on application, and if satisfied that there is a good reason to do so, to hear more evidence and change or modify my judgment, or order or reasons for it under R. 9.13(b) — the following can be said:

1. The Court may act only on application by party;

2. The Court may "hear more evidence and "change or modify its judgment or order or reasons for it"; and

3. The Court must be satisfied that there is good reason to make such a "change" or "modification]".

24 Read in light of the other, the scope of each of these powers is curious. The Court may "vary" a judgment, or an order, on its own motion. It may, however, "change" or "modify" not only its judgment or order, but its own reasons, so long as one of the parties asks it to do so.

25 It is possible that the latter power is also conditioned upon the Court hearing more evidence. That depends upon whether the "and" in Rule 9.13(b)'s statement that the Court may "hear more evidence *and* change or modify its judgment or order or reasons for it" (emphasis added) is conjunctive (in which case the Court *must* hear more evidence) or disjunctive (in which case the Court need not).

26 Assuming that puzzle is solved so as not to preclude the outcome the Applicants seek, there remains the language of the Rule itself. The Applicants ask me to "vary" my September 6, 2013 judgment. Is that the same as to "change" or "modify" it? And, does it matter that Rule 9.13(a) only allows me to vary a "judgment or order", whereas R. 9.13(b) allows me to change or modify my "judgment or order *or reasons for it*"? (Emphasis added.) In other words, does the inclusion in R. 9.13(b) of a power to change or modify specific to my reasons operate to preclude my power to vary my reasons for judgment? This matters, because as noted my reasons for judgment specifically addressed the very issue that the Applicants ask me to vary. And, does the conditioning of an exercise of the power under R. 9.13(b) upon the Court's satisfaction that a good reason exists for doing so mean that an exercise of the Court's power under R. 9.13(a) does not require a good reason? One supposes not, but the Rule strictly construed suggests otherwise.

27 I do not propose to resolve these issues here because I have decided that, even assuming that I am empowered by R. 9.13 to vary (or change, or modify) my judgment (or my reasons for judgment) in the manner proposed by the Applicants, I should not do so.

28 By way of explanation, I agree with Graesser and Shelley JJ that — where R. 9.13's threshold is met — it expands the scope for correcting errors in judgments from that permitted by the predecessor Rule 339. And, I agree with Shelley J that, in deciding whether to exercise that discretion so as to correct an error in that original judgment, one ought to have in mind the purpose of the Rules, the avoidance of unnecessary and costly appeals, and (where an appeal is brought in any event) the desirability of the Court of Appeal having a chambers or trial judge's most fully developed consideration of the facts and law.

29 That does not mean, however, that the power ought to be exercised wherever R. 9.13's threshold, with all its vagaries, is met.

30 While pronounced before the adoption of the present *Rules of Court*, this statement of Côté JA (in Chambers) in *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)*, 2009 ABCA 258 (Alta. C.A.) at paras 10 & 11 remains apposite:

> ... [A] number of more recent cases have pointed out that it is not enough simply to say that the judge has jurisdiction to reopen the matter. The question is whether he **should** reopen the matter, and under what circumstances.

> ... [T]he cases all seem to agree on one thing. That is that the Courts should be very sparking in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings will result ....
>
> (Emphasis in original.)

31 I should add that I do not take the Applicants here as having sought to advance a new argument, or as having held back, or as otherwise not having put their best foot forward at the hearing that led to my September 6, 2013 judgment. The point remains however that, while as Shelley J noted in *Paniccia Estate* there are good reasons for the Court to exercise its discretion under R. 9.13 in some circumstances, there are also good reasons for the Court to be slow to do so in other circumstances. Finality and certainty — two important objectives of any judicial process — militate against re-opening a pronounced decision. And, R. 1.2, which was relied upon in *Paniccia Estate* to lend force to R. 9.13's exercise, also cuts the other way. That is, a fair and just judicial resolution of disputes in a timely and cost effective way may just as easily weigh against re-opening a decision (bearing in mind that it seeks to promote *resolution*) as for it.

32 Whether the powers conferred upon the Court under R. 9.13 are to be exercised is therefore circumstance-dependent. In *Evans*, it was exercised to correct a reading of a contractual term that all parties agreed was in error. In *Paniccia Estate*, it was exercised to correct an incorrect statement of law. These were objectively demonstrable errors. The circumstances of *Evans* and *Paniccia Estate* stand in contrast to those which led my colleague Hall J to *decline* to exercise his discretion under R. 9.13(b) in *Peters v. Wilson Estate*, 2011 ABQB 689 (Alta. Q.B.) [*Peters*]. Justice Hall had granted the defendant summary judgment. The plaintiff then applied under R. 9.13, raising three arguments that he said Hall J had not considered properly. In addition to observing that two of the arguments were contradicted by appellate authority, he also pointed out (at para 11) that the remaining argument (about "expenses that were made by the Plaintiff for seed and seeding operations incurred after the original lease had expired") had been dealt with in his original judgment. There being no good reason to modify or change his decision, he did not do so.

33 It makes sense to apply R. 9.13 to correct the sorts of errors identified in *Evans* and *Paniccia Estate*. Doing so not only averts an injustice but saves litigants the costs and delay of bringing an otherwise unnecessary appeal. R. 9.13 is not, however, a vehicle for seeking reconsideration of a judgment call such as the treatment of evidence or the finding of facts. An unsuccessful litigant's remedy in such a case lies only in an appeal. And, because judgments need not and often will not specifically address every argument put before the Court, where a Court is invited to reconsider under R. 9.13 a matter that it *has* specifically addressed in its original judgment, the putative error ought be plain and manifest. Otherwise, R. 9.13 would quickly become a vehicle for litigants seeking second kicks at the can. This concern also explains why the test for the admission of fresh evidence on appeals is so high; the trial is designed to determine the facts.

34 What the Applicants seek of me is closer to what the applicants sought of Hall J in *Peters* than the request to correct a clear error of fact in *Evans* or clear misstatement of law in *Paniccia Estate*. Like the argument about the timing of expenses of seeding and seeding operations in *Peters*, the question of whether MGB-level work in respect of the 2007 and 2008 tax assessment years ought to be included among those accounts to be put before the review officer was specifically addressed by me in paragraph 86 of my September 6, 2013 judgment, with reasons that, in the light of the evidence before me are not plainly and manifestly displaced by the Applicants' submissions. This need not require agreement between the parties as to whether there was an error. While such agreement was present in *Evans*, it was not for example in *Paniccia Estate*. Rather, the evidence and law put before the Court ought to make an applicant's case so compelling that the likelihood that it has correctly identified an error is very high. This is, I note, essentially the test for obtaining summary judgment. (See Wakeling J's useful formulation of the test in *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.) at paras 56, 59-68, 70; and *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.) (at paras. 38-41).) A lower standard than this would encourage rehearings which consume private and public resources for no valid purpose. As well, the interpretation and application of rules in such a way as to create the possibility of inconsistent orders brings the administration of justice into disrepute. (*R. (A.) v. Alberta (Director, Child, Youth & Family Enhancement Act)*, 2013 ABQB 715 (Alta. Q.B.) at para 36: "[i]t is not in the public interest to devote public or private resources to relitigate controversies [featuring common fact patterns and legal issues].")

35 Mr McGee's concerns regarding duplication of work did not implicate the work done on the MGB appeal in respect of the 2007 and 2008 assessment years.

His evidence, it will be recalled, was that it was his understanding that "the issues for the 2007, 2008, 2009 and 2010 years are the same." Elaborating upon that, he said that "Brownlee LLP made submissions to the ARB and to the MGB that the issues were the same and that *the MGB's decision for the 2007 and 2008 years would likely decide the 2009 and 2010 years.*" (Emphasis added.) As I explained at paragraph 54, I took this affidavit as saying, as it did say, that "the costs of the appeals for the later years of 2009 and 2020 might ... be lower than those incurred in appealing the assessments for 2007 and 2008." I did not take it as saying, and it did not say, that the costs of MGB appeals for 2007 and 2008 might be lower than those incurred in the ARB-level work for 2007 and 2008.

36 Nor does it logically follow, merely by reason of Mr McGee having said (and my having accepted at paragraphs 54 and 75 of my September 6, 2013 judgment) that the submission as to similarity of issues regarding assessment years 2007 through 2010 inclusive had been made both to the ARB *and to the MGB*, that I must conclude that the work done at the ARB in connection with the 2007 and 2008 assessment years would be duplicated by the work done at the MGB in connection with those years. I had, for example, no evidence before me about the respective processes followed at the ARB and at the MGB. This argument is still met with the problem that Mr McGee's evidence does not — as I said in paragraph 86 of my September 6, 2013 reasons for judgment — support a reasonable basis for supposing that the work done on the MGB appeal for the 2007 and 2008 taxation years would have been duplicative to the work done on those assessments at the ARB level. Rather, Mr McGee's evidence merely allowed for me to conclude — as I did — that there was a reasonable basis for supposing that the costs of the appeals for the later years of 2009 and 2010 should have been lower than those incurred in appealing the assessments for 2007 and 2008, and that the timing of this duplication provided the Applicants with a reasonable explanation for their delay in seeking a timely review of some of Brownlee's accounts.

37 In the absence of evidence to support the extension of my earlier judgment permitting review of certain limited accounts to the accounts reflecting work done on the MGB appeals for assessment years 2007 and 2008, I cannot find that the Applicants' case that I ought to have done so is so compelling as to support a variation of my order under R. 9.13.

IV. Conclusion

38 The application is dismissed.

39 If the parties cannot agree on costs, they may be spoken to within 60 days of these reasons.

Application dismissed.

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2012 ABQB 11
Alberta Court of Queen's Bench

Paniccia Estate v. Toal

2012 CarswellAlta 48, 2012 ABQB 11, [2012] 6 W.W.R. 162, [2012] A.W.L.D. 1178, [2012] A.W.L.D. 1181, [2012] A.W.L.D. 1219, [2012] A.W.L.D. 1220, [2012] A.W.L.D. 1221, [2012] A.W.L.D. 1222, [2012] A.W.L.D. 1274, [2012] A.W.L.D. 1275, [2012] A.W.L.D. 1282, [2012] A.W.L.D. 1283, [2012] A.J. No. 31, 16 C.P.C. (7th) 18, 216 A.C.W.S. (3d) 1026, 521 A.R. 73, 57 Alta. L.R. (5th) 124, 90 C.C.L.T. (3d) 310

Angela Paniccia, as Executrix for the Estate of Lino Paniccia for the Benefit of the Estate of Lino Paniccia, Angela Paniccia, Danny Paniccia, Melissa Paniccia, Selena Waugh, Jason Paniccia, and Her Majesty the Queen in Right of Alberta (Plaintiffs) and Dr. Stephen Toal (Defendant)

D.L. Shelley J.

Heard: September 27 - November 24, 2011
Judgment: January 9, 2012
Docket: Edmonton 1003-07117

Proceedings: additional reasons to *Paniccia Estate v. Toal* (2011), 2011 ABQB 326, 2011 CarswellAlta 1372, 88 C.C.L.T. (3d) 89, 51 Alta. L.R. (5th) 299 (Alta. Q.B.)

Counsel: B.A. Guido, A.W. Heil, for Plaintiffs
V.R. Prather, A.L. Froese, for Defendant

Subject: Civil Practice and Procedure; Torts; Estates and Trusts; Family

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.c After judgment entered
XXII.16.c.i Error or inadvertence
Civil practice and procedure
XXIV Costs

XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.B Misconduct
Remedies
I Damages
I.5 Damages in tort
I.5.a Personal injury
I.5.a.i Special damages (pre-trial pecuniary loss)
I.5.a.i.A Expenditures
I.5.a.i.A.9 Medical and dental expenses
Remedies
I Damages
I.10 Practice
I.10.i Miscellaneous
Torts
XVI Negligence
XVI.12 Fatal accidents acts
XVI.12.c Dependant's claim for damages
XVI.12.c.iii Defences
XVI.12.c.iii.D Miscellaneous

Headnote

Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Error or inadvertence

Incorrect statement of law — Deceased patient developed and died from stomach cancer ten months after diagnosis — Patient, and later his estate, and family successfully brought action against physician — Parties agreed on reduced scope of issues and quantum of damages — Trial judge held that physician's negligence caused patient to die of stomach cancer six months earlier than if he had received timely diagnosis — Paragraph 47 of trial decision stated that Fatal Accidents Act did not operate where there was negligence and as result person dies for certain cause, but at earlier rather than later date — As result, physician refused to pay bereavement damages pursuant to s. 8 of Act and special damages relating to alternative therapies patient underwent — Parties made submissions as to whether trial decision required revision — Trial decision was revised by deleting paragraph 47 — Physician was required to pay agreed upon damages — Rule 9.13(a) of Alberta Rules of Court allowed judge to investigate whether error existed in judgment, and whether defect warranted correction — Statement in paragraph 47, that bereavement damages in s. 8 of Act were not available where negligence shortened life, was incorrect — Such error required correction by R. 9.13(a) of

Rules — Correction would hopefully make appeal of issue unnecessary or provide benefit to appellate court if appeal were taken — Potential mischief of incorrect statement of law confusing future judicial analysis deserved immediate attention — Paragraph 47 was obiter to judgment as agreed issues did not challenge whether bereavement damages were available.

Remedies --- Damages — Practice — Miscellaneous

Application to vary judgment — Deceased patient developed and died from stomach cancer ten months after diagnosis — Patient, and later his estate, and family successfully brought action against physician — Parties agreed on reduced scope of issues and quantum of damages — Trial judge held that physician's negligence caused patient to die of stomach cancer six months earlier than if he had received timely diagnosis — Paragraph 47 of trial decision stated that Fatal Accidents Act did not operate where there was negligence and as result person dies for certain cause, but at earlier rather than later date — As result, physician refused to pay bereavement damages pursuant to s. 8 of Act and special damages relating to alternative therapies patient underwent — Parties made submissions as to whether trial decision required revision — Trial decision was revised by deleting paragraph 47 — Physician was required to pay agreed upon damages — Rule 9.13(a) of Alberta Rules of Court allowed judge to investigate whether error existed in judgment, and whether defect warranted correction — Statement in paragraph 47, that bereavement damages in s. 8 of Act were not available where negligence shortened life, was incorrect — Such error required correction by R. 9.13(a) of Rules — Correction would hopefully make appeal of issue unnecessary or provide benefit to appellate court if appeal were taken — Potential mischief of incorrect statement of law confusing future judicial analysis deserved immediate attention — Paragraph 47 was obiter to judgment as agreed issues did not challenge whether bereavement damages were available.

Torts --- Negligence — Fatal accidents acts — Dependant's claim for damages — Defences — Miscellaneous

Whether reduced life expectancy cause of death — Deceased patient developed and died from stomach cancer ten months after diagnosis — Patient, and later his estate, and family successfully brought action against physician — Parties agreed on reduced scope of issues and quantum of damages — Trial judge held that physician's negligence caused patient to die of stomach cancer six months earlier than if he had received timely diagnosis — Paragraph 47 of trial decision stated that Fatal Accidents Act did not operate where there was negligence and as result person dies for certain cause, but at earlier rather than later date — As result, physician refused to pay bereavement damages pursuant to s. 8 of Act and special damages relating to alternative therapies patient underwent — Parties made submissions as to whether trial decision required revision — Trial decision was revised by deleting

of loss of consortium damages authorized by the *Tort-feasors Act*, R.S.A. 2000, c. T-5, s. 2.1.

66 Though I will not conduct a detailed review of the history of legislation in Alberta that has dealt with the scope of tort action where the injured party dies, I agree with the analysis advanced by the Plaintiffs. That, however, is merely an additional basis on which to conclude that a 'death accelerated' is a 'death caused'.

67 This issue requires an exercise of common-sense in light of the remedial function of the *FAA*. There is no logical basis to deny the family of a deceased tort victim their legislatively mandated bereavement and funeral expense awards. I therefore conclude that the statement of law in paragraph 47 is incorrect.

2. Should Paragraph 47 Be Revised?

68 I have concluded that the statement in paragraph 47, that s. 8 bereavement damages are not available where negligence shortens a life, is incorrect. The next step is to evaluate whether that error is one that requires correction by *Rule* 9.13(a).

69 I conclude that it does. In my consideration of *Rule* 9.13(a), I identified factors that are relevant where a judge considers revision of an order or judgment on the judge's own authority. Some of those factors are relevant here.

70 The Defendant asserted that the interpretation of the *FAA* was now a question for appeal. Perhaps so, but I hope that my more detailed analysis here will make an appeal on that issue unnecessary and save both parties the costs of a legal proceeding of that kind. If the Defendant does appeal my conclusion on this point, then the Court of Appeal will have the benefit of my analysis of the relevant law.

71 Another strong reason to correct the misstatement in paragraph 47 is that the incorrect statement of law may confuse future judicial analysis and incorrectly bind lower courts. This is a potential mischief that deserves immediate attention.

72 Last, paragraph 47 is ultimately irrelevant to the Trial Decision. Thus, varying that paragraph has no effect on the trial's outcome. The misstatement in paragraph 47 is *obiter*. Defence counsel argues the Trial Decision comment on the availability of *FAA* bereavement damages is not *obiter*. However she agreed that *obiter* is any statement that is "unnecessary to the disposition of the issues of the action." The scope of the issues for trial was set at the beginning of trial. That list of issues did not challenge whether the s. 8 bereavement damages were available to the Plaintiffs. That renders the paragraph 47 comment on the *FAA* as, at best, *obiter*.

TAB 6

2014 ABCA 17
Alberta Court of Appeal

Strathcona (County) v. Hansen

2014 CarswellAlta 27, 2014 ABCA 17,
[2014] A.W.L.D. 727, 236 A.C.W.S. (3d) 720

Strathcona County, Respondent (Plaintiff) and Charles G. Hansen, Appellant (Defendant)

Jean Côté J.A., Frans Slatter J.A., Brian O'Ferrall J.A.

Heard: January 8, 2014
Judgment: January 14, 2014
Docket: Edmonton Appeal 1303-0026-AC

Counsel: M.S. Solowan, for Respondent / Plaintiff
Charles G. Hansen, Appellant / Defendant, for himself

Subject: Civil Practice and Procedure; Public; Municipal
Related Abridgment Classifications
Remedies
II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.iii Enforcement of by-laws and statutes
Headnote
Remedies --- Injunctions — Availability of injunctions — Injunctions in specific contexts — Enforcement of by-laws and statutes
Injunction required owner to remove unauthorized developments from his land and to submit development application for any structures that remained — Order set out circumstances under which remedial work was to be done to owner's lands — Owner did not commence or complete necessary drainage work — Original order did not set out deadline for work — Respondent sought further order imposing timeline and further direction on how work was to be completed — Order allowed respondent to obtain quantity of free topsoil of suitable quality and stockpile it on owner's lands — When frost was out of ground, order permitted respondent to use topsoil to grade lands in accordance with drainage plan — Owner appealed order — Appeal dismissed — Owner did not show any reviewable error

in order — Owner showed no prejudice from fact that drainage plan was prepared by engineer and not surveyor — So long as plane was prepared by qualified expert it did not matter exact qualifications of expert — Nothing prevented court from specifying deadline when work was not done within reasonable time — Court was entitled to permit respondent to do grading, given owner showed no inclination to respect spirit of original injunction order.

Table of Authorities

Statutes considered:

Engineering and Geoscience Professions Act, R.S.A. 2000, c. E-11

s. 2(3) — referred to

Rules considered:

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

R. 323.1 [en. Alta. Reg. 269/97] — referred to

Alberta Rules of Court, Alta. Reg. 124/2010

R. 9.14 — considered

APPEAL by owner from order settting out circumstances under which certain remedial work was to be done to owner's lands.

Per curiam:

1 The appellant appeals an order granted January 16, 2013, which sets out the circumstances under which certain remedial work was to be done to the appellant's lands.

2 The dispute originates in an injunction granted in August of 2010. The injunction required the appellant to remove unauthorized developments from his land, and to submit a development application for any structures that remained. Clause 3 of the injunction permitted the respondent County to have an Alberta Surveyor prepare a drainage plan for the lands. Clause 4 of the injunction was mandatory, and required the appellant to "complete the site grading work in accordance with the drainage plan". It did not give the appellant the option to do the work only if he wanted to proceed with other aspects of the development. The fact that the injunction does not specifically state that the appellant was in breach is of no consequence, because a breach is implicit in Clause 4, and an order is not obliged to recite all the evidence and findings of the trial judge.

3 The County had a drainage plan prepared. Despite being given several opportunities by the chambers judge to explain when or how he would do the necessary drainage work, the appellant neglected to commence or complete it. Clause 4 of the injunction did not provide a timeline within which the site grading

work was to be completed. Accordingly, the County applied to the chambers judge for a further order imposing a timeline for the completion of that work, as well as further directions on how the work was to be completed.

4 The order under appeal allowed the respondent County to obtain a quantity of free topsoil of suitable quality, and stockpile it on the appellant's lands. When the frost was out of the ground, the order permitted the County to use this topsoil to grade the lands in accordance with the drainage plan. Some of the required work was actually done during the summer of 2013.

5 The appellant appeals the order. He argues firstly that the drainage plan was prepared by an engineer, not an Alberta Surveyor. The County prepared two drainage plans, and the appellant has not provided any competing plan, nor has he identified any technical inadequacy in the plan finally adopted. There is no evidence on this record that an Alberta Surveyor would have prepared any different type of plan. So long as the plan was prepared by a qualified expert, the exact qualifications of the expert are not essential, as engineers are allowed to do this type of surveying work: *Engineering and Geoscience Professions Act*, RSA 2000, c. E-11, s. 2(3). The appellant has shown no prejudice by what is at best a mere irregularity.

6 Secondly, the appellant argues that the Court was *functus officio*, and had no ability to amend or vary the original injunction order. However, R. 9.14 empowers a court to make a further order when that is needed in order to provide the litigants with the relief to which they are entitled under the original order. Here the original order did not set a deadline for doing the grading work, in which event the work should have been done within a "reasonable time". There was nothing to prevent the Court from specifying a deadline when the work was not done. The Court was also entitled to permit the County to do the grading itself, given that the appellant has not shown any inclination to respect the spirit of the original injunction order.

7 As pronounced at the end of the oral argument, the appellant has not demonstrated any reviewable error in the order, and the appeal is dismissed.

8 The parties agreed that the Court should deal with costs by a lump sum order. The respondent's factum was late. While there was no compelling reason given for the late filing, the appellant could not point to any prejudice, and accordingly the respondent should be entitled to one-half of the normal fees for a factum. The costs of this appeal are fixed at $2,000, plus $250 for disbursements, plus GST of $112.50, for a total of $2,362.50. The formal judgment of the Court should read: "The appeal is dismissed with costs to the respondent of $2,250 plus GST". Given that direction, R. 323.1 is waived.

Appeal dismissed.

End of Document

TAB 7

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of January 1, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, 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

Tax becomes debt to municipality

348 Taxes due to a municipality

(a) are an amount owing to the municipality,

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) are a special lien

(i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy, or

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

RSA 2000 cM-26 s348;2005 c14 s12

Fire insurance proceeds

349(1) Taxes that have been imposed in respect of improvements are a first charge on any money payable under a fire insurance policy for loss or damage to those improvements.

(2) Taxes that have been imposed in respect of a business are a first charge on any money payable under a fire insurance policy for loss or damage to any personal property

(a) that is located on the premises occupied for the purposes of the business, and

(b) that is used in connection with the business and belongs to the taxpayer.

1994 cM-26.1 s349

Tax certificates

350 On request, a designated officer must issue a tax certificate showing

(a) the amount of taxes imposed in the year in respect of the property or business specified on the certificate and the amount of taxes owing,

TAB 8

1995 CarswellOnt 374
Ontario Court of Justice (General Division), Commercial List

Hamilton Wentworth Credit Union Ltd.
(Liquidator of) v. Courtcliffe Parks Ltd.

1995 CarswellOnt 374, [1995] O.J. No. 1482, 23 O.R. (3d) 781,
28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, 55 A.C.W.S. (3d) 953

HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation v. COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR.

COURTCLIFFE PARKS LIMITED and COURTLAND L. WEAVER, SR. v. HAMILTON WENTWORTH CREDIT UNION LIMITED in Liquidation, DONALD BABB, JOHN CALDERWOOD, JOHN EDMONDS, ARNOLD GEORGIAN, GARFIELD WOODS, ROY J. PARKIN and MICHAEL GREEN

R.A. Blair J.

Judgment: May 30, 1995
Docket: Docs. B117/92 and 92-CQ-20023

Counsel: *Rob B. Thibodeau*, for receiver Deloitte & Touche Inc.
Lee A. Pinelli, for Corporation of the town of Flamborough.
John M. Hovland, for Hamilton Wentworth Credit Union Limited, in liquidation.

Subject: Corporate and Commercial; Insolvency; Public; Civil Practice and Procedure; Tax — Miscellaneous; Municipal

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.a General principles
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iii Costs
Municipal law
XXI Tax collection and enforcement

XXI.7 Remedies available to municipality
XXI.7.e Priorities
XXI.7.e.iii Miscellaneous
Municipal law
XXII Tax sales
XXII.1 Nature and scope of legislation

Headnote

Municipal law --- Tax collection and enforcement — Remedies — Municipality — Priorities — Miscellaneous priorities
Municipal law --- Tax sales — Nature and scope of legislation
Receivers — Costs and remuneration — Priorities — Municipality's claim for taxes having priority over receiver's claim for fees and disbursements by virtue of s. 382 of Municipal Act and Municipal Tax Sales Act — Municipal Act, R.S.O. 1990, c. M.45, s. 382 — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.
Receivers — Order appointing receiver — Court having jurisdiction to add leave requirement in receivership order but not having jurisdiction to interfere with or abridge scheme set out in Municipal Tax Sales Act as part of process of granting leave — Municipal Tax Sales Act, R.S.O. 1990, c. M.60.
The plaintiff was appointed receiver and manager of the assets and property of a debtor company. The only asset of the debtor consisted of a trailer park, which it was operating as an illegal non-conforming use. The estimated market value of the property was $500,000; however, total municipal tax arrears exceeded $559,000. The municipality took the position that it was entitled and obliged to pursue its remedies of sale to collect tax arrears under the *Municipal Tax Sales Act* (Ont.). The receiver argued that the municipality was barred from taking such steps by virtue of a "no proceedings without leave" provision in the receivership order appointing it as receiver and manager. The receiver also argued that it was entitled to payment of its fees and disbursements for preserving the property in priority to the payment of the municipality's taxes and it brought a motion for such a declaration. The municipality brought a cross-motion for leave to exercise its tax sale rights and remedies under the *Municipal Tax Sales Act*.

Held:

The motion was dismissed and the cross-motion was allowed.
A court has jurisdiction to make a receivership order that any party must first obtain leave before commencing any proceedings in respect of the assets of the debtor. The municipality was not, however, to be denied leave in seeking to pursue a statutorily prescribed remedy. The court had no jurisdiction to impose terms of sale different from those set out in the *Municipal Tax Sales Act* as part of the process of granting leave. The Act sets out a complete statutory code respecting the sale of lands for the recovery of municipal tax arrears and for the disposition

of the proceeds from such sales. The court had no authority to interfere with or impose a different scheme.

There was no discretion, in view of the provisions of the *Municipal Tax Sales Act* and s. 382 of the *Municipal Act* (Ont.), for a receiver's claim for fees and disbursements to have priority over a municipality's claim for taxes.

A receiver and manager is an officer of the court. That position does not provide it with carte blanche to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. Although a court-appointed receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain. There must be an air of commercial reality to its efforts.

Table of Authorities

Cases considered:

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.) — *referred to*

Crédit foncier franco-canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. T.D.), affirmed (1966), 56 W.W.R. 623 (note) (Alta. C.A.) — *referred to*

Great West Life Assurance Co., Re, [1927] 3 W.W.R. 302 (Man. K.B.) — *considered*

Oberman v. Mannahugh Hotels Ltd., 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487, 4 Man. R. (2d) 312 (Q.B.) — *referred to*

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

Public Finance Corp. v. Edwards Garage Ltd. (1957), 22 W.W.R. 312 (Alta. T.D.) — *referred to*

Regent's Canal Ironworks Co., Re; Ex p. Grissell (1875), 3 Ch. D. 411 (C.A.) — *referred to*

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

Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 29 C.B.R. (3d) 297, 15 C.E.L.R. (N.S.) 165, 100 B.C.L.R. (2d) 378, [1995] 3 W.W.R. 181, 17 B.L.R. (2d) 127 (S.C.) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.) — *referred to*

Winmil Holidays Co., Re (1984), 10 D.L.R. (4th) 572 (B.C. C.A.) — *referred to*

Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31 —

s. 36

s. 40 [am. S.O. 1994, c. 27, s. 40]

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

Interpretation Act, R.S.O. 1990, c. I.11 —

s. 29(1) "person"

s. 29(2)

Municipal Act, R.S.O. 1990, c. M.45 —

s. 382

Municipal Tax Sales Act, R.S.O. 1990, c. M.60 —

s. 1

s. 3 [am. S.O. 1994, c. 27, s. 124(1)]

s. 4 [am. S.O. 1994, c. 27, ss. 124(2), 124(3)]

s. 5

s. 8

s. 9 [am. S.O. 1994, c. 27, s. 124(4)]

s. 9(2)

s. 9(11)

s. 10 [am. S.O. 1994, c. 27, ss. 124(5), 124(6)]

s. 12(6)

s. 18

Regulations considered:

Municipal Tax Sales Act, R.S.O. 1990, c. M.60 —

Municipal Tax Sales Rules,

Reg. 824

Motion for declaration respecting priority of receiver's fees and disbursements over municipal taxes; cross-motion for leave to commence municipal tax sale proceedings.

R.A. Blair J.:

A. Facts

Background

1 These proceedings involve two motions arising in the context of a receivership.

2 The receivership of Courtcliffe Parks Limited has been a particularly tortured, difficult, and expensive process. In this instance, the motions are brought to resolve the competing interests of the receiver, on the one hand, and the corporation of the town of Flamborough, on the other hand. The receiver seeks protection for its fees and disbursements incurred during the course of the receivership. The municipality seeks to pursue its remedies for the collection of outstanding realty taxes.

3 A trailer park, known as "Courtcliffe Park," in the town of Flamborough, is the only asset of the debtor company; and, thus, the only possible source of funds for either of these purposes is the sale of the trailer park, which is currently being operated and maintained by the receiver and on which 116 mobile homes — most of which are occupied on a year-round nature — are located.

4 Courtcliffe Parks Limited has been in receivership since an order of this court made on May 5, 1992, to that effect. Deloitte & Touche Inc. ("the receiver") was appointed receiver and manager of all of its property, assets, and undertaking. At the time of the original order, Courtcliffe Park — which does not comply with municipal by-laws and zoning regulations — was home for a group of mobile home tenants who were not, for the most part, paying their rent, and it was plagued by extensive safety hazards and operating deficiencies. Significant costs and expenditures were required to rectify serious electrical, environmental, and health problems — dangerous and improper hydro connections, sewage hazards and garbage disposal inefficiencies, and an unsafe water supply, to name some.

5 In May 1992, the receiver took immediate steps to satisfy urgent safety requirements, and in its first report, filed on June 10, 1992, recommended that the operations of Courtcliffe Park be wound down and that all tenants be ordered to provide vacant possession by October 31, 1992. Authority to do so was

granted. There ensued very contentious proceedings regarding the collection of rental arrears and the termination of the tenancies. The date for delivering vacant possession was extended. The receiver's efforts to collect rents and to maintain the property continued.

6 In its third report, filed on March 15, 1993, the receiver presented a plan for the sale of the park, which was approved by order dated April 16, 1993. Appraisals were to be obtained, as part of the plan for sale, on both an "as is-where is" basis and on the basis that all necessary rezoning and approvals were granted and received such that the trailer park would be a legal conforming use. Such appraisals were obtained, on June 7, 1993, from Jacob Ellen & Associates Inc. of Hamilton. They indicated that the estimated market value, *under either basis*, was approximately $500,000.

7 In addition to its efforts to deal with the tenants and to maintain the property, the receiver spent considerable time and energy throughout 1993 in attempting to obtain a rezoning approval from the town of Flamborough in order to facilitate the sale of the park as a legally conforming trailer park. The application for rezoning was rejected.

8 Moreover, the receiver's efforts to sell the property have been similarly unsuccessful. Only one offer has ever been elicited. It was in the amount of $300,000 and was not accepted. According to its sixth report, dated August 15, 1994, and filed in connection with these motions, "the Receiver has not subsequently attempted to sell the property and has received little unsolicited interest." Indeed, the receiver states (at p. 22 of the sixth report):

> Based on the foregoing considerations, and the unique nature of the development, it is uncertain if the Receiver would receive an offer in excess of the appraised value of $500,000, regardless of whether the purchaser intended to develop the property as a year-round mobile home park.

Municipal Taxes

9 At the time of the initial receivership order, on May 5, 1992, Courtcliffe Park's municipal tax arrears, including penalties and interest, totalled $255,729.97. Interest accrues on the arrears at 15 per cent per annum. I am advised that the taxes amount to approximately $120,000 per year. Total arrears as at November 8, 1994 (the latest figures the court has been given), stand at $559,773.51, in any event.

10 Simple arithmetic indicates that municipal taxes alone exceed the appraised value of the property.

11 Apart from a minor payment of $2,832.72 on July 16, 1992, the receiver has made no payments on account of municipal taxes; nor has it made any arrangements for payments to be provided. In the meantime, as Mr. Pinelli points out on behalf of the municipality, the receiver has made the following payments, among others:

Utilities:	$202,430.87
Legal Fees & Disbursements	83,910.79
Receiver and Manager Fees & Disbursements	252,071.25

Total	$538,412.91

B. Issues

12 It is the failure to keep taxes current that has led to the present predicament. Two central issues have arisen.

> (1) First, the municipality takes the position that notwithstanding the receivership proceedings, it is entitled — indeed, *obliged* — to pursue its remedies of sale in order to collect its tax arrears under the *Municipal Tax Sales Act* R.S.O. 1990, c. M.60. The receiver argues that the municipality is barred from taking any such steps by virtue of the "no proceedings without leave" provision of the receivership order, and that if leave is granted it should only be granted upon terms of sale that are broader than those set out in the *Municipal Tax Sales Act*.
>
> (2) A second issue also arises. The receiver submits that it is entitled to payment of its fees and disbursements, incurred in the process of preserving the property for all creditors — including the municipality — in priority to the payment of the municipality's taxes; and it seeks not only approval of those fees and disbursements, but also a declaratory order establishing such a priority.

C. Law and Analysis

The Receivership Orders

13 By order dated May 5, 1992 — and extended until trial, by order dated May 15, 1992 — Deloitte Touche Inc. was appointed receiver and manager of "the assets, property and undertaking of Courtcliffe Parks Limited or under their

control" (collectively, the "assets"). In that capacity, Deloitte Touche Inc. was empowered to do the usual sorts of things that court appointed receivers and managers are empowered to do, including the power

> a) to manage, operate and carry on the business of Courtcliffe Parks in all its phases whatsoever;
>
> . . . . .
>
> c) to pay all debts of Courtcliffe Parks which [it] deems necessary or advisable to properly operate, manage and sell the business of Courtcliffe Parks and all such payments to be allowed Deloitte Touche Inc. in passing its accounts *and shall form a charge on the Assets in priority to the mortgage*;
>
> f) to take possession of and control all property owned by Courtcliffe Parks;
>
> g) to enter into an agreement or agreements for the sale of the Assets in whole or in part subject to approval of such sale by this Court;
>
> h) to deal with all tenants and public utilities of Courtcliffe Parks; and
>
> . . . . .
>
> j) to take such other steps as [it] deems necessary or desirable to preserve and protect and realize upon the assets and manage and operate the business of Courtcliffe Parks.

14 The order also contained the customary provision precluding actions or proceedings in respect of the assets or against any of the parties without leave of the court. Paragraph 5 states:

> 5. This Court Orders that no action or other proceedings (whether through the courts, tribunals, or otherwise) shall be taken or continued in respect of the Assets, Courtcliffe Parks or Deloitte Touche Inc. in relation to Courtcliffe Parks without leave of this Court first being obtained upon seven days' notice being made to Deloitte Touche Inc. and the parties to these proceedings.

Is Leave Required?

15 The municipality argues that leave is not necessary and that paragraph 5 can have no bearing upon the ability of the municipality to pursue its tax arrears remedies under the *Municipal Tax Sales Act*. Mr. Pinelli submits on its behalf that the court has no jurisdiction to abridge or abrogate the statutory rights of a municipality under the *Municipal Tax Sales Act*, supra, or the *Municipal Act*, R.S.O. 1990, c. M.45, s. 382.

16 The issue is not free from difficulty. In general, however, "[w]here any third party has rights paramount to the receiver and manager, such third party must seek leave of the court before initiating or continuing proceedings already taken": Frank Bennett, *Receiverships* (Scarborough, Ont.: Carswell, 1985), at p. 19.

17 I have concluded — whatever may be the effect of other arguments relating to property tax arrears and the operation of the statutory tax sales scheme — that the court has jurisdiction to make an order such as that contained in paragraph 5 above which encompasses steps taken by a municipality pursuant to such a scheme.

18 The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors: *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (C.A.), at p. 88; *Re Winmil Holidays Co.* (1984), 10 D.L.R. (4th) 572 (B.C. C.A.), at pp. 579-580. The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with whatever happens to the property that comes under its administration. See Bennett, supra, at pp. 110-111.

19 All of the assets, property, and undertaking of the debtor come under its administration. They remain the property, assets, and undertaking of the debtor, notwithstanding the receivership, until otherwise disposed of. They do not vest in the receiver and manager, and they do not become the property of the municipality simply because the legislation creates a statutory lien. The municipality remains the claimant of a statutory lien or charge, by virtue of s. 382 of the *Municipal Act*. The assets remain under the aegis of the court's administration. An order requiring that leave be obtained before steps are taken that will affect the assets under that administration is therefore, in my view, within the jurisdiction of the court, by virtue of its inherent jurisdiction and by virtue of its statutory jurisdiction respecting the appointment of receivers "where it appears to a judge of the court to be just and convenient to do so": the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

20 Mr. Pinelli submitted that I should read the wording of paragraph 5 of the order narrowly, and hold that it is not broad enough in its language to catch steps taken by a municipality respecting tax arrears. The words "other proceedings" have to be read in context, the argument goes, and should be read together with the words they accompany, such as "action," "courts," and "tribunals" in paragraph 5,

and "suits," "administrative hearings," "cases," and "actions in law" in paragraph 4 of the order. The legal principle for this concept is referred to as the ejusdem generis rule. I have little difficulty in concluding, however, that the purpose of paragraph 5 of the receivership order is to preserve the integrity of the court's role as supervisor over the realization and preservation of the assets which have fallen within its administration, and that its language should be read broadly with that objective in mind.

21 I recognize that in other cases, such as *Re Great West Life Assurance Co.*, [1927] 3 W.W.R. 302 (Man. K.B.), the words "other proceeding" have been interpreted to exclude extra-judicial matters, such as foreclosure of mortgages in the land titles or registry offices. In that case Dysart J. concluded that the language "action or other proceeding" did not encompass such steps. He was of the view that "other proceeding" must mean "some process or step in a matter to be brought before, or pending in, this Court" (p. 303). It is clear from the wording of paragraph 5 of the May 5, 1992, receivership order that it is intended to be broader than the more restrictive "action or other proceeding" because it provides that "no action or other proceedings (whether through the courts, tribunals, *or otherwise*) shall be taken *in respect of* the Assets" [emphasis added] without leave. To my mind, this language is ample to catch "a process or step in a matter" which is taken "otherwise" than through the courts or an administrative tribunal, "in respect of" the sale of the Courtcliffe Park assets for tax arrears.

The Test for Leave, and Its Parameters

22 It has been held that leave to commence proceedings with respect to receivership assets is to be granted unless there is no foundation for the claim or the action is frivolous or vexatious. At the same time, however, the granting of leave is not to be dealt with on a perfunctory basis or given in a carte blanche manner; it calls for a careful examination of the legal and factual issues. See *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.).

23 When what is sought is leave to pursue a remedy which will have a significant impact upon the very assets which form the subject matter of the receivership, the foregoing caveats regarding the granting of leave apply with particular vigour, in my view. Here, of course, the remedy sought will result in the disposition of the only asset which is available to satisfy either the claims of creditors or the claim of the receiver for recovery of its fees and disbursements.

24 Nonetheless, what the municipality seeks to do is to pursue a remedy which is clearly given to it by statute. At whatever level the onus is pitched, it seems to me that the municipality has met it and, accordingly, that leave must be granted.

25 The question remains, however, whether it should be granted upon terms of sale different from those set out in the *Municipal Tax Sales Act*, supra, and, if so, on what terms. This, in turn, raises an additional — and preliminary — question, namely, whether the court has any discretion, in circumstances such as these, to impose, as a term of granting leave, a sale mechanism different than that mandated by the Act.

Does the Court have Jurisdiction To Impose Terms of Sale Different from those Set Out in the Municipal Tax Sales Act?

26 It does not follow that simply because the municipality must seek leave to pursue its remedies under the *Municipal Tax Sales Act*, the court has jurisdiction to impose terms of sale different from those set out in the Act as a part of the process of granting leave. The two matters are different, and raise different considerations, in my view.

27 The court's power to require leave to be obtained relates to its supervisory and administrative jurisdiction over the receivership process and is necessary to preserve the integrity of that process. The proceedings with respect to which leave is granted stand on their own feet, however; and, if the statutory remedy being pursued by the municipality carries with it a mandatory procedure prescribed by statute, the court has no authority to interfere with that statutorily prescribed remedy and procedure.

28 That is precisely the case with the provisions of the *Municipal Tax Sales Act*, it seems to me. Failure by a property owner or tenant to pay property taxes starts a clock ticking under those provisions. If that clock is not stopped, it triggers the operation of a taxpaying time bomb which, with one exception, can only be diffused by payment of the amounts owing to the municipality or by negotiating an extension agreement with the municipality for making such payment.

The Tax Sale Scheme under the Municipal Tax Sales Act

29 The scheme, as set out in s. 1, 3, 4, 5, 8, 9, and 10 of the *Municipal Tax Sales Act*, is as follows.

30 Where tax arrears with respect to improved land in a municipality remain owing for more than three years, the treasurer of the municipality may register a tax arrears certificate against "the title to the land with respect to which the tax arrears are owing." Notice of registration is given to the assessed owner of the land, the assessed tenants in occupation of the land, and to persons appearing on the register of title to have an interest in the land. Before the expiry of one year following the registration of the tax arrears certificate, any person may have the certificate cancelled upon payment of what is defined in the Act as the "cancellation price," that is, upon payment of all outstanding taxes, together with any outstanding penalties and interest and the municipality's reasonable costs of collection. If the cancellation price is not paid, however, "the land *shall be sold or vested in the municipality* in accordance with section 9 [of the Act]" (s. 5). [Emphasis added.]

31 There exists one possibility for avoiding a sale if the cancellation price is not paid. Section 8 provides that the municipality may authorize an extension agreement with the owner of the land, extending the time for payment on certain terms. That authorization, however, must be in the form of a by-law "passed after the registration of the tax arrears certificate *and before the expiry of the one-year period*" mentioned above. [Emphasis added.] Nothing in the statute permits the authorization of an extension agreement *after* the one-year period has expired.

32 Where, at the end of the one-year period, the cancellation price has not been paid and there is no subsisting extension agreement, s. 9(2) of the Act states clearly that:

> the land *shall* be offered for public sale by public auction or public tender.

33 Regulation 824, promulgated pursuant to s. 18 of the Act, sets out the *Municipal Tax Sales Rules* for such sales.

34 If there is no successful purchaser, the land vests in the municipality. Subsection 9(11) provides that the treasurer is not bound to inquire into or form any opinion of the value of the land before conducting the sale, nor is he or she under any duty to obtain the highest or best price.

35 While, under s. 12(6) of the Act, there is some residual discretion in the treasurer of a municipality — the one "exception" referred to above — to halt proceedings by registering a cancellation certificate if, in his or her opinion, it is not in the financial interest of the municipality to continue or it is not practical or desirable to continue because of some neglect, error, or omission, there is nothing in the statute which permits the court to intervene in such a fashion.

36 Finally, s. 10 dictates the way in which the sale proceeds are to be applied. They shall be applied,

(a) firstly, to pay the cancellation price;

(b) secondly, to pay all persons, other than the owner, having an interest in the land according to their priority at law; and

(c) thirdly, to pay the owner.

37 In my view, these provisions set out a complete statutory code of procedure respecting the sale of lands for the recovery of municipal tax arrears and for the disposition of the proceeds from such sales. I see no reason to read the mandatory "shall" found in the various foregoing provisions to read the permissive "may." Section 29(2) of the *Interpretation Act*, R.S.O. 1990, c. I.11, as amended, states that the word "shall" is to be construed in the imperative, and while there are circumstances in which the word may be given a different connotation, the court should assume that the legislature, when it uses "shall," intends the provision to be imperative, unless such an interpretation would be inconsistent with the context or render the clause in question irrational or meaningless: see *Public Finance Corp. v. Edwards Garage Ltd.* (1957), 22 W.W.R. 312 (Alta. T.D.).

38 There is nothing in the context of the *Municipal Tax Sales Act* which would require such a reinterpretation of the word "shall." Municipalities must fund their operations and activities on behalf of the public from the public purse. The legislature has clearly directed them to do so, in part, at least, by collecting the taxes due to them (thus, incidentally, reducing the amount of funding that must be directed to the municipalities from provincial sources), and has put in place a strict regime for doing so.

39 The court, in my opinion, has no authority to interfere with or to alter that statutory scheme or to impose a different regime for the ap plication of proceeds. To do so would be to amend the legislation. That is not the court's function. See, for example, *Standard Trust Co. v. Lindsay Holdings Ltd.* (1994), 15 C.E.L.R. (N.S.) 165 (B.C. S.C.), at pp. 172-173.

40 Accordingly, in my view, the court has no jurisdiction in these circumstances to impose terms of sale different from those set out in the *Municipal Tax Sales Act* as a condition of granting leave to proceed.

Receiver's Fees and Disbursements

41 It would seem to follow from the foregoing that there is no discretion in the court to declare the receiver's claim for fees and disbursements to be entitled to priority over the municipality's claim for taxes.

42 This view is fortified by the provisions of s. 382 of the *Municipal Act*, R.S.O. 1990, c. M.45. While the sections of the *Municipal Tax Sales Act*, referred to above, set out the method of enforcement and the statutory scheme for application of the proceeds of sale, it is s. 382 of the *Municipal Act* which provides the statutory source of a municipality's authority to collect realty taxes and to enforce collection against the land in question. Section 382 states:

> *Who liable for taxes, lien on lands. — 382.* The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration.

43 Do these statutory provisions in the *Municipal Act* and the *Municipal Tax Sales Act* preclude a court from awarding a receiver and manager a type of "super priority" over the claims of a municipality for proper taxes, in appropriate circumstances? In my view, they do. A brief review of the principles surrounding the remuneration of a receiver and manager may be helpful to place this decision in context, however.

44 In Ontario, the basic principles applying to the recovery of fees and disbursements by a receiver and manager were restated by Houlden J.A. in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, supra, at pp. 87-92. A receiver and manager must look to the assets under its control for recovery of fees and for reimbursement of its charges and expenses. In the absence of an indemnity agreement to that effect, it cannot look to the secured creditor at whose instance it was appointed, or to other creditors for payment; and, of course, the court has no funds to provide for payment. Moreover, the ability to recover is *generally* confined to the equity in those assets. In order to protect receivers and managers, however, and to ensure that they are fairly remunerated for their efforts — and in order to ensure that there will be people willing to undertake the important task of acting as receiver and manager — there are certain exceptions to the qualification that

recovery is generally limited to the equity in the assets which are the subject of the receivership. Amongst these exceptions are the following three:

> 1. if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holder;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property, it may be given priority for such expenditures over secured creditors.

45 See also *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); *Oberman v. Mannahugh Hotels Ltd.* (1980), 34 C.B.R. (N.S.) 181 (Man. Q.B.); *Crédit foncier franco-canadien v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 (Alta. T.D.), affirmed (1966), 56 W.W.R. 623 (note) (Alta. C.A.).

46 Thus, while the claim of a receiver and manager for fees and disbursements will normally be confined to the equity in the assets in question, there are circumstances in which those fees and disbursements may be ordered paid in priority to secured creditors where the assets are insufficient to cover all liabilities. It has even been held that the court may order the fees and disbursements of a receiver and manager to be paid out of trust funds held by the debtor in circumstances governed by statute, where the trust funds were being administered by the debtor and where recovery on behalf of the beneficiaries was a main reason for the appointment of the receiver and manager: *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (C.A.), at p. 389 and p. 398.

47 In none of the foregoing cases, however — and in none that my own research reveals — has a receiver and manager been granted priority over municipal realty taxes, although in numerous instances such priority has been given over secured creditors. The reason, I conclude, is because the statutory scheme in place forbids it.

48 Section 382 of the *Municipal Act* is quite clear:

> the nature of the receivership, the attacks that have been made by supposed interested parties on the receivership and the requirements which have been tremendous with respect to dealing with each and every individual tenant of the Courtcliffe Parks property. As can be determined from the previous five reports filed by the Receiver and the approximate nine previous court appearances, the material for which was all prepared by the Receiver and its counsel to protect, preserve, maintain and prepare the subject property, the demand upon the Receiver's time and that of its legal counsel has been extensive, continuous and expansive.

56 As the judge who has presided over the receivership and been the recipient of the materials referred to, I have no hesitation in accepting what Mr. Robertson has said with respect to the time and efforts of the receiver and its counsel, and the purposes of those endeavours. That is not the end of the matter, however.

57 The receiver argues that it should be protected vis-à-vis the municipality's claim for taxes because the fees it has earned and the moneys it has expended have been incurred (i) to preserve and realize the assets for the benefit of all the creditors, including the municipality; and/or (ii) for the necessary preservation or improvement of the property.

58 A receiver and manager is the officer of the court. That position does not provide it with a carte blanche, however, to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. While a receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain: *Standard Trust Co. v. Lindsay Holdings Ltd.*, supra, at p. 174. There must be an air of commercial reality to its efforts.

59 Here, it must have been apparent to all involved upon receipt of the appraisals in mid-1993 that the receivership assets were unlikely to yield very much more than the outstanding property tax obligations existing at the time. Certainly, the total of those tax obligations plus the then existing fees and disbursements of the receiver exceeded the estimated recovery from the property — *regardless of whether it was sold on an "as is-where is" basis or on an improved basis, after all necessary rezoning approvals had been obtained (assuming they could be obtained).*

60 One wonders how anything other than an orderly wind-down of the trailer park and a tax sale could be justified, after that point.

61 Assuming, without concluding, that some other approach could be justified in the circumstance, the receiver had other ways of protecting itself and of ensuring that the municipality did not pursue its tax sale remedies under the *Municipal Tax Sales Act*. It could have paid current taxes to prevent the three-year period, which gives rise to the registration of a tax arrears certificate under the Act, from running. It could have negotiated an extension agreement with the municipality, under s. 8 of the Act, to prevent the one-year period leading to a mandatory sale from expiring. It could have sought an indemnity agreement from the secured creditor. However, it did none of these things.

62 Although there have apparently been scattered volleys back and forth between the receiver, or its solicitors, and the municipality, or its solicitors, it is apparent that the receiver decided to ignore the tax arrears certificate and its implications, and to proceed on the basis that it could put the trailer park on its financial feet and obtain rezoning approval for a going concern sale. This ignores the reality that a going concern sale will not — even on the receiver's own estimate — yield enough to recoup more than the amount claimed by the municipality.

63 The receiver has also submitted that the municipality's assessments are erroneous and that they will be appealed. No steps have been taken to launch such an appeal, though, and the time within which an appeal lies has elapsed under the *Assessment Act*, R.S.O. 1990, c. A. 31, ss. 36 and 40.

64 Thus, while I would be inclined — if I had the discretion to do so — to grant the receiver some form of priority with respect to its disbursements incurred for the purposes of "necessary preservation and improvements" of the trailer park prior to June 1993, and perhaps for its related fees, the extent of that priority, I think, is something that would have to await the results of the tax sale. Only then could the court's discretion, in balancing the interests of the receiver, the municipality, and the secured creditor, and in considering all of the circumstances, be properly exercised.

65 I would not be prepared to make a blanket order granting the receiver priority over the municipality's claim for property tax arrears for its fees and disbursements in the circumstances here prevailing.

Approval of the Receiver's Fees and Disbursements

66 For similar reasons, I am of the view that approval of the receiver's fees and disbursements should await the final disposition of the property, and I make no order in that respect at this time.

D. Conclusion

67 For the foregoing reasons, the receiver's motion is dismissed and the cross-motion of the corporation of the town of Flamborough seeking leave to exercise its statutory tax sale rights and remedies pursuant to the *Municipal Tax Sales Act*, R.S.O. 1990, c. M.60, as amended, is allowed. An order is also granted directing the receiver to serve the corporation of the town of Flamborough with all materials in relation to all motions brought regarding the receiver's management of Courtcliffe Parks Limited.

68 Although the town was unsuccessful with respect to its argument concerning the need for the granting of leave for it to proceed, the substantial issues on these motions related to the terms upon which it would be able to proceed with its tax sale rights and remedies, and to the question of whether the receiver was entitled to priority with respect to its fees and disbursements. The town has been successful on these issues and, accordingly, is entitled to its costs of the motions. I will fix the costs if counsel are unable to agree upon them. Written submission may be made in that regard within 30 days of the release of these reasons, if necessary.

Motion dismissed; cross-motion allowed.

TAB 9

Municipal Act, RSO 1990, c M.45

This statute is repealed or spent since 2003-01-01.
This statute is replaced by SO 2001, c 25.

Past version: in force between Dec 31, 1990 and Dec 31, 2002

Municipal Act

R.S.O. 1990, CHAPTER M.45

Note: This Act was repealed on January 1, 2003. See: 2001, c. 25, ss. 484 (1), 485 (1).
Amended by: 1991, c. 11, s. 5; 1991, c. 15, ss. 1-6 ;1991, c. 54, s. 9; 1992, c. 15, ss. 1-19; 1992, c. 17, s. 5; 1992, c. 23, s. 40; 1992, c. 32, s. 22; 1993, c. 11, ss. 44, 45; 1993, c. 20, ss. 1-4; 1993, c. 23, s. 68; 1993, c. 26, ss. 46-48; 1993, c. 27, Sched.; 1994, c. 2, ss. 50, 51; 1994, c. 7; 1994, c. 10, s. 21; 1994, c. 17, s. 49; 1994, c. 23, ss. 51-58; 1994, c. 25, s. 82; 1994, c. 27, ss. 109, 123; 1994, c. 37, ss. 1-5; 1996, c. 1, Sched. M, ss. 1-24; 1996, c. 4, s. 54; 1996, c. 32, ss. 2-58; 1997, c. 5, ss. 40-61; 1997, c. 8, s. 43; 1997, c. 19, s. 39; 1997, c. 23, s. 10; 1997, c. 24, s. 216; 1997, c. 25, Sched. E, s. 6; 1997, c. 26, Sched.; 1997, c. 27, s. 72; 1997, c. 29, ss. 22-49; 1997, c. 31, s. 155; 1997, c. 43, Sched. F, s. 9; 1997, c. 43, Sched. G, s. 23; 1998, c. 3, ss. 11-30; 1998, c. 4, s. 3; 1998, c. 15, Sched. E, s. 19; 1998, c. 33, ss. 9-37; 1999, c. 6, s. 40; 1999, c. 9, ss. 143-164; 1999, c. 12, Sched. M, ss. 17-20; 1999, c. 14, Sched. F, s. 5; 2000, c. 5, s. 15; 2000, c. 25, ss. 14-44; 2000, c. 26, Sched. K, s. 2; 2001, c. 8, ss. 190-193, 207; 2001, c. 13, s. 21; 2001, c. 17, s. 3; 2001, c. 23, ss. 156-168; 2001, c. 25, ss. 478, 484; 2001, c. 32, s. 29; 2002, c. 17, Sched. C, s. 16.

Definitions

1.(1)In this Act,

"arbitration" means an arbitration under this Act; ("arbitrage")

"assessment corporation" means the Municipal Property Assessment Corporation; ("société d'évaluation foncière")

"Assessment Review Board" means the Assessment Review Board under the *Assessment Review Board Act*; ("Commission de révision de l'évaluation foncière")

(6)The council of a supporting municipality may appeal the decision resulting from the Ministry review to the Municipal Board within 30 days after notice of the decision was sent to the municipality. 1997, c. 5, s. 55.

Interest on county debentures

375. Nothing in this Act or in the *Assessment Act* alters or invalidates any special provisions for the collection of a rate for interest on county debentures in any general or special Act or in any county by-law providing for the issue of debentures. 1997, c. 5, s. 55.

376.-381. Repealed: 1997, c. 5, s. 55.

Who liable for taxes, lien on lands

382. The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration. R.S.O. 1990, c. M.45, s. 382.

Recovery of taxes by action

383.(1)The taxes payable by any person may be recovered with interest and costs as a debt due to the municipality, in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified as a true copy by the clerk of the municipality, is, in the absence of evidence to the contrary, proof of the debt. R.S.O. 1990, c. M.45, s. 383 (1).

(2)Repealed: 1997, c. 5, s. 56.

Paying rent to collector or treasurer until taxes paid

384.(1)Where taxes are due upon any land occupied by a tenant, the collector or, after the roll has been returned, the treasurer, may give the tenant notice in writing requiring the tenant to pay such collector or treasurer the rent of the premises as it becomes due from time to time to the amount of the taxes due and unpaid and costs, and the collector or treasurer has the same authority as the landlord of the premises would have to collect the rent by distress or otherwise to the amount of the unpaid taxes and costs. R.S.O. 1990, c. M.45, s. 384 (1); 1998, c. 3, s. 25.

Other remedies continue

(2)Nothing in this section prevents or impairs any other remedy for the recovery of the taxes or any portion thereof from the tenant or from any other person liable therefor. R.S.O. 1990, c. M.45, s. 384 (2).

When tenant may deduct taxes from rent

385. Any tenant may deduct from the rent any taxes paid by the tenant that as between the tenant and the landlord the latter ought to pay. R.S.O. 1990, c. M.45, s. 385; 1998, c. 3, s. 26.

Provincial taxes

386. All moneys assessed, levied and collected under any Act by which the same are made payable to the Treasurer of Ontario or other public officer for the public uses of Ontario, or for any special purpose or use mentioned in the Act, shall be assessed, levied and collected in the same manner as local rates, and shall be similarly calculated upon the assessments as finally

TAB 10

2001 CarswellOnt 525
Ontario Court of Appeal

Toronto Dominion Bank v. Usarco Ltd.

2001 CarswellOnt 525, [2001] O.J. No. 649, 103 A.C.W.S. (3d) 740, 142 O.A.C. 70, 17 M.P.L.R. (3d) 57, 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303

The Toronto-Dominion Bank (Moving Party / Respondent / Appellant) and Usarco Limited and Frank Levy (Defendants) and The Corporation of the City of Hamilton (Moving Party / Respondent / Respondent in appeal) and Coopers & Lybrand Limited (Moving Party / Respondent / Respondent in appeal) and The Ministry of Labour (Respondent / Respondent in appeal)

Austin, Laskin, Simmons JJ.A.

Heard: October 11-12, 2000
Judgment: February 28, 2001
Docket: CA C29472

Proceedings: affirming (1997), 40 M.P.L.R. (2d) 293, 50 C.B.R. (3d) 127, 31 O.T.C. 81 (Ont. Gen. Div.)

Counsel: *John A. Campion*, *Michael J. MacNaughton* and *Carole J. Hunter*, for Appellant, The Toronto Dominion Bank
Neil C. Saxe, for Respondent, Coopers & Lybrand Limited
F. Paul Morrison and *David E. Leonard*, for Respondent, Corporation of the City of Hamilton

Subject: Insolvency; Public; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.3 Claims for municipal taxes and public utilities rates
X.3.b Preferred claims
X.3.b.iii Priority over secured creditors
Headnote
Bankruptcy --- Priorities of claims — Claims for municipal taxes and public utilities rates — Preferred claims — Priority over secured creditors

Company had five properties on which bank held mortgages or guarantees as security for funds advanced to company — Company defaulted on loan payments and was indebted to bank for $18 million — Receiver paid $900,000 to bank and recovered additional $960,000 — Receiver failed to give notice of payment to municipality which was owed $2 million in property tax arrears — Municipality's motion for payment of tax arrears was granted — Motions judge held that receiver had breached duty to represent all creditors and that receiver failed to act meticulously in its duties — Bank appealed — Appeal dismissed — Section 382 of Municipal Act puts municipality's claim for arrears of property taxes ahead of all other claims by creditors except for Crown — Section 400 of Act accords right to municipality to distrain against goods and chattels of bankrupt — Court will not permit conduct by court-appointed receiver which has effect of changing rights of competing creditors — Trial judge correctly held that receiver breached normal duty to pay taxes as part of preserving bankrupt's property — Municipal Act, R.S.O. 1990, c. M.45, ss. 382, 400.

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s. 384 — considered

s. 400 — considered

s. 400(1) — considered

s. 400(1)(a) — considered

s. 400(1)(d) — considered

s. 400(11) — considered

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s. 384 — considered

Suburban Area Development Act, Act to amend the, S.O. 1922, c. 77

Generally — considered

APPEAL from judgment reported at (1997), 40 M.P.L.R. (2d) 293, 50 C.B.R. (3d) 127, 31 O.T.C. 81 (Ont. Gen. Div.), granting motion by municipality for payment of monies by receiver to municipality in satisfaction of municipal tax arrears.

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

1 The Toronto-Dominion Bank ("the Bank") appeals from the decision of Rosenberg J. made June 2, 1997, that Coopers & Lybrand Limited (the "Receiver") should have paid to the Corporation of the City of Hamilton (the "City") the municipal taxes on the property of Usarco Limited ("Usarco") and Frank Levy ("Levy") in receivership as they accrued due.

2 From the Bank's perspective, the issue is whether the claim of a fully secured creditor ranks ahead of a municipality's claim for realty taxes on a receivership. The City's position is that it had priority and that the Receiver was wrong in not paying the taxes as they accrued due. Rosenberg J. agreed with the City's position and ordered the Bank to refund the money received during the receivership to the Receiver. The Receiver was also ordered to pay to the City all the money it had realized with the exception of its fees and disbursements, including all the money refunded to it by the Bank. Rosenberg J.'s reasons are reported at (1997), 50 C.B.R. (3d) 127 (Ont. Gen. Div.) and at (1997), 40 M.P.L.R. (2d) 293 (Ont. Gen. Div.). I agree with his reasons and his conclusion. My reasons follow.

3 The matters in issue involve the duty of a court-appointed receiver and the interpretation of certain sections of the *Municipal Act* R.S.O. 1990 c. M.45 (the "Act"), insofar as they bear on the issue of priority. The facts are set out fully in the reasons of Rosenberg J. A summary will suffice for the purposes of the appeal.

4 Levy was a principal of Usarco. Usarco was a scrap metal dealer and processor for over 40 years. It operated on five properties in Hamilton, Ontario, some registered in its name and others in the name of Levy. All or some of these lands were believed to be highly contaminated because of the operations carried out on them.

5 Levy and Usarco had been dealing with the Bank for about 40 years. In 1989, Usarco's business was failing and Usarco owed the Bank about $18,000,000. As security for Usarco's obligations the Bank held, among other security, a registered general security agreement dated December 22, 1987, charging all of Usarco's property, a registered $3,000,000 demand debenture charging all of Usarco's property, a registered general assignment of book debts, mortgages on 371 Wellington Street North and 735 Strathearne Avenue and guarantees of Usarco's debts to the Bank provided by Levy, secured by mortgages upon 363 Wellington Street, 675 Strathearne Avenue and 725 Strathearne Avenue, all in Hamilton.

6 The Receiver was appointed by the order of Borins J. on October 11, 1990. The Receiver was not to go into possession or to manage or continue the business because of the contamination. The Receiver's function was "to sell, lease, transfer or otherwise dispose of" the assets. Those assets consisted of the five properties and the buildings, contents and equipment on them. The Receiver was granted the power and authority but not the obligation to make payments to persons having prior mortgages, charges or encumbrances upon the assets and to pay any debts, charges or expenses of Usarco and Levy considered "necessary and desirable for the purposes of carrying out this Order." Usarco and Levy remained the owners of the assets. Any tenants were to pay rents and arrears to the Receiver, but the Receiver was not obligated to fulfil any of the obligations of Usarco or Levy as landlords. No proceedings were to be taken or continued against the Receiver without leave of the court.

7 The Receiver actively carried on the receivership from the date of the order until 1996. By that time some of the property had been sold to Archibald Leach ("Leach") and the receivership had been discontinued with respect to the balance of the assets in light of the fact that they were unsaleable. The Receiver and the Bank were in the process of winding up the receivership when the City brought a motion seeking to recover municipal realty taxes.

8 During the receivership the Receiver dealt with the Ministry of Labour respecting claims of former employees, the Ministry of the Environment respecting contamination of the premises and the City with respect to the removal of chemicals

from the lands in question into the city at large. The Receiver also dealt with Dofasco with respect to a part of the premises leased to Dofasco.

9 During the receivership, the Receiver recorded receipts of $3,606,611.48 and disbursements of $2,561,238.30. Among the receipts was a payment by Dofasco of $115,245.23 in February 1993, for the years 1990, 1991 and 1992 in accordance with a lease requirement that the tenant's share of the municipal realty taxes be paid to the landlord.

10 Included in the disbursements made by the Receiver were the following:

Security	$267,638.39
Utilities	$120,687.06
Legal Fees	$110,756.34
Telephone	$ 4,408.66
Receiver's Fees	$467,374.52
Ministry of Labour	$509,557.14

The $115,245.23 paid by Dofasco to the Receiver on account of taxes was not paid over to the City.

11 As is the custom, the Receiver's activities were periodically reported to the court. These reports, some lengthy and detailed, were dated March 13 and July 14, 1992, November 15 and December 3, 1993, February 11 and August 10, 1994, September 28, 1995, and March 15 and October 30, 1996. They were presented to the court on or about their respective dates, each accompanied by a notice of motion requesting a particular order or orders, as for instance for the approval of a sale.

12 Although Dofasco's payment to the Receiver on account of taxes was made in February 1993, it does not appear in the lists of disbursements in the reports until October 1996. Presumably it was included under "Rental of Premises" in the earlier reports. No explanation for this accounting was provided. There is no reference to the payment of municipal realty taxes in any of the lists of disbursements in the reports.

13 As of October 11, 1990, $186,002.93 was owing on account of such taxes. Nothing was paid on that account by the Receiver. As a consequence, by January 15, 1997, $2,588,159 was owing for taxes, penalties and interest. No issue was raised with respect to the amounts of these debts.

14 The evidence before the court does not indicate when it was decided not to pay these taxes nor by whom or why. Borden & Elliot were the Receiver's solicitors. In June, 1992 they provided the Receiver with an opinion letter as to the Bank's priority over all other claims. "Unregistered Rights and Liens" were expressly excluded from that opinion. The letter dealt with municipal realty taxes at length. They were described as constituting a "special lien against the land in priority to all other claims except claims by the Crown". It was pointed out that notice of the lien did not require registration. As to s. 384 of the Act, which deals with leases, the letter stated that "[t]his provision takes effect upon the tenant receiving written notice from the "collector" or the treasurer of the municipality" and would not apply otherwise.

15 The only reflection of this opinion letter in the reports to the court is in the Report dated July 14, 1992, paragraph 8 of which states that:

> The Receiver has obtained an opinion from Messrs. Borden & Elliot that, subject to certain qualifications, the Security held by the Bank charges the Proceeds in priority to the claims of third parties.

16 That Report proposed that from its excess receipts, the Receiver should pay to the Bank $900,000 subject to agreement by the Bank to refund to the Receiver as much as might later be revealed to be required to satisfy the costs of the Receivership or a claim ranking in priority to the security held by the Bank. There was no indication in that Report that substantial municipal taxes were owing and were not being paid. Nor is there any indication that any consideration was given to the propriety or otherwise of non-payment of municipal taxes or to the question whether the court should be advised of such non-payment and direction sought.

17 In the first Report dated March 13, 1992, it was noted that a cash offer of $525,000 which had been made for the land and equipment "was withdrawn upon the offeror learning of the property taxes payable in respect of the Wellington Street property".

18 In the same Report, there is a reference to the Receiver being required to pay the Minister of Labour a sum in excess of $500,000 on account of wages, vacation pay, termination pay and severance pay of former employees. An order to this effect was made by Farley J. on August 2, 1991.

19 The Receiver's statement of receipts and disbursements to September 30, 1993, includes the following disbursements:

Pension Plan	$509,557.14
Receiver's Fees	$387,965.95
Security Charges	$253,201.10
Utilities	$120,687.06

There is no mention of municipal taxes.

20 The Report of November 15, 1993, indicated that under the agreement with Leach the purchaser would be responsible for the settlement of all property taxes and that, based on information supplied by the City, the property tax arrears were approximately $260,000. The same report indicated a net excess of receipts over disbursements of $1,322,988.64, $900,000 of which had already been remitted to the Bank.

21 In dealing with the sale to Leach, the Report of December 3, 1993, states that the agreement is "conditional upon Leach making an arrangement with the City of Hamilton with respect to outstanding tax arrears".

22 The motion which accompanied the Report of December 3, 1993, was made on notice to the City. This was the first notice the City had of the receivership or of any of the proceedings before the court. The City was not given notice because of tax arrears owing to the City, but because the City claimed the Receiver was responsible for certain costs incurred when chemicals from the property were spread within the City and a "state of emergency" was declared. The Receiver's response was to send the City a copy of the original receiving order referring:

> in particular to paragraphs 1 and 2 of that Order which directs the Receiver not to and deems the Receiver not to have possession, management or control of Usarco's property . . . .

23 The Receiver's next Report was dated February 11, 1994. It noted that the Receiver's motion in respect of the partial termination of the receivership had been adjourned in December 1993, as a consequence of concerns raised by the Ministry of the Environment. These concerns were resolved through the sale by the Receiver of certain of Usarco's equipment for $25,000 and the application of that sum to environmental assessment of the Wellington Street property. In paragraphs 8 and 13 of this Report the Receiver refers to the Bank as "the only secured creditor of Usarco". The result of the Receiver's motion for approval of the Report of February 11, 1994, was an order of Farley J. dated February 18, 1994, reducing the receivership by deleting the unsold properties from it. The receivership was continued with respect to the lands still in the process of being sold to Leach.

24 The Report of March 15, 1996, advised that the sale to Leach had been completed. The Receiver's statement of receipts and disbursements showed that it expected a net receipt of $375,000 from the sale to Leach after commissions and expenses. Leach was responsible for and had assumed the tax arrears on the property purchased. He had not paid the taxes as of the date of the hearing before Rosenberg J. Leach provided a limited indemnity to the Receiver and the Bank in respect of any claims that might be brought against them in regard to realty taxes.

25 The Bank's position is that there was a contest as to entitlement from the outset and that the Receiver's duty in the circumstances was to recognize this, to refrain from paying the municipal taxes and to wait until the court determined priorities, if necessary. The Bank argues that this approach is supported by the original order of October 11, 1990, which authorizes and empowers the Receiver to pay bills, including encumbrances, but does not order the Receiver to do so. The City's position is that the Receiver should have paid the municipal taxes as they became due. Had the Receiver done so, the total amount paid to the City would have been approximately $1,260,000, leaving about $600,000 available for distribution to the Bank.

26 In his decision, after setting out the facts, Rosenberg J. dealt with the issues as follows:

> Without criticizing the Receiver or Mr. MacNaughton as counsel for the Bank and sometimes counsel for the Receiver, the receivership has been conducted as if it were a private receivership by the Receiver for the Bank rather than a court appointed receiver. Even the indemnity from Leach with regard to the realty taxes is given both to the Receiver and the Bank. Mr. MacNaughton on behalf of the Bank argued that the position is analogous to a second mortgagee serving notice on tenants to attorn the rents to the second mortgagee. The funds that the second mortgagee thus realizes can be applied on account of the second mortgage until such time as the first mortgagee takes steps to protect its position. This analogy does not apply to the present situation. The City is prevented from taking any steps because of the order of this court. Even more significant is the duty owed by the Receiver to represent all of the creditors (at para 31).

27 After reference to the law, Rosenberg J., at paras 33, 36-40, continued as follows:

> At the time of the appointment of the Receiver the total tax arrears were approximately $186,000. Those tax arrears have increased and the latest

statement shows the total tax arrears to be $2,588,000. In my view the Receiver would not be acting in a meticulously correct manner if during the term of receivership the Receiver realized some $1,900,000 while paying nothing on account of taxes and allowing tax arrears to accumulate and increase in the amount of some $2,500,000. The Receiver has not even paid on account of realty taxes the amount paid to the Receiver under the leases as contribution to realty taxes.

. . .

One other factor that makes this application unusual but reflects on the equities between the parties is the concern about the environment. The Bank and the Receiver were careful to make certain that the order of Borins J. did not make either the Bank or the Receiver subject to the strict requirements that might be ordered by the Ministry of the Environment with regard to cleaning up any pollution of the property. These requirements can be most onerous. It was prudent of the Bank and the Receiver to have the appointment in the nature of a liquidator and not as an occupier or owner. However if the City attempted to sell and if a purchaser were unable to be found the city would become the owner and subject to those onerous requirements. This is particularly relevant in the present case since it is already known from the Receiver's reports that there are no purchasers that have been located and likely none that can be located for the properties in question. It is also known that there maybe serious environmental problems with the properties.

The *Municipal Act* R.S.O. 1990, c.M.45, section 400 gives the City recourse to chattels owned by the taxpayer and similarly other sections of the Act allow the City to collect rentals.

It is not necessary for the Receiver to proceed under these sections of the *Municipal Act* on behalf of the City because the Court has already given the Receiver all rights to dispose of the chattels and to collect the rents. Accordingly it is not appropriate to deprive the City of the rights to proceeds of the sale of the chattels or the collection of rents on the ground that it could have taken steps to collect them and has not.

For all of the foregoing reasons and in the peculiar circumstances of this case, it is appropriate that the net proceeds realized by the Receiver (especially in this case since they are less than the taxes that accrued during the receivership) should be paid to the City. Accordingly the Bank will pay back to the Receiver the sum of $900,000 paid to it together with interest at the prime bank rate

> from the time of receipt to the time of repayment to the Receiver and all of the net funds realized by the Receiver shall be paid to the City on account of taxes. The City shall also be entitled to its costs of these proceedings against the Bank after assessment thereof on a party and party basis.
>
> I wish to make it abundantly clear that in so deciding I am not criticising the actions of the Receiver or Mr. MacNaughton. The situation is an unusual one and neither the Receiver nor Mr. MacNaughton could be expected to predict that the City was entitled to priority for all monies realized.

28 I turn now to consider the law. As I do so, it is useful to repeat what was said at the outset of these reasons, namely that from the perspective of the appellant Bank, the issue in this appeal is whether the claim of a secured creditor on a receivership ranks ahead of a claim for municipal realty taxes. From the perspective of the respondent City, on the other hand, the issue is whether, during a receivership, the receiver is bound to pay such taxes as they become due.

29 A useful place to start (as Rosenberg J. did) is with the statement of Laycraft C.J.A. in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.), at 292, 293 and 294; Supplementary Reasons at (1991), 86 D.L.R. (4th) 567 (Alta. C.A.) leave to appeal refused (1992), 86 D.L.R. (4th) 567n (S.C.C.):

> A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care.
>
> . . .
>
> A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alta. Treasury Branches v. Invictus Fin. Corp.* (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) Stratton J. (as he then was) said that the Receiver's obligations "reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.* (1981), 2 P.P.S.A.C. 32 at p. 37, [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142 (Q.B.):

> . . . the receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed. [Emphasis added.]

The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126 . . . per Sherstobitoff J.A. at pp. 250-51:

> The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> . . .
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default. [Italics in the original; underlining added.]

30 Reference may usefully be made to *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 180-181 (footnotes omitted):

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor

> is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.
>
> . . .
>
> In setting the standard of care, the court-appointed receiver must act with meticulous correctness, but not to a standard of perfection. As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. . . . The court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership. [Emphasis added.]

31 Perhaps of limited significance here is the duty of a court-appointed receiver to the debtor and its shareholders. It would normally be a matter of some concern to a debtor and shareholders if the conduct of a receiver included the non-payment of taxes and the incurring of penalties and interest, thereby reducing the recovery or the chance of recovery of the owner. Barring extraordinary circumstances, such events should be fully disclosed to the court and the advice and instruction of the court sought.

32 The priority of a municipality with respect to municipal taxes is set out in the Act., Section 382 deals with realty, s. 384 deals with tenants and s. 400 with personalty. The relevant parts of those sections read as follows:

> **382.** The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent, or officer, or by want of registration. [Emphasis added.]
>
> **384.** (1) Where taxes are due upon any land occupied by a tenant, the collector or, after the roll has been returned, the treasurer, may give the tenant notice in writing requiring the tenant to pay such collector or treasurer the rent of the premises as it becomes due from time to time to the amount of the taxes due and unpaid and costs, and the collector or treasurer has the same authority as the landlord of the premises would have to collect the rent by distress or otherwise to the amount of the unpaid taxes and costs.

(2) Nothing in this section prevents or impairs any other remedy for the recovery of the taxes or any portion thereof from the tenant or from any other person liable therefor.

400. (1) Subject to section 399, if taxes that are a lien on land remain unpaid for twenty-one days after demand or notice made or given under section 392, 395 or 399 or, where a longer period has been authorized under subsection 399(6) such taxes remain unpaid at the expiry of that period, the collector or, where there is no collector, the treasurer may alone or by an agent, subject to the exemptions and provisos mentioned in this section, levy them with costs by distress,

(a) upon the goods and chattels, wherever found within the county in which the municipality lies, belonging to or in the possession of the owner or tenant of the land whose name appears upon the collector's roll (the owner or the tenant in this section is called "the person taxed");

(b) upon the interest of the person taxed in any goods on the land, including an interest in any goods to the possession of which the person is entitled under a contract for purchase or a contract by which the person may or is to become the owner thereof upon performance of any condition;

(c) upon the goods and chattels of the owner of the land found thereon, though the owner's name does not appear upon the roll;

(d) upon any goods and chattels on the land, where title to such goods and chattel is claimed,

(i) by virtue of an execution against the person taxed or against the owner, though the person's name does not appear on the roll,

(ii) by purchase, gift, transfer or assignment from the person taxed, or from such owner, whether absolute or in trust, or by way of mortgage, or otherwise,

(iii) by the spouse, daughter, son, daughter-in-law or son-in-law of the person taxed, or of such owner, or by any of his or her relatives, in case such relative lives on the land as a member of the family, or

(iv) by virtue of any assignment or transfer made for the purpose of defeating distress,

provided that, where the person taxed or such owner is not in possession, goods and chattels on the land not belonging to the person taxed or to such owner are not subject to seizure, and the possession by the tenant of such goods and chattels on the premises is sufficient proof, in the absence of evidence to the contrary, that they belong to the tenant; provided also that no distress shall be made upon the goods and chattels of a tenant for any taxes not originally assessed against him, her or it as tenant; provided also that in cities and towns no distress for taxes in respect of vacant land shall be made upon goods and chattels of the owner except upon the land.

. . .

(11) Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or any liquidator, trustee or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it is sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount to the collector in preference and priority to any other and all other fees, charges, liens or claims.

33 Courts have long recognized the importance of taxation to society. In *Decker's Delicatessen, Re* (1924), 56 O.L.R. 140 (Ont. S.C.), Fisher J., in the course of interpreting the predecessor to s. 382 of the Act, made the following observation at 142:

Governments and municipalities must secure revenue, otherwise they could not function; money must be secured, and taxation is the method adopted to secure it; and transactions between individuals must, therefore, unless excepted by statute, be subordinated to that of the Government or municipality.

34 Also on the subject of priority, he said at the same page:

It also seems to me that banks, loan companies, and persons engaged in the lending of money must have in mind, when valuing the security upon which they make a loan, to provide for taxes due to Dominion and Provincial

> Governments, or to a municipality, as being a prior charge or encumbrance in the event of insolvency.

35 More recently, MacPherson J. in *Royal Bank v. Lawton Development Inc.* (1994), 19 M.P.L.R. (2d) 170 (Ont. Gen. Div.) noted at 176 that s. 382 of the Act and its related provisions deserved of broad construction. As he explained:

> In recent years, Canadian courts have recognized that taxes serve important social purposes and are, therefore, entitled to judicial respect provided they are imposed in a clear fashion by a proper legislative body.

MacPherson J. also commented on the importance of property taxes at p. 175:

> It seems obvious that if a taxpayer owes a $1,000 municipal tax on January 1, 1994, and does not pay it, then the municipality is deprived of the use of that money. It will not have the money, to which it is legally entitled and on which it has counted, available to support the education, recreation, housing, social support and other programmes which it is required to provide. . . .

36 Inherent in the Bank's appeal is the proposition that the Receiver had no duty to keep current and to pay the arrears of property taxes owed by Usarco and Levy out of the proceeds of the receivership. In my view, this proposition is wrong. It fails to recognize the principles enunciated in *Decker's Delicatessen, Re, supra.* Further, it has been specifically rejected in numerous cases.

37 In *Royal Bank v. Lawton Development Inc., supra,* a court-appointed receiver sought the court's advice regarding the payment of certain moneys owed to the municipality. While the receiver did not question that it had an obligation to pay the accrued property taxes, it did question its obligation to pay, *inter alia,* the penalties, interest and costs assessed by the municipality. MacPherson J. specifically endorsed the receiver's recognition of its obligation to pay the accrued property taxes at p. 173 as follows:

> The Royal Bank does not challenge the priority of the municipal tax over its security, almost certainly because of the clear language of s. 382 of the *Municipal Act. . .*

MacPherson J. continued at pp. 174-175:

> . . . the status and recovery of [a municipal] tax are governed by s. 382 ... [The provisions of s. 382] make it clear that a tax due upon land ... has priority over all other forms of security, except security held by the Crown.

> This conclusion has been reached by several judges of the Ontario courts in cases raising the relationship between a variety of municipal taxes and many different encumbrances held by private parties . . . It follows that the security held by the Royal Bank in the instant case does not take priority over the money owed to the City of Toronto . . .

In the end, MacPherson J. had little difficulty deciding that the priority granted to the City of Toronto under s. 382 of the Act extended to interest, penalties and certain costs.

38 In *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 28 M.P.L.R. (2d) 59 (Ont. Gen. Div. [Commercial List]) Blair J. observed that the receiver had not made tax payments to the municipality on an ongoing basis, nor had it made any arrangements specifically providing for such payment. In contrast, however, the receiver had made other payments, including legal fees, receivership fees and utilities. When the municipality proposed selling the property pursuant to its powers under the *Municipal Tax Sales Act*, R.S.O. 1990, c. M.60, it appeared there would be insufficient proceeds to pay both the property tax arrears and the receiver's own fees and disbursements. In denying the receiver priority over the municipality, Blair J. noted at p. 63:

> It is the failure [by the receiver] to keep taxes current that has led to the present predicament.

Blair J. also stated at pp. 72-73:

> Accordingly, I am of the opinion that the statutory scheme enacted through the *Municipal Act* and the *Municipal Tax Sales Act* for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the Municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.
>
> While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case - and the understanding in the industry - concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be paid by a receiver and manager.

39 The City's claim with respect to realty is quite straightforward. Section 382 puts the City's claim ahead of all others except the Crown. As stated by Sherstobitoff J.A. in *Canadian Commercial Bank, supra* at p. 251, "the Court will not permit or approve any action on the part of its officer [the receiver] which has the effect of changing the rights of competing creditors . . . " This is precisely what the City says has happened. I agree with Sherstobitoff J.A. that the court will not permit such conduct. The same result is dictated by consideration for other interested parties. Levy and Ursaco should not be prejudiced by the City's claim increasing because of the accretion of penalties and interest.

40 Usarco leased part of the lands in question to Dofasco. This arrangement was continued following the Receiver's appointment. Under the lease Dofasco was responsible for taxes on that land. Dofasco paid $115,245.23 in taxes for the years 1990, 1991 and 1992 to the Receiver on or about February 15, 1993. Counsel for the Bank conceded during oral argument that this amount should have been paid over to the City on account of taxes. No similar concession was made by counsel for the Receiver.

41 In my respectful view, that amount should have been paid to the City on account of taxes in February 1993. It is my understanding that Dofasco remained liable for the taxes on the "leased lands" which were subsequently sold to Leach. To the extent that Dofasco has paid further amounts to the Receiver on account of taxes, such amounts should have been and must now be paid over to the City.

42 Personalty is dealt with under s. 400 of the Act. The Bank advances many reasons why the City has no entitlement to personalty or its proceeds. First, the Bank argues in its factum that the "goods and chattels" the City was entitled to pursuant to s. 400(1) did not include such items as Usarco's receivables, rent and like matters. I understood this argument respecting receivables was withdrawn during oral argument.

43 The Bank then argued that the City was further limited to applying the proceeds of the sale of personalty on a particular lot to the realty taxes on that lot. It was then argued that the City's lien respecting chattels did not arise until after distraint, and since the City never distrained any personalty, it had no lien in that regard and therefore no priority. Finally, in dealing with s. 400(11), which applies where personal property liable to seizure for taxes is in the hands of certain named persons, it was argued that as the Receiver was not one of such named persons, no relief was available to the City under s. 400(11).

44 The City's position is that s. 400(1)(a) accords the City the right to distrain against the goods and chattels of Usarco and Levy situated anywhere in the county and that s. 400(1)(d) gives the City the right to distrain against any goods and chattels situated on the subject property, i.e. on the property on which municipal taxes remain unpaid.

45 The City also argues that "chattels" is one of the widest words known in law in its relation to personal property (*Goverde, Re*, [1972] 2 O.R. 506 (Ont. S.C.)), therefore it encompasses all personal property including:

> . . . choses in action such as money in a bank account, stocks, bonds, the right to receive money under a contract (e.g. rents under release) and debts (e.g. accounts receivable).

46 As a result, the City submits that in the instant case the meaning of "chattels" in s. 400(1) includes all of the assets realized upon by the Receiver and the proceeds thereof. Having regard to the concession by counsel for the Bank in the course of oral argument and his choosing not to argue further as to the meaning of "chattels", no specific ruling is required in this regard.

47 In view of the fact that s. 400(1)(a) refers to goods and chattels situated anywhere in the county and s. 400(1)(d) refers to *any* goods and chattels on the particular land on which taxes are unpaid, it does not seem to me that the City is limited by any geographic argument.

48 The real argument with respect to personalty is whether s. 400(11) applies to the Receiver in this case. The relevant language of that section is set out earlier in these reasons. The Bank argues that the section has no application because a court-appointed receiver or a receiver of any kind is not included in the list of persons to whom the subsection applies. Only a sheriff, bailiff of any court, assignee, liquidator, trustee or authorized trustee in bankruptcy are listed in s. 400(11). The City's position is that the Receiver is a "trustee" within the meaning of s. 400(11).

49 In my view, the purpose of s. 400(11) is to provide a municipality clear and simple means to assert its priority in circumstances where personalty otherwise available to be seized for taxes, has come under the control of some other person and has been or is in the process of being realized for the purpose of paying a debt or debts owed to that other person or his or her principal. In my opinion a receiver in these circumstances has no personal interest in the fund, apart from its fees and

is therefore a trustee as well as a receiver. As such the Receiver comes within the ambit of the s. 400(11).

50 The jurisprudence on this point is mixed. In *Royal Bank v. 238842 Alberta Ltd.* (1985), 57 C.B.R. (N.S.) 242 (Sask. C.A.) the contest was between a debenture holder and a municipality claiming for business taxes and water and electric charges. The receiver, whose appointment by the debenture holder had been affirmed by the court, was directed to pay into court the proceeds of his sales of the debtor's assets. Section 384 of the *Saskatchewan Urban Municipality Act*, R.S.S. 978, c. U-10 was identical to our s. 400(11) for the purposes of these proceedings. At 247 and 248 Wakeling J.A. speaking for the majority said:

> The section [s. 384] certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen* . . . in which an almost identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.

51 The reasons of the court do not reveal any discussion apart from the foregoing as to whether the receiver in that case was a "trustee" within the meaning of s. 384.

52 In *Alberta Treasury Branches v. Invictus Financial Corp.* (1986), 42 Alta. L.R. (2d) 181 (Alta. Q.B.), aff'd (1986), 47 Alta. L.R. (2d) 94 (Alta. C.A.) a court appointed receiver-manager sought direction as to the priority of claims as amongst a Workers' Compensation Board claim for employer contributions, claims of two municipalities for business taxes incurred both before and after the appointment of the receiver and the claim of a debenture holder under its debenture. Stratton J. of the Court of Queen's Bench decided that the Workers' Compensation Board ranked first because of the language of its legislation. One of the claiming municipalities was Lloydminster, which is partly in Alberta and partly in Saskatchewan, and as a consequence is governed by a charter. Section 330 of the charter is for our purposes identical to Ontario s. 400(11). At 189 and 190 Stratton J. said:

> Upon deciding that the *Decker's Delicatessen and Mowbrey Stout* [*Royal Bank v. 238842 Alberta Ltd.*] cases apply to the case at bar, it must then be determined whether, in the present case, the receiver-manager falls within any

of the categories listed in s. 330 of the charter. "Receiver" is not expressly mentioned in that section.

I am of the view that a court-appointed receiver-manager would fit within the term of "trustee." A court-appointed receiver-manager is a fiduciary. His obligations reach further than merely acting honestly and in good faith. Wilson J. of the Manitoba Court of Queen's bench indicated in *Fotti v. 777 Mgmt. Inc.* ... that a receiver-manager appointed under a court order is:

> . . . an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.

The scope of the priority created by s. 330 of the charter is clearly limited to personal property and to the proceeds of personal property. [Emphasis added.]

53 Thus *Royal Bank v. 238842 Alberta Ltd.*, *supra*, *Alberta Treasury Branches v. Invictus Financial*, *supra* and *Fotti v. 777 Management Inc.* [reported [1981] 5 W.W.R. 48 (Man. Q.B.)], *supra* all equate a receiver with a trustee for the purposes of s. 400 (11). *Bennett on Receiverships*, *supra*, cites the *Alberta Treasury Branches v. Invictus Financial*, *supra*, as authority for the statement that "[a] court-appointed receiver is a trustee and fiduciary" (at p. 180, footnote 93).

54 *Royal Bank v. Sherkston Beaches Ltd.* (1988), 70 C.B.R. (N.S.) 197 (Ont. H.C.) stands for the contrary position. This case involved a claim by a municipality for business taxes assessed against Sherkston Beaches Limited. Sherkston Beaches Limited owned and operated a recreational park and camping facility within the limits of the municipality. Royal Bank was its major creditor and on its application a receiver was appointed by the court. The operation was sold to another company but the proceeds were not sufficient to pay both the business taxes assessed and the amount owing to the bank. With respect to the application or otherwise of s. 400(11) O'Driscoll J. at 202 and 205-207, said the following:

V. ISSUES

A. *Is the court-appointed receiver a "trustee or authorized trustee in bankruptcy" under the provisions of s. 387(11)* [now s. 400 (11)] of the Municipal Act?

Re P.W. Ellis Co. (1929), 36 O.W.N. 202, 10 C.B.R. 491 at 493-94 (S.C.; Official Referee):

Secondly, Mr. Herapath contends that if the proceeds are to be regarded as I think they must be, as being in the possession of Mr. Clarkson *qua* receiver on behalf of the bondholders, then the words in the subsection "or of any trustee" include a receiver such as Mr. Clarkson is and the section applies.

I disagree with this contention also. The whole phrase must be read together, "or of any trustee or authorized trustee in bankruptcy," both referring, I think to a case of bankruptcy; and I cannot bring myself to believe, what Mr. Herapath's argument implies, that a trustee for a mortgagee claiming or being in possession of chattel property, is in a worse position than the mortgagee himself would have been had he taken possession of the mortgaged property.

Conclusion

My answer to the question posed in "A" is: "No".

. . .

VI. SUBMISSION OF COUNSEL FOR THE CITY OF PORT COLBORNE

1. The receiver is a "trustee" under the provisions of s. 387(11) of the *Municipal Act*.

2. In the case at bar, "property has been converted into cash and is undistributed." (s. 387(11) of the *Municipal Act*).

3. Notice of the amount due was given to the "trustee".

4. The "trustee" is obliged to pay the city the arrears of business tax under s. 387(11) of the *Municipal Act*.

5. The following decisions support the city's position:

(a) *Royal Bank v. 238842 Alta. Ltd.; Saskatchewan v. Mowbrey Stout Ltd.*, 57 C.B.R. (N.S.) 2422, [1985] 5 W.W.R. 373, 20 D.L.R.(4th) 450, 40 Sask.R. 177 (C.A.)

(b) *Re Decker's Delicatessen*, O.L.R. 140, 5 C.B.R. 208, [1925] 1 D.L.R. 652 (S.C.)

My conclusions

1. The following quotations are found in the majority judgment in the Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta., Ltd., supra*:

Page 246:

> The section then goes on to indicate that the only interest which is protected from the city's remedy by distress is that of a vendor with a subsisting lien for the purchase price (s. 379(2)).

Pages 247-48:

> In the result, the provisions of s. 379 set up a different but very extensive system of priorities which are sweeping in nature, covering by specific mention the right to distrain against property other than that of the taxpayer and exempting only the claim of an unpaid vendor . . .
>
> The section certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen*[*supra*] in which an almost identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.

2. It will be observed that:

(a) The Saskatchewan Court of Appeal in *Royal Bank v. 238842, supra*, did not consider the question: Was the personal property "liable to seizure for taxes"?

> (b) The Saskatchewan Court of Appeal did not deal with the question whether a court-appointed receiver falls within the phrase "trustee" in the legislation comparable to s. 387(11) of the *Municipal Act*.
>
> (c) (c) In *Re Decker's Delicatessen*, *supra*, Fisher J. was sitting as a *bankruptcy judge* and had to decide whether the priorities set out in s. 387(11) of the *Municipal Act* of Ontario should take precedence or whether a priority in the *Landlord and Tenant Act* of Ontario should take precedence.

Fisher J. held (headnote [O.L.R.]):

> . . . [that] the trustee of the bankrupt estate is bound to pay, out of the proceeds of the personal property of the debtor liable to seizure for taxes and rent, rates payable by the debtor to Hydro-Electric Power Commission, in priority to the claim of the landlord for rent.
>
> (d) The case before me does not involve a bankrupt estate nor does it involve two competing statutes each setting out a priority.
>
> (e) In my view, *Re Decker's* is not analogous to the case before me.
>
> (f) The Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta. Ltd., supra*, dealt with a statute which gave wide powers to municipalities regarding distress for arrears of business taxes - powers much wider that the Ontario statute.

If and insofar as the decision of the Saskatchewan Court of Appeal is in conflict with the Ontario decisions, I decline to follow it.

55 I am not certain what weight should be given to *Royal Bank v. Sherkston Beaches Ltd.*. First, it deals with business taxes rather than realty taxes and the powers of a municipality with respect to collecting realty taxes and business taxes are not co-extensive. In addition, the motions judge found that the goods in question were not "liable to seizure" because the bank's secured claim exceeded the value of the goods and accordingly Sherkston Beaches Ltd. had no interest or equity in the goods. As well, the decision of the Alberta Court of Appeal in *Alberta*

Treasury Branches v. Invictus Financial, *supra*, does not appear to have been drawn to the attention of the motions judge.

56 If the motions judge's conclusion was based upon the Official Referee's opinion, then with respect, I would draw a distinction between the example referred to by the Official Referee, namely a person not appointed by the court, and the situation in the instant case. That same distinction was drawn by Sherstobitoff J.A. in *Canadian Commercial Bank*, *supra*, when he pointed out the difference between a "private debtor" and an "officer of the court". It may well be that, in the instant case, had the Bank itself taken and sold the personalty, it would have been in a stronger position than the Receiver. The Receiver was bound, by its appointment, to act on behalf of all interested parties, including Usarco, Levy and the City. Had the Bank taken possession, by itself or by a private receiver it could have looked to its own interests alone. I disagree with what appears to have been the opinion of the Official Referee in this regard.

57 In *Royal Bank v. Niagara Falls (City)* (1992), 7 O.R. (3d) 147 (Ont. Gen. Div.) Steele J. dealt with the lawfulness of a seizure for business taxes. After deciding the case in favour of the municipality, Steele J. said at 151:

> I do not think that s. 400(11) has any application. The private receiver appointed by the bank is not one of those persons referred to therein. In this regard, I agree with the conclusion in *Royal Bank of Canada v. Sherkston Beaches Ltd.* (1988), 64 O.R. (2d) 126, 49 D.L.R. (4th) 460 (H.C.J.), at p. 130 O.R., p. 464 D.L.R. I would distinguish the decision in the *Sherkston Beaches* case from the present one in that, in that case, no seizure had taken place. [Emphasis added.]

58 I agree with Steele J. that s. 400(11) had no application to the circumstances of that case. His remarks with respect to the decision in *Royal Bank v. Sherkston Beaches Ltd.*, *supra*, were accordingly *obiter*. It does not appear from the reasons of Steele J. that the decision in *Alberta Treasury Branches v. Invictus Financial*, *supra*, was drawn to his attention.

59 Having regard to the purpose of s. 400(11) as set out earlier and to the circumstances under which the court-appointed Receiver dealt with the properties in question, including both realty and personalty, I conclude that the Receiver in the instant case was a "trustee" within the meaning of s. 400(11). It is conceded that the requirement for notice in s. 400(11) was met. Accordingly the Bank's arguments with respect to priority with respect to the proceeds from the sale of personalty must be rejected.

60 I should note that in reaching this conclusion, in addition to the authorities discussed above, I have considered the following:

The Assessment Amendment Act, S.O. 1917 c.45, s.10 (the original of what is now s. 400(11) of the *Municipal Act* R.S.O. 1990, c.M-45).

In *West & Co., Re* (1921), 2 C.B.R. 3 (Ont. S.C.).

In *Cecilian Co., Re* (1922), 2 C.B.R. 330 (Ont. S.C.).

The Suburban Area Development Act, S.O. 1922, c.77, s.24 (which amended the *Assessment Act* by adding the words "or trustee or authorized trustee in bankruptcy").

In *Ellis Co., Re* (1929), 10 C.B.R. 491 (Ont. Master).

In *General Fireproofing Co. of Canada, Re* (1937), 18 C.B.R. 159 (S.C.C.).

In *Blind River Pine Co., Re* (1937), 19 C.B.R. 41 (Ont. S.C.).

Merrell v. A. Sung Holdings Ltd. (1992), 11 M.P.L.R. (2d) 62 (Ont. Gen. Div.) aff'd. (1995), 22 O.R. (3d) 44 (Ont. C.A.).

808757 Ontario Inc. (Receiver of), Re (1994), 26 C.B.R. (3d) 75 (Ont. Gen. Div. [Commercial List]).

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc. (1996), 41 C.B.R. (3d) 251 (B.C. C.A.)

61 The Bank has an alternative or additional argument. It submits that the Bank is entitled to any and all of the money recovered by virtue of its security, while the City is more limited in that it can only apply the money recovered by the disposition of realty and personalty owned by Usarco to the taxes owing by Usarco. Simply put, the money recovered from the sale of Levy's property cannot be applied to tax arrears on Usarco's property.

62 This submission was not made by the Bank at the hearing below nor does it appear in its factum. Counsel for the Bank first advised counsel for the City of the argument at 8:30 a.m. on October 11, 2000, the day the appeal was to be argued. The court was advised of this submission when the case was called for argument, at which time counsel for the Bank sought to introduce a chart to illustrate this point. The City's position was that the court should not hear the argument because it was

not raised before and notice was not given until that day. As the court anticipated that the hearing might run over into the following day, it decided to accept the chart and hear the argument without any commitment on the court's part to deal with the argument. Counsel for the City would be at liberty, if so advised, to file written submissions on the matter. He did so the following day.

63 The first two paragraphs of those submissions are as follows:

> 1. The Bank now raises, for the first time in these proceedings, the distinction between assets and property owned by the two Defendants, Usarco Limited ("Usarco") and Usarco's President, Director and majority shareholder Frank Levy ("Levy"). The Bank says that the assets of Usarco cannot be used to pay the realty tax arrears of Levy, and vice versa, and as a result, at most the City is entitled to recover $645,823.01 in respect of Usarco realty tax arrears and $276,980.32 in respect of Levy realty tax arrears.
>
> 2. This is wrong, it is submitted, in three ways:
>
> > (a) it ignores the treatment of the Usarco and Levy properties and assets as one by the Receiver during the course of the receivership, as set out in more detail below and as evidenced in the attached documents from the Appeal Books;
> >
> > (b) it ignores the strong evidence that Usarco was a tenant on the Levy properties; and
> >
> > (c) even if the Appellant is correct in its submission, it fails to allocate to the Levy realty tax arrears the $541,800.00 the Receiver realized in respect of Usarco's inventory which was situated on Levy property (363 Wellington St. N.) and the $729,802.43 the Receiver realized in respect of Usarco's Accounts Receivable which were situated at Usarco's head office on Levy property (363 Wellington St. N.), as it should pursuant to s. 400(1)(d)(ii) of the *Municipal Act*.

64 I agree with those submissions. Arguments (a) and (b) run together. All the properties were used by Usarco or for Usarco's purposes. There was no indication that Levy's involvement in or ownership of the properties was personal. The Receiver treated the properties as a single pool of Usarco assets and the only reference to Levy was to identify which parcels were being talked about. Usarco assets were used for the benefit of "Levy" lands. When lands were sold, there was no apportionment of the price between the part in Levy's name and the part in Usarco's name.

65 Whether in retrospect the Receiver acted properly in treating this as a single receivership rather than as two, the fact remains that it did. To achieve the allocation now asserted by the Bank would require, at the least, consideration of a reaccounting to reflect separate ownerships. In my view it is neither timely nor appropriate to consider such a suggestion. The allocation argument must therefore be rejected.

66 In paragraph 25, I set out the position taken by counsel for the Bank on the appeal. This position was that the issue between the Bank and the City was a question of priorities and that the Receiver was correct in not paying any taxes during the receivership. Instead, the proper position was to protect, preserve and realize the assets and leave priorities to be worked out at the end. The Bank claimed that nothing had been lost and no one had been injured by the Receiver following such a course.

67 In my respectful view, that position is quite wrong and totally untenable. It overlooks the Receiver's normal duty to pay the taxes as part of preserving the property. The deliberate accretion of penalties and interest discriminated amongst interested parties, favouring the Bank at the expense of all others, including the City and the owners. There may well be receiverships where an uneven hand is appropriate. Such a position, however, should not be adopted unilaterally or at the suggestion or request of the petitioning creditors, but only upon direction from the court upon complete disclosure and on notice to parties who may be affected.

68 The appeal of the Bank must therefore be dismissed with costs. The Receiver submitted its rights to the court and took no significant part in the argument. Its costs may be addressed by letter if so advised.

Appeal dismissed.