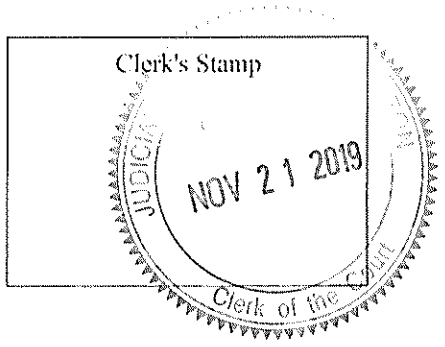

COURT FILE NUMBER	1803-09581
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**BANK OF MONTREAL**
DEFENDANT	**LADACOR AMS LTD., NOMADS PIPELINE CONSULTING LTD., 2367147 ONTARIO INC., and DONALD KLISOWSKY**
DOCUMENT	**SECOND SUPPLEMENTAL BRIEF**
PARTY FILING THIS DOCUMENT	ALVAREZ & MARSAL CANADA INC. LIT, in its Capacity as Receiver and Manager of LADACOR AMS LTD., NOMADS PIPELINE CONSULTING LTD., and 2367147 ONTARIO INC.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP 3500 Bankers Hall East 855 - 2nd Street S.W. Calgary, Alberta T2P 4J8 Attention: Kelly Bourassa Keith D. Marlowe James Reid Telephone: 403-260-9697 403-260-9632 403-260-9731 Facsimile: 403-260-9700 Email: kelly.bourassa@blakes.com keith.marlowe@blakes.com james.reid@blakes.com File Ref.: 99766/12

I. INTRODUCTION

1. This Second Supplemental Brief of Law is filed by Alvarez & Marsal Canada Inc. LIT ("**A&M**"), the Court-appointed receiver and manager (the "**Receiver**") of Ladacor AMS Ltd. ("**Ladacor AMS**"), Nomads Pipeline Consulting Ltd. ("**Nomads**"), and 2367147 Ontario Inc. ("**236**", and together with Ladacor AMS and Nomads, collectively, the "**Debtors**").

2. This Second Supplemental Brief of Law is filed in response to the brief of law filed by Mr. Donald Klisowsky on November 14, 2019 (the "**Klisowsky Brief**"). Mr. Klisowsky asks this Honourable Court to, among other things: (i) stay the Receiver from assigning Nomads into bankruptcy; and (ii) direct the Receiver to allocate alleged Nomads debts to Ladacor AMS.

3. The Receiver previously filed briefs of law in support of the Receiver's Application on September 5, 2019 (the "**Application Brief**"), and September 12, 2019 (the "**First Supplemental Brief**"). Capitalized terms used and not otherwise defined herein will have the meanings given to them in the Application Brief or the First Supplemental Brief.

II. BACKGROUND

4. A brief overview of the relevant facts pertaining to the relief sought by Mr. Klisowsky in the Klisowsky Brief is set out below.

A. The Receivership Order was not Amended or Appealed

5. Pursuant to the Receivership Order, the Receiver was appointed receiver and manager, without security, over all of the Property of the Debtors pursuant to, among other things, section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**").

    - Fourth Report at para 1

6. In the First Supplemental Brief, at paragraphs 28 – 34, the Receiver addresses the law with respect to Nomads' insolvency under the BIA.

7. The Receivership Order authorizes the Receiver to assign Nomads into bankruptcy, as Nomads is an insolvent person.

    - Application Brief at Tab 1, section 3(s)

8. Mr. Klisowsky's counsel was served with the application that gave rise to the Receivership Order. Further, Mr. Klisowsky's counsel attended that application.

- Transcript of Questioning of Donald John Klisowsky on October 23, 2019 (the "**Klisowsky Transcript**"), 6:12-26
- Affidavit of Service of Michelle Tuck filed May 17, 2018

9. Thereafter, Mr. Klisowsky's counsel was served with a copy of the Receivership Order.

- Klisowsky Transcript, 7:10-13
- Affidavit of Service of Michelle Tuck filed May 25, 2018

10. Mr. Klisowsky did not appeal the Receivership Order, nor has Mr. Klisowsky sought to amend the terms of the Receivership Order.

- Klisowsky Transcript, 7:13-16

11. Mr. Klisowsky has not provided any evidence to show Nomads is not an insolvent person under the BIA.

B. The Court has Approved of the Receiver's Conduct

12. To date, the Receiver has filed five reports in which the Receiver provided updates to this Honourable Court and the Debtors' stakeholders on the Receiver's ongoing activities and conduct.

13. The Receiver filed its First Report on October 2, 2019 (the "**First Report**"). The Receiver served the First Report on the interested parties, including Mr. Klisowsky. The First Report addressed the Receiver's application for, among other things, approval of the actions, conduct, and activities of the Receiver as set out in the First Report.

- Application of the Receiver filed October 2, 2018
- Affidavit of Service of Lindsay Farr filed October 9, 2018
- Klisowsky Transcript, 12:20-27

14. In the First Report, and several of its subsequent reports, the Receiver advised the Court that, for accounting and financial reporting purposes, Nomads and Ladacor AMS combined their financial records and did not separate their assets and liabilities.

- First Report at paragraph 10
- Second Report of the Receiver filed October 17, 2018 (the "**Second Report**") at paragraph 7
- Third Report of the Receiver filed December 10, 2018 (the "**Third Report**") at paragraph 7
- Fourth Report of the Receiver filed September 4, 2019 (the "**Fourth Report**") at paragraph 8

15. Also in the First Report, the Receiver provided reporting regarding certain liabilities of the Debtors, including unpaid pre-receivership source deductions, WEPP claims, and accounts payable owing by Nomads.

- First Report at paragraphs 21, 25(b), 27

16. The First Report described the status of various projects of Nomads and Ladacor AMS. In particular, the Receiver reported extensively on its dealings with respect to the Hythe Project and the Chateh Courthouse Project (as defined in the First Report). Specifically with respect to the Chateh Courthouse Project, the Receiver advised that it was not in a position to adopt that Project, particularly given that Ladacor AMS had not yet started that work.

- First Report at paragraphs 37, 45-49

17. Further, in the First Report, the Receiver reported on a transaction for the sale of the inventory and equipment of Nomads and Ladacor AMS pursuant to an Auction Agreement (as defined in the First Report). The Auction Agreement was attached to the First Report as Appendix B.

- First Report at paragraphs 53-62

18. The Auction Agreement listed the inventory and equipment that was deemed to be owned by Nomads and the inventory and equipment that was deemed to be owned by Ladacor AMS. Further, the Application filed by the Receiver in conjunction with the First Report (the "**October 2018 Application**") attached, as a schedule, a list of the inventory and equipment that was subject to the Auction Agreement. In the schedule, the Receiver set out the inventory and equipment that was deemed to be Nomads' and which inventory and equipment was deemed to be that of Ladacor AMS.

- First Report at Appendix A and Appendix B
- October 2018 Application filed October 2, 2018

19. Finally, in the First Report the Receiver also advised that it intended to assign Ladacor AMS and Nomads into bankruptcy when appropriate due to, among other things, the significant debts of each company.

- First Report at paragraph 78(b)

20. Mr. Klisowsky's counsel acknowledged that he was served with the October 2018 Application and First Report. Mr. Klisowsky also acknowledged reading the First Report.

- Klisowsky Transcript, 10:10-11 and 12:20-27
- Affidavit of Service of Lindsay Farr filed October 9, 2018

21. Mr. Klisowsky did not dispute any of the facts or information reported by the Receiver in the First Report, nor did Mr. Klisowsky oppose the October 2018 Application or appeal the order (the "**October 2018 Order**") approving the Auction Agreement and the Receiver's conduct, as reported in the First Report.

- Klisowsky Transcript,14:3-5
- October 2018 Order at section 18

III. ISSUES

22. The Klisowsky Brief lists seven issues, each of which are addressed in turn below.

IV. ARGUMENT

A. Issues Regarding the Liberty Indemnity Agreement and Performance Bond

23. In the Klisowsky Brief, Mr. Klisowsky alleges that the Receiver could have unilaterally cancelled the Performance Bond between Ladacor AMS and Liberty. Mr. Klisowsky's only authority for this position is a reference to Clause 45 of the Indemnity Agreement, which in fact states the exact opposite.

- Supplemental Affidavit of Donald Klisowsky sworn September 11, 2019 (the "**Supplemental Klisowsky Affidavit**") at Exhibit B at Clause 45

24. In the First Supplemental Brief at paragraphs 43 - 47, the Receiver set out the law regarding why the Receiver could not have cancelled the Performance Bond. This Second Supplemental Brief does not repeat that law, but instead addresses specific statements made in the Supplemental Klisowsky Affidavit and Klisowsky Brief that conflict with Mr. Klisowsky's evidence on cross-examination.

25. In the Supplemental Klisowsky Affidavit, Mr. Klisowsky says that he is "very familiar" with performance bonds, and, as such, in his view, the Performance Bond should have and could have been cancelled by the Receiver prior to cancelling the Chateh Courthouse Project. Mr. Klisowsky acknowledged that the Performance Bond was a standard form Canadian Construction Documents Committee ("**CCDC**") document and was in a form approved by the Surety Association of Canada. Notwithstanding his familiarity with performance bonds, Mr. Klisowsky said he had never used this particular CCDC form.

- Klisowsky Transcript, 39:1-20
- Affidavit of Donald Klisowsky filed September 13, 2019 (the "**Original Klisowsky Affidavit**") at Exhibit E

26. In cross-examination, Mr. Klisowsky further advised that he was unfamiliar with the Surety Association of Canada and unfamiliar with the Surety Association of Canada's information paper that expressly states that performance bonds cannot be cancelled.

- Klisowsky Transcript at pages 40 - 42
- Surety Association of Canada, *Information Paper: Surety Bonds Versus Letters of Credit*, Exhibit A for Identification to the Klisowsky Transcript, **[TAB 1]**

27. Ultimately, in cross-examination, Mr. Klisowsky acknowledged that he did not know whether it was possible for the Receiver to cancel the Performance Bond.

- Klisowsky Transcript, 42:12-18

28. Accordingly, because performance bonds cannot be cancelled, the suggestion made by Mr. Klisowsky in the Klisowsky Brief that it was commercially unreasonable for the Receiver to have not adopted the Chateh Courthouse Project without cancelling the Performance Bond is entirely without merit.

29. Mr. Klisowsky argues in the alternative that if the Performance Bond could not have been cancelled, then the Receiver should have carried out the Chateh Courthouse Project.

30. Ladacor AMS had not even started the Chateh Courthouse Project when the Receiver was appointed. The Receiver is not in the business of construction and if the Receiver were to consider starting a construction project, the project terms would have to be negotiated with the project owner and ultimately there would need to be benefit for the estate, with little to no risk of completion. It is unreasonable for Mr. Klisowsky to suggest that the Receiver should have taken on that work simply to avoid the triggering of the Performance Bond.

31. Further, the Receiver was acting within the authority granted to it by the Receivership Order by not adopting the Chateh Courthouse Project.

- Application Brief at Tab 1, Receivership Order at section 3(c)

32. In the First Report, the Receiver advised the Court and the Debtors' stakeholders that it was unable to adopt the existing Chateh Courthouse Project or enter into a new contract to start the work on this project. Pursuant to the October 2018 Order, this Court approved the Receiver's activities, including with respect to the Chateh Courthouse Project.

- First Report at paragraph 37
- October 2018 Order at paragraph 18

33. If Mr. Klisowsky had concerns with the Receiver's actions in not adopting the Chateh Courthouse Project contract, he could have and should have raised this issue with the Receiver or the Court last year. He did not do so, and he did not appeal the October 2018 Order approving the Receiver's conduct.

34. At this late stage in the Receivership Proceedings, for Mr. Klisowsky to seek to challenge the previously approved actions and conduct of the Receiver is a collateral attack on the October 2018 Order and should be disregarded.

- *Royal Bank v Hirsche Herefords,* 2012 ABQB 32 [**TAB 2**]
- *Marsh Engineering Ltd v Deloitte & Touche Inc,* 2008 CarswellOnt 7933 (SC) [**TAB 3**]

B. The Identification of Debt between Ladacor AMS and Nomads

1. There was no Transfer of Assets and Liabilities from Nomads to Ladacor AMS

35. Paragraph 15 of the Klisowsky Brief states that prior to these Receivership Proceedings all of the assets and liabilities of Nomads' modular systems business were "effectively" transferred to Ladacor AMS, and that Nomads ceased operating as a going concern. As a result, Mr. Klisowsky suggests that many of the unsecured creditors attributed to Nomads in the Nomads Unsecured Creditor Listing are creditors of Ladacor AMS, irrespective of who these creditors were addressing their invoices to or who they had contracted with.

36. The Receiver is unaware of any documentary evidence to support Mr. Klisowsky's assertion that Nomads had transferred its assets and liabilities to Ladacor AMS. Further, at the time the Receiver was appointed, Nomads had ongoing projects, which undermines the assertion that Nomads was simply a passive holding company.

- Richard Affidavit at paragraph 27

37. If Nomads had in fact ceased its operations and transferred its assets and liabilities to Ladacor AMS, there would have been transaction documents, board resolutions and contract assignments to support that assertion. There are no such documents. Both Nomads and Ladacor AMS had outstanding projects, employees, and contractual obligations. For Mr. Klisowsky to state that Nomads ceased its operational business to become a passive holding company is incorrect.

- First Report at paragraphs 39-49
- Third Report at paragraphs 15-21
- Fourth Report at paragraphs 22-27

2. The Receiver was Required to Allocate the Assets and Liabilities

38. The Receiver has consistently stated in the reports filed with this Court that Nomads and Ladacor AMS combined their financial records for accounting and financial reporting purposes, and that they had not separated their assets and liabilities at the time the Receiver was appointed.

- First Report at paragraph 10
- Second Report at paragraph 7
- Third Report at paragraph 7
- Fourth Report at paragraph 8

39. In cross-examination, Mr. Klisowsky acknowledged that Nomads operated under the name Ladacor. Further, certain of Nomads' contracts included the Ladacor Advanced Modular Systems logo, showing that it also operated under that name.

- Klisowsky Transcript, 16:12-16
- Original Klisowsky Affidavit at Exhibit A
- Affidavit of Jack Steenhof sworn October 25, 2019 at Exhibit A
- Answers to Undertakings of Bonnie Erin Richard (the "**Richard Undertakings**"), Response to Undertaking 4

40. As a result of the confusion in the names of the entities and the combined financial records of the companies, the Receiver engaged Nomads' and Ladacor AMS' former controller, Erin Richard, to help the Receiver determine which assets and liabilities belonged to which entity.

- Fourth Report at paragraphs 29(d) and 32
- Supplement to the Fourth Report of the Receiver dated September 12, 2019 (the "**Supplemental Report**") at paragraphs 16 - 20

41. Mr. Klisowsky suggests in the Klisowsky Brief that Ms. Richard was not employed by Nomads and Ladacor AMS long enough to know which assets and liabilities belonged to which entity. However, it was Mr. Klisowsky who advised the Receiver that Ms. Richard was best positioned to assist the Receiver because she had a fulsome understanding and knowledge of the assets and liabilities of the companies.

- Supplemental Report at paragraph 18

42. As a result of the intermingling of accounts, employees, and even the use of the Ladacor name, as part of the Receiver's duties to administer the estates of each company, the Receiver had to determine which assets and liabilities belonged to which estate. The Receiver, in good faith and with the assistance of Ms. Richard, the person who had the most knowledge of the books and records of the companies, allocated invoices to the company and the project to which such

invoices were addressed (i.e. either a Nomads project or a Ladacor AMS project). It is the Receiver's view that such an allocation of liabilities is commercially reasonable.

- Supplemental Report at paragraph 18

43. Mr. Klisowsky argues in the Klisowsky Brief that the procedure used by the Receiver to determine which assets and liabilities belonged to which company was commercially unreasonable because, at the time the Receiver was appointed, all business activity was flowing through Ladacor AMS' Bank of Montreal account (the "**BMO Account**").

44. The reason that all business activities of both companies were flowing through the BMO Account was because Nomads' bank account at the Royal Bank of Canada became subject to the Requirement to Pay Money Notice from Alberta Finance. This meant that Nomads could no longer use its own bank account without the funds being swept to pay Nomads' debt to Alberta Finance.

- Affidavit of Bonnie Erin Richard filed October 25, 2019 (the "**Richard Affidavit**") at paragraphs 10 - 15 and Exhibit C
- Transcript of Questioning of Bonnie Erin Richard held November 4, 2019 (the "**Richard Transcripts**") at pages 16 - 22

45. As a result of professional designation concerns with Nomads conducting its banking operations through Ladacor AMS' account, when Nomads started using the BMO Account, Nomads CFO resigned.

- Richard Affidavit at paragraph 14
- Richard Transcripts at pages 16 - 22

3. Nomads and Ladacor AMS Combined their Financial Records for Reporting to the Bank of Montreal

46. The Klisowsky Brief relies heavily on the fact that the combined financial reporting of Nomads and Ladacor AMS to the Bank of Montreal is proof that all of the assets and liabilities of Nomads had been transferred to Ladacor AMS. The reporting to Bank of Montreal does not show this.

47. As noted above, and as has been consistently reported by the Receiver, prior to the Receiver's appointment, Nomads and Ladacor AMS combined their financial records for accounting and reporting purposes.

- First Report at paragraph 10
- Second Report at paragraph 7
- Third Report at paragraph 7

- Fourth Report at paragraph 8

48. The Bank of Montreal was aware that the reporting it received was combined reporting of both Nomads and Ladacor AMS.

- Affidavit of John Herman filed May 24, 2018 at Exhibit B

49. In fact, the reporting to the Bank of Montreal showed the same accounts receivable as being accounts receivable of both Nomads and Ladacor AMS.

- Richard Undertakings, Response to Undertaking 4

50. The financial reporting to the Bank of Montreal is consistent with the Receiver's reporting to this Court, that Nomads and Ladacor AMS combined their financial records for accounting and reporting purposes. The financial reporting is not evidence of Nomads having transferred its assets and liabilities to Ladacor AMS or of Nomads ceasing its operations.

4. The Denial of the Nimchuk Claim

51. In the Klisowsky Brief, Mr. Klisowsky denies the validity of the $325,000 claim of Nomads' former President and CEO against Nomads. In the alternative, Mr. Klisowsky claims that Mr. Nimchuk was an employee of Ladacor AMS and not Nomads.

52. Mr. Nimchuk's employment contract expressly states that he was employed by Nomads. Any dispute as to the quantum or validity of Mr. Nimchuk's claim can be assessed by the bankruptcy trustee of Nomads in a claims process.

- Secretarial Affidavit of Lindsay Farr at Exhibit A

5. The Denial of the CRA Claim

53. In the Klisowsky Brief, Mr. Klisowsky denies that the amount owing by Nomads to the Canada Revenue Agency ("**CRA**") for unpaid pre-filing source deductions is a debt of Nomads. The Klisowsky Brief states that if there are amounts owing to the CRA they are properly deemed to be debts of Ladacor AMS. There is no authority cited for that position.

54. The First Report noted that Nomads owed amounts to the CRA. At no time did Mr. Klisowsky advise the Receiver that those amounts were incorrectly classified as liabilities of Nomads. Further, the CRA tax notice is clearly addressed to Nomads. Mr. Klisowsky's denial of this debt obligation of Nomads is entirely unsupportable.

- Supplement to the Fourth Report at Appendix B
- First Report at paragraph 21(b)

6. Summary of Mr. Klisowsky's Creditor Listing Allegations

55. Mr. Klisowsky takes no exception with the Receiver reporting receivables coming into the estate of Nomads, including receivables from the Westgate and Hythe Projects. Mr. Klisowsky however wants to attribute all expenses for the Hythe and Westgate Projects of Nomads to the account of Ladacor AMS. This is neither reasonable nor logical from an accounting perspective.

56. In other cases, such as with the claims of Mr. Nimchuk and the CRA, Mr. Klisowsky simply denies that these claims exist, without providing any support for his position.

57. In summary, there is no merit to Mr. Klisowsky's allegations that the Receiver mischaracterized the Nomads' Unsecured Creditor Listing.

C. Identification and Allocation of Auction Proceeds

58. In the Klisowsky Brief, Mr. Klisowsky objects to the Receiver having applied certain proceeds from the sale of Nomads' inventory and equipment pursuant to the Auction Agreement to the account of Nomads instead of Ladacor AMS.

59. The Klisowsky Brief relies on a Ladacor Advanced Modular Systems accounting manual (the "**Accounting Manual**") as the basis for Mr. Klisowsky's position that all inventory was to be classified as inventory of Ladacor AMS.

- Klisowsky Affidavit at Exhibit B

60. The Accounting Manual simply provides that it is the manual for Ladacor Advanced Modular Systems. It does not specify that it is a manual for Ladacor AMS. In fact, documents show that it was Nomads, and not Ladacor AMS, that typically went by the trade name Ladacor Advanced Modular Systems. As a result, the Accounting Manual provides no basis for suggesting that inventory and equipment was to be accounted for as the property of Ladacor AMS exclusively.

- Steenhof Affidavit at Exhibit A
- Richard Undertakings, Response to Undertaking 4

61. In the First Report, the Receiver provided the lists of inventory and equipment that were purported to be owned by either Nomads or Ladacor AMS, and which were being sold in accordance with the Auction Agreement. At no point did Mr. Klisowsky dispute these inventory and equipment listings or advise the Receiver that such inventory or equipment were incorrectly being assigned to Nomads' estate.

- First Report at Appendices A and B

62. Finally, the Auction Proceeds issue does nothing to assist Mr. Klisowsky's position that Nomads is solvent, since he seeks to remove funds from the estate of Nomads and apply such funds to the estate of Ladacor AMS.

D. Identification of Nomads' Employees and WEPP Claims

63. As set out in the Supplement to the Fourth Report, the Receiver, with the assistance of the Controller, reviewed the employment contracts and human resources records of the companies to determine by which entity each employee was employed.

- Supplement to the Fourth Report at paragraph 26

64. There were approximately 120 employees of either Nomads or Ladacor AMS, and many of the employees' work overlapped both companies' projects.

- Richard Affidavit at paragraph 31

65. There are no records of the Nomads' employees having been terminated by Nomads and hired by Ladacor AMS upon the incorporation of Ladacor AMS in late 2017. Further, at no point did Ladacor AMS invoice Nomads for the use of its employees on Nomads' projects like the Hythe Project or the Westgate Project.

- Richard Affidavit at paragraph 27
- Richard Transcript at pages 84 - 85

66. As a result of the intermingling of the Ladacor AMS and Nomads payroll and employees, in the circumstances, the Receiver determined that it was reasonable to designate an employee's employment based on when such employee started working for the companies. Specifically, the Receiver used best efforts to determine which employees were employed by a particular entity for the purposes of filing WEPP claims in order for the former employees to obtain its claims for unpaid wages, vacation pay and other amounts eligible under the WEPP program.

The Receiver reported on Nomads' WEPP claims in the First Report, which was not disputed by Mr. Klisowsky.

- Richard Affidavit at paragraphs 30 – 33
- First Report at paragraph 25

E. The Alberta Finance Claim

67. In the Klisowsky Brief, Mr. Klisowsky does not appear to dispute that the Alberta Finance claim is a valid claim against Nomads, which Nomads has never paid. The Klisowsky Brief suggests however that the Receiver should be directed to investigate and negotiate a reduced amount of the debt of Nomads to Alberta Finance.

68. Mr. Klisowsky would have known about the Alberta Finance claim long before the appointment of the Receiver, since in January 2018, Alberta Finance sent Nomads' bank the Requirement to Pay Money notice.

- Richard Affidavit at Exhibit C
- Fifth Report of the Receiver filed October 25, 2019 at paragraph 11

69. As a result of the amounts that were owing by Nomads to Alberta Finance, Nomads started using the BMO Account.

- Richard Affidavit at paragraphs 10 - 15
- Richard Transcripts at pages 16 - 22

70. The Alberta Finance claim against Nomads relates to tax reassessments from 2012 through 2014, before the appointment of the Receiver. There is no evidence that Nomads or Mr. Klisowsky took any steps to appeal, challenge, or make enquiries about the Alberta Finance claim prior to the appointment of the Receiver.

- Supplement to the Fourth Report at Appendix C

71. For Mr. Klisowsky to criticize the Receiver for not investigating the Alberta Finance claim is unreasonable, especially considering that Mr. Klisowsky himself took no such steps when he was in control of Nomads.

72. Given that the Alberta Finance claim is an unsecured claim, any steps to challenge or enquire about the Alberta Finance claim can be made by the bankruptcy trustee of Nomads at the instruction of the company's unsecured creditors.

F. Issues Regarding the Proposed Subrogation Claim and 236

1. The 236 Subrogation Claim

73. It is undisputed that 236 paid the vast majority of Ladacor AMS' obligations to the Bank of Montreal.

74. The Klisowsky Brief does not appear to dispute the fact that, as a result of 236 paying the majority of Ladacor AMS' debt, 236 has a subrogation claim against Ladacor AMS, as primary debtor, and Nomads, as co-guarantor, as set out in the Application Brief at paragraphs 23 to 31.

75. As a result, it is apparent that any remaining funds held by Ladacor AMS and Nomads are properly to be allocated to 236 in partial satisfaction of 236's subrogation claims against each of these Debtors. The Klisowsky Brief provides no reason for delaying this process.

2. The Steenhof Dispute

76. Finally, in the Klisowsky Brief, Mr. Klisowsky objects to a claim being made against 236 by 1459428 Ontario Inc. operating as Steenhof Building Services Group ("**Steenhof**"). The validity of the Steenhof claim can be assessed in the bankruptcy proceedings of 236 through a claims process.

77. Paragraph 65 of the Klisowsky Brief notes that counsel to Mr. Klisowsky made a request to the Receiver's counsel for a copy of the minute book of 236, which is true. The Klisowsky Brief then states that the Receiver's counsel did not respond to this request, which is false.

78. The Receiver's counsel responded to the request of Mr. Klisowsky's counsel within five minutes of receiving the request, and the Receiver's counsel advised that it would make the minute book available to Mr. Klisowsky's counsel for review. Mr. Klisowsky's counsel subsequently advised that he was too busy to view the minute book and that he would set up a time in the future to view the records. To date, Mr. Klisowsky's counsel has not attempted to schedule a time to view the 236 minute book.

- Secretarial Affidavit of Lindsay Farr at Exhibit B

G. Issues Concerning the Conduct of the Receiver

79. The Klisowsky Brief alludes to the Receiver having engaged in improper conduct in relation to the creation of the creditor listings of the companies, the completion of the Hythe Project, and the non-adoption of the Chateh Courthouse Project.

80. The Receiver has previously reported on its actions with respect to the Hythe Project and the Chateh Courthouse Project. This Court has approved the actions and conduct of the Receiver in this regard. At no prior time in these Receivership Proceedings did Mr. Klisowsky raise any concerns with the actions or conduct of the Receiver with respect to either of these projects.

81. For Mr. Klisowsky to now raise concerns with the actions and conduct of the Receiver is without merit and is a collateral attack on the previous orders of this Court.

- *Royal Bank v Hirsche Herefords,* 2012 ABQB 32
- *Marsh Engineering Ltd v Deloitte & Touche Inc,* 2008 CarswellOnt 7933 (SC)

V. CONCLUSION

82. For the reasons set out above and in the Application Brief and Supplemental Brief, the Receiver submits that the Klisowsky Application should be dismissed, and the Receiver's Application should be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF NOVEMBER, 2019

BLAKE, CASSELS & GRAYDON LLP

Keith Marlowe / James Reid
Counsel to the Receiver

LIST OF AUTHORITIES

TAB	AUTHORITY
1	Surety Association of Canada Information Paper: Surety Bonds Versus Letters of Credit
2	*Royal Bank v Hirsche Herefords,* 2012 ABQB 32
3	*Marsh Engineering Ltd v Deloitte & Touche Inc,* 2008 CarswellOnt 7933 (SC)

Tab 1

INFORMATION PAPER: SURETY BONDS VERSUS LETTERS OF CREDIT

QUESTION

What are the differences between surety bonds and ILOCs (irrevocable letters of credit)? As an owner, does it matter if I call for a surety bond rather than an ILOC? Do I get "more" from a surety bond?

ANSWER

The following table summarizes some of the differences between ILOCs and surety bonds and why calling for surety bonds may be prudent and provide "more" protection for owners.

	Surety Bonds	ILOCs
Prequalification of contractor	Sureties have an extensive process for prequalifying contractors and only issue bond(s) when they have the confidence that a contractor has the skills/talent, labour, equipment, cash and experience to be able to complete the work.	Banks issue ILOCs based their assessment of the contractor's financial status. Banks do not assess a contractor's past performance before issuing an ILOC.
Cash position	Sureties assess the working capital and cash flow of the contractor (principal). A surety bond **does not negatively** affect the ability of the contractor to access more bank credit.	An ILOC reduces a contractor's line of credit which can cause cash flow issues during a project. The likelihood of default increase if the contractor does not have the cash flow and banking credit to pay the bills. A contractor must have access to significant cash reserves and/or borrowing lines to secure an ILOC. This could lead to a reduction in the number of qualified contractors bidding which may increase the cost of the project.

Integrity of the security	**Performance bonds and labour and material payment bonds cannot be cancelled.** A standard CCDC Performance bond clearly states what constitutes completion of the work so there is no need for the obligee (owner) to ensure that the bond is still in force.	**The onus is on the owner to ensure that the ILOC is still in force and has not been cancelled or expired.**
On-going monitoring	Because sureties monitor a bonded contractor's entire work program on an on-going basis, they are often aware of problems that have the potential to negatively impact the bonded project. While these problems may have nothing to do with the bonded contract, sureties will use this information to work with the contractor to prevent performance problems on the bonded project.	Banks focus strictly on the contractor's ability to repay the outstanding amounts.
Trigger	Surety bonds are "on default" instruments. Therefore, the obligee (owner) must also honour its obligations and demonstrate that a default has occurred. The Canadian Construction Association and other industry groups recognize that surety bonds provide a fair balance between the rights and obligations of obligees (owners) and principals (contractors).	An ILOC may be demanded by the owner at any time for any reason providing little protection to the contractor to discuss issues at hand.
Performance Bond vs. ILOC	A performance bond guarantees that the obligee (owner) ends up with a completed project at the original contract price (plus approved change orders).	An ILOC does not provide a completed project. It only provides cash (usually 10% to 20% of the contract value). Surety industry claims experience indicates that average losses approach 40% of the contract value and there have even been cases when the loss exceeds 100% of the contract value. Therefore, it is likely the cash from an ILOC will not be sufficient to complete the project and the owner will greatly exceed its original budget.
Labour and Material Payment Bond vs. ILOC	A labour and material payment bond ensures payment to the defaulted principal's (contractor's) direct subcontractors and suppliers. Payment to these subcontractors and suppliers is handled by the surety, therefore no	The claims for non-payment and liens placed by subcontractors and suppliers can easily exceed the amount of the ILOC. The owner has to use its own resources to vacate the liens and secure clear title to the property.

	additional administrative burden falls to the obligee (owner).	

SUMMARY

Surety bonds represent the best means of providing full, non-intrusive protection against the perils of contractor default for the following reasons:

Prequalification
Surety bonds provide more than pure financial security and are issued only after an exhaustive evaluation and prequalification process. The process of evaluation and prequalification, which is at the heart of the surety product, provides owners (obligees) with the confidence that the contractor (principal) has sufficient management and business structures in place to assure success.

Cash Position
Surety bonds do not affect the contractor's (principal's) cash and/or its banking facility. The contractor (principal) has full access to these resources which enables the company to expedite the completion of the bonded project.

Integrity of the Security
A surety bond is in force for the life of the contract and does not expire.

On-going Monitoring
Sureties monitor a bonded contractor's (principal's) entire work program on an ongoing basis which often allows them to foresee potential problems and mitigate these issues before any impact has been realized on the bonded project.

Trigger
Surety bonds are "on default" instruments. They support the fairness of the underlying construction contract and require an owner (obligee) to honour its obligations and demonstrate that a default has occurred.

Completed Project
With a performance bond in place, when a default has been declared, the owner (obligee) will end up with a completed project at the amount it contracted.

Administrative Burden
A labour and material payment bond removes the administrative burden to the owner and ensures that subs and suppliers are paid in full. Any unpaid subs and/or suppliers with direct contracts on the project will not be required to lien a job. Once their bond claim has been validated they will be paid by the surety.

GLOSSARY OF TERMS

Obligee

An individual or organization in whose favour an obligation is created and to whom a bond is given.

Principal

The individual or organization that bears the primary responsibility for fulfilling the obligation under the written contract referenced in the bond and that has the duty to perform for the Obligee's benefit.

Surety

The party to a surety bond who answers to the Obligee for the Principal's default or failure to perform as required by the underlying contract, permit or law.

This paper is intended to serve as a general guideline to assist members and other readers in responding to the issues discussed. Nothing contained herein should be construed as legal advice and readers are cautioned to consult with legal counsel for such advice.

RESOURCES

A.C.S.B. Designation

On-line Learning Centre

SAC Information Papers

SAC Position Papers

Construction Act of Ontario

E-Bonding

ABOUT SAC :

The Surety Association of Canada (SAC) is the national trade advocacy association that represents the interests of the surety industry across Canada. Its members consist of primary surety firms, surety reinsurers, surety/insurance brokers, and other organizations that provide related and complementary services to the surety industry.

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Tab 2

2012 ABQB 32
Alberta Court of Queen's Bench

Royal Bank v. Hirsche Herefords

2012 CarswellAlta 66, 2012 ABQB 32, [2012] A.W.L.D. 1489,
[2012] A.W.L.D. 1596, 212 A.C.W.S. (3d) 744, 530 A.R. 339

Royal Bank of Canada, Plaintiff and Hirsche Herefords, Grant Hirsche and Annette Hirsche, Defendants

Strekaf J.

Heard: October 26 - December 21, 2011
Judgment: January 13, 2012
Docket: Calgary 0901-11545

Counsel: G. Scott Watson, for Plaintiffs, Pricewaterhousecoopers Inc., As the Receiver and Manager of Hirsche Herefords, Grant Hirsche and Annette Hirsche
Patricia Quinton-Campbell, for Respondent, Canada Finance Corporation Limited

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency

Table of Authorities

Cases considered by *Strekaf J.*:

Ernst & Young Inc. v. Central Guaranty Trust Co. (2006), 384 W.A.C. 225, 397 A.R. 225, 24 B.L.R. (4th) 218, 66 Alta. L.R. (4th) 231, 2006 CarswellAlta 1479, 2006 ABCA 337, [2007] 2 W.W.R. 474, 28 E.T.R. (3d) 174 (Alta. C.A.)

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.)

Halagan v. Reifel (November 25, 1997), Doc. Vancouver C940538 (B.C. S.C.)

Hill v. Hill (2010), 2010 ABQB 528, 2010 CarswellAlta 1629, 32 Alta. L.R. (5th) 310, 62 E.T.R. (3d) 87, 98 C.P.C. (6th) 261, [2011] 2 W.W.R. 299, (sub nom. *Hill v. Hill Family Trust)* 501 A.R. 227, 323 D.L.R. (4th) 714 (Alta. Q.B.)

Iron v. Saskatchewan (Minister of the Environment & Public Safety) (1993), 1993 CarswellSask 323, [1993] 6 W.W.R. 1, 109 Sask. R. 49, 42 W.A.C. 49, 103 D.L.R. (4th) 585 (Sask. C.A.)

R. v. Litchfield (1993), 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.)

Topgro Greenhouses Ltd. v. Houweling (2009), 277 B.C.A.C. 179, 469 W.A.C. 179, 58 C.B.R. (5th) 161, 97 B.C.L.R. (4th) 301, 2009 CarswellBC 2862, 2009 BCCA 469 (B.C. C.A.)

Statutes considered:

Water Act, R.S.A. 2000, c. W-3

Generally — referred to

s. 81 — referred to

s. 82 — referred to

APPLICATION by receiver for approval of sale of water rights to property.

***Strekaf J.*:**

I. Introduction

1 A Receiver is applying for court approval of the sale of a water license. The application is opposed by a party who asserts that the water license is appurtenant to lands previously purchased by it from the Receiver.

II. Relevant Facts

2 PricewaterhouseCoopers Inc. was appointed the Receiver of Hirsche Herefords, Grant Hirsche and Annette Hirsche (the "Debtors") pursuant to a Consent Receivership Order granted on April 1, 2010 which empowered the Receiver to sell the assets of the Debtors.

3 The assets of the Debtors included lands located at the NE 30-19-29 W4M ("Hirsche Lands") and water extraction rights identified as Interim License No. 6153 and Amendments Nos. 0038539-00-01 and 00038530-00-03, Priority 1968-01-31-001 ("Water License").

4 The Receiver prepared an Information Memorandum dated August 12, 2010 that listed various assets including the Hirsche Lands and the Water License as separate items upon which interested purchasers could bid. The description of the Hirsche Lands, being Lot 3, stated in bold print that "Water Rights are not included in Lot 3 and are a separate Lot denoted as Lot 3A". The Information Memorandum was included in the Receiver's Second Report which was filed with the Court on January 20, 2011.

5 The Receiver engaged Remax Southern Realty to market the Hirsche Lands. The MLS Listing posted February 24, 2011 stated that "(w)hile this quarter is irrigated the equipment and water rights will be sold separately."

6 The Receiver's Third Report filed on April 4, 2011 stated in part that "... the Receiver has withheld from the sale of lands certain water rights which will be marketed separately in the spring of 2011".

7 On April 8, 2011, the Receiver accepted an offer by Canada Finance Corporation Limited ("Canada Finance") to purchase the Hirsche Lands for $5.3 million which had been made in the form of an Agricultural Real Estate Purchase Contract ("Purchase Contract"). Section 1.6 of the Purchase Contract, which was headed "Other considerations as per the attached Schedules:" and included check boxes for various items including "Water Rights/Irrigation Schedule (if applicable)" was crossed out and initialled by both parties.

8 The Receiver applied for court approval of the sale contemplated in the Purchase Contract. The Receiver's Fourth Report filed on April 15, 2011 in support of that application stated in paragraph 8:

> In addition, the Receiver has withheld from the sale of lands certain water rights which will be marketed separately in the spring of 2011. The water rights are in the form of a Water License in the name of Grant and Annette Hirsche issued pursuant to the *Water Act* (the "Water License"). The Water License permits the taking of water from the Highwood River at the diversion point being the land described as Northeast Quarter, 30-19-29W4, being one of the parcels being purchased by the Second Purchaser. The transfer of the Water License is subject to the transfer provisions set out in the *Water Act*, which require a mandatory public review of any requested transfer and the discretionary approval of the Director appointed pursuant to the *Water Act*. If the transfer of the Water License is not approved by the Director, then the *Water Act* provides that such licenses transfer with the land to which an existing water license is appurtenant. The Receiver has obtained advice from its counsel in respect of the inclusion of certain contractual provisions in the Second Contract to attempt to mitigate against such risk.

9 Copies of the Receiver's application and the Receiver's Fourth Report were delivered to Canada Finance's legal counsel, Ms. Patricia Quinton-Campbell, on the evening on April 20, 2011.

10 At the hearing before me on April 21, 2011 of the Receiver's application to approve the sale of the Hirsche Lands to Canada Finance, the Receiver's counsel stated that the application for approval of the sale of the Hirsche Lands to Canada Finance "does not involve the Water License, which is excluded underneath this order, and (that) the Receiver will attempt to market that separately and try to sell it because there may be some additional separate value associated with that." Thereafter, in response to a canvas by the Court of other parties' positions on the application, Canada Finance's counsel stated:

> My Lady, since we're the offeror, we're obviously in support of your approval.

11 At the conclusion of submissions regarding the application, the following exchange took place between the Court and the Receiver's counsel:

> Mr. Watson: The only other paragraph that I draw the Court's attention is the reservation in paragraph 6 of all right, title and interest — oh, I'm sorry, its actually paragraph 5 concerning the water license —
>
> The Court: Okay
>
> Mr. Watson: — no, paragraph 7 is the reservation of — of the water license from this transaction.
>
> The Court: Okay. Okay, Mr. Watson, that — that's granted.

12 The April 21, 2011 Order approving the sale of the Hirsche Lands to Canada Finance stated in part:

> 3. The Agricultural Real Estate Purchase Contract - Offer to Purchase of Canada Finance Corporation Limited dated April 7, 2011, as amended (the "Purchaser"), and the transactions contemplated therein are approved and accepted and directing that the Receiver is authorized to take all necessary steps to close the sale to the Purchaser in accordance with the terms and conditions of the accepted offer (the "Purchase Agreement") or as may be subsequently agreed to between the Receiver and the Purchaser, or as may be ordered by this Court;
>
> . . . . .
>
> 7. The Purchaser is not purchasing or acquiring as part of the Purchase Agreement any title or right in respect of the Water License, Priority No. 1968-01-31-001, File No. 11409 registered in the name of Grant Arthur Hirsche and Annette Hirsche;

13 David Kerr, a consultant to Canada Finance, who witnessed the execution by Canada Finance of the Purchase Contract, was present in the court room at the hearing of application on April 21, 2011 for approval of the sale of the Hirsche Lands to Canada Finance.

14 The April 21, 2011 Order was served on Canada Finance's counsel on April 21, 2011. No application has been brought to set aside or vary that Order, nor was any appeal filed within the appeal period.

15 On April 26, 2011, new counsel for Canada Finance, Abdi M. Abdi of Your Lawyer LLP, contacted the Receiver's counsel and requested the Receiver's position on his client "being granted a right of first refusal with respect to their riparian water rights". On May 4, 2011, the Receiver's counsel forwarded a draft agreement to Mr. Abdi which contemplated Canada Finance acquiring the Water License at a price to be negotiated. The Receiver's counsel forwarded closing documents, including a transfer of the Hirsche Lands and an agreement concerning the Water License to Mr. Abdi on May 13, 2011. By a letter dated May 26, 2011, the Receiver's counsel removed trust conditions relating to the Water License Agreement and proposed that the parties use best efforts to conclude an agreement with respect to the Water License by June 15, 2011.

16 By a letter dated May 27, 2011, Ms. Quinton-Campbell advised that "(i)t has always been our client's understanding, from previous transactions and previous involvement with the Department of the Environment, that water rights simply run with the land and as such they understood it was not necessary to purchase the water

rights separate from the land". The letter made no reference to paragraph 7 of the April 21, 2011 Order or the statements that the Water Licence was excluded from the sale that had been made by the Receiver's counsel in the presence of Canada Finance's representative and its counsel prior to her advising the Court that her client supported the Receiver's application.

17 The parties proceeded to close the transaction notwithstanding the dispute regarding the Water License and a transfer of land was registered July 22, 2011 on the basis that they would "negotiate and attempt to resolve the dispute regarding the Water License. If the parties cannot negotiate a resolution to that dispute in a relatively short time frame they will go to Court for a determination of that issue" (email from Ms. Quinton-Campbell to the Receiver's counsel dated June 9, 2011).

18 On October 26, 2011 the Receiver applied before me for approval of a Purchase and Sale Agreement to sell the Water License to a third party, 1552277 Alberta Ltd. The application was opposed by Canada Finance who argued that the Water License was appurtenant to and ran with the Hirsche Lands, that the Receiver had no jurisdiction to sever the Water License from the Hirsche Lands other than in accordance with the *Water Act*, R.S.A. 2000 c. W-5, as amended, which had not occurred, that the parties had not agreed to exclude the Water License in the Purchase Contract and that the Court lacked the jurisdiction to sever the Water License from the Hirsche Lands. That application was adjourned to provide counsel with the opportunity to provide some additional materials and to address whether Canada Finance's objections constituted a collateral attack on the April 21, 2011 Order and/or an attempt to approbate and reprobate.

19 The application came back before me on December 21, 2011 at which time the Receiver's counsel advised that the consideration to be paid for the Water License by 1552277 was $378,000.00 and that the deal had a drop dead date of March 31, 2012. The purchase agreement was attached to the Supplement to the Fifth Report of the Receiver, which was filed with the court on a confidential basis on terms that permitted Canada Finance's counsel to review same.

III. Issues

20 There are a number of issues to be determined on this application:

1. Do Canada Finance's objections to the application for approval of the sale of the Water License offend the doctrine against collateral attack?

2. Is Canada Finance stopped by the doctrine of approbation and reprobation from objecting to the validity of paragraph 7 of the April 21, 2011 Order?

3. Was the Water License sold to Canada Finance pursuant to the Purchase Contract?

4. Should the sale of the Water Licence to 1552277 be approved by the Court?

IV. Analysis

1. Collateral Attack

21 The doctrine of collateral attack was described by the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at paragraph 71:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, The Doctrine of Res Judicata in Canada (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack

procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

22 The doctrine of collateral attack was applied in *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337 (Alta. C.A.).

23 The Receiver argues that Canada Finance's objection constitutes a collateral attack on the April 21, 2011 Order, paragraph 7 of which stated that "(t)he Purchaser is not purchasing or acquiring as part of the Purchase Agreement any title or right in respect of the Water License, Priority No. 1968-01-31-001, File No. 11409 registered in the name of Grant Arthur Hirsche and Annette Hirsche." The Receiver notes that Canada Finance's counsel at the hearing supported the Receiver's application for the Order and that Canada Finance did not appeal the Order within the appeal period, nor has it applied for a stay or to vary or set aside the Order. Canada Finance argues that the doctrine of collateral attack does not apply because the Order was without jurisdiction.

24 The nature of the jurisdictional limitations that prevent the application of the doctrine were addressed by Iacobucci J., in *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.) at paragraphs 14 and 15:

> This rule holds that "a court order, made by a court having jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, per McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of order, erroneously exercises that jurisdiction, the rule against collateral attack applies. See, e.g., *B.C. (A.G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 129 (S.C.), at p. 141, and *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at pp. 498-99, per Bayda C.J.S. Such an order is binding and conclusive until set aside on appeal.
>
> The rule against collateral attack has been re-affirmed by this Court on numerous occasions, such as in *R. v. Meltzer*, [1989] 1 S.C.R. 1764, *R. v. Garofoli*, [1990] 2 S.C.R. 1421, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, per McLachlin J. at p. 973, citing R. J. Sharpe, Injunctions and Specific Performance (1983).

25 In *Litchfield*, the Court concluded that the rule against collateral attack should not be applied in the context of a division and severance order granted in a criminal trial where the effect of applying the rule would be that the order would otherwise not be appealable. Iacobbuci J. explained at paragraph 17:

> In my opinion, however, this is not the case for a strict application of the rule against collateral attack which was not intended to immunize court orders from review. The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal *R. v. Pastro*, *supra*, at p. 497). However, these principles behind the rule against collateral attack are not applicable in the case of a pre-trial division and severance order.

26 By contrast, this case is one where the April 21, 2011 Order was granted by a superior court judge and where there is no reason to not apply the doctrine as Canada Finance could have appealed it. Canada Finances was served with the April 21, 2011 Order on the same day it was granted and it should have been aware prior to the expiry of the appeal period of the existence of a dispute regarding the Water License. The Receiver's position was clearly made known, not only prior to the expiry of the appeal period but prior to and at the hearing of the application for the Order in question, the granting of which Order was supported by Canada Finance's counsel in the presence of its representative. Further, Canada Finance's new counsel wrote to the Receiver on April 26, 2011 seeking assignment of refusal with respect to the water license and was provided with a draft Purchase Agreement on May 4, 2011.

27 There has been nothing placed before me to suggest that the agreement reached between counsel to have the dispute about the Water License determined by the Court contained any waiver by the Receiver of any arguments available to it and placed any limits on the Receiver's ability to advance any arguments, including the application of this doctrine.

28 The doctrine of collateral attack applies in this case to preclude Canada Finance from asserting that it acquired any title or right in the Water License as part of the Purchase Contract.

2. Approbation and Reprobation

29 The doctrine of estoppel by approbation and reprobation was described by Nation J in *Hill v. Hill*, 2010 ABQB 528, 501 A.R. 227 (Alta. Q.B.) , at paragraphs 37 and 38:

> The terms approbation and reprobation are associated with the equitable principle of election rather than the common law election principle: Piers Feltham, et al, The Law Relating to Estoppel by Representation 4th ed. (Butterworths, London: 2004) at p. 360. The doctrine of estoppel of approbation and reprobation requires, from Halsbury's Laws of England (4th ed. Reissue 2003) Vol. 16(2) at para. 962:
>
> > 1. That the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and
> >
> > 2. That he will not be regarded, in general at any rate, as having so elected unless he has taken the benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

30 Procedural choices can engage the principle of approbation and reprobation. In *Halagan v. Reifel* (November 25, 1997), Doc. Vancouver C940538 (B.C. S.C.) the doctrine of approbation and reprobation applied to an attempt by defendant to enforce inconsistent rights regarding the release of shares from escrow. A plaintiff was not allowed to resile from relief obtained at trial in *Topgro Greenhouses Ltd. v. Houweling*, 2009 BCCA 469, 58 C.B.R. (5th) 161 (B.C. C.A.). Similarly, the Court in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 109 Sask. R. 49, 103 D.L.R. (4th) 585 (Sask. C.A.) prevented the appellant from taking contradictory positions at trial and on appeal. There, the appellant accepted the Court's jurisdiction, received a negative decision and then sought to challenge the Court's jurisdiction. In each of these cases, a party enjoyed a benefit as a result of a procedural choice from which it later attempted to resile.

31 Canada Finance asserts that paragraph 3 of the April 21, 2011 Order should stand (which provided court approval of the Purchase Contract) while it argues that paragraph 7 of the same Order is without jurisdiction and is of no effect. It seeks to rely upon and to attack the Order at the same time. Canada Finance cannot take the benefit of the sale being approved but resile from a portion of the Order that limited the scope of what was being acquired. Canada Finance cannot have it both ways. The doctrine applies.

3. Was the Water License sold to Canada Finance pursuant to the Purchase Contract?

32 This issue has already been determined by this Court. Paragraph 7 of the April 21, 2011 Order stated that "(t) he Purchaser is not purchasing or acquiring as part of the Purchase Agreement any title or right in respect of the Water License".

4. Approval of the Sale of the Water License

33 The Receiver's Fifth Report states that the offer from 1552277 to purchase the Water License was the only offer received by the Receiver in respect of the Water License, that it was accepted by the Receiver subject to Court approval and that the Receiver believes that acceptance of the offer is appropriate and recommends that the offer be approved.

34 The Water License is an asset of the receivership. Water licenses in Alberta are governed by the *Water Act*. Applications to transfer an allocation of water under a water license are to be made to the Director appointed under the *Water Act* (sections 81 - 82). It is for the Director to determine whether a transfer of a water license should be approved. The sale of the Water License 1552277 is approved, subject to obtaining any required approvals from the Director appointed under the *Water Act*.

V. Costs

35 If the parties are unable to agree on costs, they are at liberty to contact me within 30 days of the date of this decision to arrange to address that issue.

Application granted.

Tab 3

2008 CarswellOnt 7933
Ontario Superior Court of Justice

Marsh Engineering Ltd. v. Deloitte & Touche Inc.

2008 CarswellOnt 7933, [2008] O.J. No. 5277, 173 A.C.W.S. (3d) 774, 49 C.B.R. (5th) 286

Marsh Engineering Limited, Daniel Russell, and 603126 Ontario Limited (Plaintiff) and Deloitte & Touche Inc. and Bank of Nova Scotia (Defendants)

Cumming J.

Heard: November 27, 2008
Judgment: December 3, 2008 *
Docket: 07-CV-337638PD3

Proceedings: additional reasons at *Marsh Engineering Ltd. v. Deloitte & Touche Inc.* (2009), 2009 CarswellOnt 62 (Ont. S.C.J.)

Counsel: Kristine G. Holder for Plaintiff
Martin Sclisizzi, Brendan Y. B. Wong for Defendant, Bank
Harvey Chaiton for Defendant, Deloitte & Touche Inc.

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts

Table of Authorities

Cases considered by *Cumming J.*:

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

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

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 37 — referred to

s. 215 — pursuant to
Real Property Limitations Act, R.S.O. 1990, c. L.15
s. 45(1)(g) — considered
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — referred to

MOTION by plaintiffs for leave under s. 215 of *Bankruptcy and Insolvency Act*; CROSS MOTION by bank for summary judgment.

***Cumming J.*:**

1 There are two motions before the Court.

2 First, the plaintiffs move for leave, *nunc pro tunc*, under s. 215 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3, as am. ("*BIA*") to commence a claim against Deloitte & Touche Inc.("Deloitte Inc."), the former Interim Receiver and Trustee in Bankruptcy for Marsh Engineering Limited ("Marsh Engineering") and 603126 Ontario Limited ("603").

3 Second, the defendant, the Bank of Nova Scotia (the "Bank"), the first-ranking secured creditor of Marsh Engineering, seeks by cross motion an order dismissing the plaintiffs' action as against the Bank. I characterize this motion as a Rule 20 summary judgment motion.

The Evidence

4 The plaintiff Daniel Russell is the controlling shareholder of 603, a holding company in respect of Marsh Engineering and other related companies (being Marsh Instrumentation (Holdings) Inc. and Marsh Industrial Equipment Repair Corporation) within what can be called the "Marsh Group." Daniel Russell is the principal of the Marsh Group. His company, Babbitt Bearings, Ltd. was also a major secured creditor of the Marsh Group. Working Ventures Capital Fund Inc. ("WVC") was also a secured creditor of the Marsh Group.

5 Deloitte & Touche LLP. (acting through John Bylhouwer, a partner of that firm, in St. Catherines, "Ontario) ("Deloitte LLP") was the accounting firm for the plaintiff Daniel Russell's parents, being Joan and Ian Russell, and Russell Family Holdings Inc. historically and it seems until, at least, 2002.

6 The affiant of the Bank, Neil Stride, Assistant General Manager, Special Accounts Management, sets forth the complex history of this matter.

7 The record establishes that by March, 2000, the Marsh Group was experiencing considerable financial difficulties. The Marsh Group provided projected cash flow statements to the Bank on February 29, 2000 which estimated that for March 2000 disbursements would exceed receipts by some $649, 000. Marsh Engineering's Vice-President of Operations advised the Bank March 11, 2000 that the Marsh Group was insolvent and unable to repay the Bank and its creditors, with an estimated shortfall in the value of its assets of $4.4 million to $7 million.

8 Deloitte LLP, as accountant for the Marsh Group, advised the parents of Daniel Russell not to invest further in the Marsh Group because of its financial situation.

9 The Bank demanded payment of the Marsh Group's indebtedness. Given its security agreement, the default of the loan agreement and the apparent insolvency of the Marsh Group on March 15, 2000 the defendant Bank

had Deloitte & Touche Inc. ("Deloitte Inc.") (acting through Robert Paul of the firm) appointed by Court Order of that date as Interim Receiver of the Marsh Group. The record establishes that the Bank had a valid security.

10 Deloitte Inc. apparently concluded it did not have any conflict of interest in acting as a Receiver/Trustee.

11 On April 7, 2000 a further Court Order was made approving a sale process for the assets of the Marsh Group, including Marsh Engineering. In all, some 13 Reports and two supplementary reports were made by the Receiver to July 23, 2004 and some 15 Orders of this Court were made for approval of the Receiver's actions, including the distribution of proceeds. The plaintiff Daniel Russell had notice of all Reports and Court proceedings and Orders.

12 On May 2, 2000, on a motion with notice to Daniel Russell, Mr. Justice Farley of this Court approved the Receiver's Second Report, including the recommendations to wind down the Port Colborne operations of the Marsh Group. A public auction of the assets ensued in June, 2000. Daniel Russell had access to a list of all the assets and prices and attended the auction. He purchased some of the assets of the Marsh Group. On a motion brought by the Receiver on notice to all interested parties, including Daniel Russell, Justice Lederman approved the conduct of the auction by an Order dated August 15, 2000.

13 The real property formerly occupied by the Port Colborne operations was sold to a company controlled by Daniel Russell and another corporation. The sales of property were approved by Justice Farley June 18, 2000 and by Justice Cameron September 14, 2000.

14 The Dartmouth operation and the accounts receivable were advertised and sold to a corporation controlled by Daniel Russell. Again, the Court approved these transactions. The Burlington operations and its accounts receivable were advertised and sold to an unrelated third party. Again, on motion by the Receiver, with notice to all interested parties, including Daniel Russell, the Court gave Approval Orders May 2, 2000 and May 12, 2000.

15 Distributions to the Bank were made on May 8 and July 4, 2000 and approved July 11, 2000 by the Order of Justice Lamek of this Court.

16 On May 8, 2002 an Order was made distributing $2,348,599 to the Marsh Group's second secured creditor, Canadian Babbitt Bearings, the principal of which is Daniel Russell. All of the debts owed to the secured lenders were ultimately satisfied.

17 By December 2000 all the assets of the Marsh Group had been disposed of. Marsh Engineering and Marsh Instrumentation (Holdings) Inc were assigned into bankruptcy December 6, 2000. Daniel Russell reportedly was in favour of the Receiver making the assignment to facilitate the timely and cost-effective distribution of the companies' estates.

18 On July 23, 2004 on a motion brought by the Receiver on notice to all interested parties, including Daniel Russell, Justice Swinton granted an Order discharging the Receiver. On May 15, 2005 Deloitte Inc. was discharged as trustee in bankruptcy of the estates of Marsh Engineering and Marsh Instrumentation.

19 On December 30, 2005 Daniel Russell successfully caused Marsh Engineering to apply for an annulment of the bankruptcy. The moving party plaintiffs in the action at hand commenced a court action the same day against Deloitte Inc. and the Bank but did not serve the statement of claim and this action was dismissed February 27, 2008 as abandoned.

20 On August 1, 2007 the plaintiffs commenced the action at hand which appears to be identical to the abandoned 2005 action.

The Claims against the Defendant Inc.

21 The plaintiffs now raise a claimed conflict of interest on the part of Deloitte Inc. in acting as Receiver and Deloitte LLP in acting for the Russells as accountants. They claim this conflict gives rise to a cause of action. They say that Deloitte LLP counselled Daniel Russell that the receivership route was advantageous given the financial situation of the Marsh Group and that he would be able to repurchase the assets of the Marsh Group, including Marsh Engineering, at a discounted price. They claim also that there was no accounting by the Trustee in respect of the realization of assets in the bankruptcy, that here was no effort to collect some $3 million in receivables and that the assets were sold under value.

22 The plaintiffs do not allude to any actual, specific impropriety on the part of the Receiver/Trustee. They do not adduce any evidence to support the bare allegation that Deloitte Inc. had a duty to advise about the option of making a proposal under the *BIA*, as to the risks of a receivership, or about the anticipated fees and costs of the receivership. They have not adduced any evidence of any advice provided by Deloitte LLP or by Deloitte Inc. to Daniel Russell or to the Marsh Group for the period prior to the receivership. They did not challenge the sales of the assets or the distribution of the proceeds as the receivership/bankruptcy progressed. They did not object to or contest any of the Approval Orders made by the Court. They were represented throughout by their own independent legal counsel. They did not appeal under s. 37 of the *BIA* to the Court in respect of any of the decisions and actions of the Trustee as the bankruptcy proceeded. They do not suggest that the Trustee has not acted in accordance with the provisions of the *BIA*.

23 Daniel Russell makes a bald accusation in his affidavit that workers of the Marsh Group went on a rampage such that there were extensive damages and losses and that the Receiver was negligent in this regard. There is no evidence to substantiate this bare allegation. Indeed, the evidence of the Receiver discloses that the Receiver engaged personnel to secure the premises 24 hours a day.

24 The moving parties do not have a listing of the equipment and inventory allegedly sold under value. Daniel Russell does not identify any accounts receivable the Receiver allegedly failed to realize upon.

25 The evidentiary record establishes that the plaintiff Daniel Russell and the directing mind of Marsh Group were aware at all times that Deloitte Inc. was acting as Receiver under the appointment initiated by the Bank as a secured lender, and that Deloitte LLP was acting as accountant to the Russell family.

26 Daniel Russell had notice of the motion for the appointment of Deloitte Inc. and he would have been aware of any alleged conflict, real or perceived. Daniel Russell did not oppose the appointment. Rather, the evidence indicates he approved the appointment.

27 The record establishes that the Russells were quite content that the affiliated receivership firm of their accounting firm would take on the receivership. Daniel Russell was fully apprised of the activities of the Receiver throughout the receivership. It seems that the intent of Daniel Russell was to bid to buy the assets of the Marsh Group when they were sold through the receivership. He reportedly made bids through a new entity in respect of many sales and was successful to some extent. The inference is that Daniel Russell hoped to resurrect the business of the Marsh Group yet shed its creditors through purchasing the assets of the Marsh Group through the receivership.

28 Throughout and after the receivership, Daniel Russell had the benefit of representation by independent legal counsel. Daniel Russell never objected to the Receiver/Trustee's actions nor did he ever challenge any of the several motions seeking approval of such actions. The entirety of the evidence indicates he gave, at the least, passive acquiescence to the Receiver's actions.

29 The plaintiffs ignore the fact that as Receiver/Trustee Deloitte Inc. is an officer of the Court with concomitant duties and obligations. Deloitte Inc. did not owe a duty to provide advice to Daniel Russell in respect of the matters complained of.

30 The test for leave under s. 215 of the *BIA* is referred to in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (S.C.C.) at paras.58-59.

31 A party seeking leave to commence an action against a receiver or trustee must demonstrate a *prima facie* case by sufficient affidavit evidence to ensure the claim's proper factual foundation. Therefore, leave is not to be given if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. As well, the evidence in support of the motion must supply facts to support the claim asserted. The leave requirement is designed to protect receivers and trustees from frivolous or vexatious actions and from actions which have no basis in fact.

32 In my view, and I so find, the plaintiffs have failed to provide any evidence that demonstrates a *prima facie* case to ensure the requisite factual foundation for the action at hand.

33 As well, in my view, the allegations of negligence by the Receiver in administering the receivership are *res judicata* because the activities of the Receiver were reported to the Court and approved in all respects. Moreover, the asserted action amounts to a collateral attack upon the Court's several Approval Orders. Hence, the action at hand amounts to an abuse of process.

34 Finally, all of the asserted causes of action by the plaintiffs against the Receiver constitute actions upon the case. The statement of Claim was issued August 1, 2007, more than six years after any conceivable cause of action against the Receiver arose. A cause of action arises when the material facts upon which it is based have been discovered or ought to have been discovered by the plaintiff through the exercise of reasonable diligence. *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) at 224. Section 45 (1)(g) of the *Limitations Act*, R.S.O. 1990, c. L 15 provides for a six year limitation period in respect of an action "upon the case." See *Bulloch-MacIntosh v. Browne*, [2003] O.J. No. 3176 (S.C.J.).

35 In my view, leave to commence this action against the Receiver is properly to be refused in the instant situation for three reasons: the moving parties have failed to satisfy the test for leave; the action is statute-barred and the allegations and claims are *res judicata* by reason of the several Court Orders, including the Approval Orders and Discharge Order. *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]).

The Claims against the Bank

36 Paragraphs 32 and 33 of the plaintiffs' claim allege that the Bank was overpaid by the Receiver or that the alleged debts claimed by the Bank were not owing by Marsh Engineering.

37 The distributions to the Bank in satisfaction of the secured debt owing to the Bank were made in 2000. The statement of claim was issued August 1, 2007, more than six years after any conceivable cause of action against the Bank arose. Section 45 (1)(g) of the *Limitations Act* provides for a six year limitation period in respect of an action founded upon any lending or contract or action upon the case.The action is therefore barred as against the Bank.

38 As well, all of the payments to the Bank were approved by Order of the Court. The individual plaintiff participated in the receivership proceedings and did not contest the approval of the payments to the Bank. The plaintiffs' allegations amount to a collateral attack upon the several Court Orders approving the actions of the Receiver. In particular, the plaintiffs' allegations against the Bank in the action at hand amount to a collateral attack upon the Court's Approval Order of July 11, 2000. The litigation at hand is in essence an attempt by the plaintiffs to re-litigate a claim which the Court has already implicitly determined through the Approval Orders. *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.). The action at hand constitutes an abuse of process.

39 In my view, the doctrine of issue estoppel also applies: *Danyluk v. Ainsworth Technologies Inc.* (2001), 201 D.L.R. (4th) 193 (S.C.C.) at paras. 18-19. There is a public interest in the finality of litigation. The question of the propriety of the payments to the Bank, and the merit of the Bank's underlying claim to such payment, is the same question in essence raised in the claim of the plaintiffs at hand; the Approval Order of July 11, 2000 was final; and the parties to that Order were the parties in the present proceeding. There are not any special circumstances in the case at hand which would justify the Court exercising its discretion against applying issue estoppel and in favour of allowing the plaintiffs to upset the prior determination made in the receivership proceedings by the Approval Order.

Disposition

40 For the reasons given, the plaintiffs' motion against Deloitte Inc. is dismissed. The Bank's cross-motion is granted and the claim against the Bank is dismissed.

41 The defendants may make any submissions as to costs within seven days; the plaintiffs have seven days thereafter for any responding submissions; and the defendants have three days thereafter for any reply.

Motion dismissed; cross motion allowed.

Footnotes

* Additional reasons at *Marsh Engineering Ltd. v. Deloitte & Touche Inc.* (2009), 2009 CarswellOnt 62 (Ont. S.C.J.).