Court File No. CV-12-9934-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL COURT

B E T W E E N:

GODSTONE CO-OWNERSHIP INC.

Applicant

and

MAPLE RIDGE REAL ESTATE INVESTMENTS CORP.,
DUCA FINANCIAL SERVICES CREDIT UNION LTD.,
LYDIA LUCKEVICH, RGL PROPERTY SERVICES INC.,
1320950 ALBERTA LTD., 1336364 ALBERTA LTD., 1336365 ALBERTA LTD.,
1336366 ALBERTA LTD., 1336367 ALBERTA LTD., PETER ZHANG, CUI HUA SUN,
FRANCISCO CENDANA, ELIZABETH CENDANA, DAVE LALL, CARMEN MANGAL,
JOE DANIEL, JIM MILNE, CHERYL FORRIN, NOEL MORRISON,
RICHARDO ARCHER, HYACINTH HINES, WENDY WANG, JIAN HUANG,
SAUNDREA COBURN, DANIEL JOHNSTON, MARJORIE JOHNSTON, MARC LEAN
and JANET LOUISE HILSON

Respondents

FACTUM OF THE RECEIVER OF GODSTONE CO-OWNERSHIP INC.

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Lawyers and Mediators
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Lawyers for Pollard & Associates Inc.,
in its capacity as Court-appointed Receiver
of Godstone Co-Ownership Inc. limited only
to the Maple Ridge Units and the Alberta
Units and not in its personal capacity

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(see attached)

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Court File No. CV-12-9934-00CL

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COMMERCIAL LIST

B E T W E E N:

GODSTONE CO-OWNERSHIP INC.

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MAPLE RIDGE REAL ESTATE INVESTMENTS CORP., DUCA FINANCIAL SERVICES CREDIT UNION LTD., LYDIA LUCKEVICH, RGL PROPERTY SERVICES INC., 1320950 ALBERTA LTD., 1336364 ALBERTA LTD., 1336365 ALBERTA LTD., 1336366 ALBERTA LTD., 1336367 ALBERTA LTD., PETER ZHANG, CUI HUA SUN, FRANCISCO CENDANA, ELIZABETH CENDANA, DAVE LALL, CARMAN MANGAL, JOE DANIEL, JIM MILNE, CHERYL FORRIN, NOEL MORRISON, RICARDO ARCHER, HYACINTH NINES, WENDY WANG, JIAN HUANG, SAUNDREA COBURN, DANIEL JOHNSTON, MARJORIE JOHNSTON, MARC LEAN and JANET LOUISE HILSON

Respondent

FACTUM OF THE RECEIVER, OF GODSTONE CO-OWNERSHIP INC.

OVERVIEW

1. Pollard & Associates Inc., (the "Receiver") is the Interim Receiver of certain co-ownership units located within a 103 unit townhouse development located at 53 to 71 Godstone Road, Toronto, Ontario, referred to herein and in these proceedings as the Maple Ridge Units and the Alberta Units, ("the Units").

2. The Receiver sold the Units by obtaining court approval of the agreement of purchase and sale.

3. The Receiver was ordered to bring a claims process to deal with the priorities between Godstone Co-Ownership Inc. ("Godstone"), the first mortgagee, DUCA Financial Services

Credit Union Ltd. ("DUCA") and the second mortgagees, Janet Louise Hilson ("Hilson") and Lyndia Luckevich ("Luckevich").

4. Godstone brought a motion claiming priority over DUCA, Hilson and Luckevich, which motion was dismissed by the Order of the Honourable Justice Hainey, which Order is under appeal.

5. The Receiver seeks approval of the distribution to DUCA based upon the court's determination of priority.

6. There are no other assets of Godstone.

7. The Receiver ought to be discharged of its obligations as interim receiver of Godstone. The professional fees and disbursements of the Receiver and its counsel ought to be approved.

THE FACTS

8. The Receiver was appointed as interim receiver pursuant to the Order of the Honourable Justice Hainey dated July 27, 2015 and on August 12, 2015, the court ordered the continuation of the interim receivership.

Sixth Report of the Receiver, April 2, 2018, para. 1 and 2, Motion Record, Tab 2

9. The Receiver completed the sale of the Units pursuant to an agreement of purchase and sale to TT6 Inc., with a purchase price of $5,850,000.00 on January 20, 2017.

Sixth Report of the Receiver, April 2, 2018, para. 16, Motion Record, Tab 2

10. On March 2, 2017, the Receiver sought and obtained the Order of the Honourable Justice Hainey, which Order approved a claims process as well as a claims bar date of May 10, 2017 (the "Claims Procedure Order"). The Claims Procedure Order provides for a process of submitting claims and reporting to the court.

Sixth Report of the Receiver, April 2, 2018, para. 7, Motion Record, Tab 2

11. On August 15, 2017, the Receiver brought a motion to report on the claims filed during the claims process and to seek directions to deal with the claims filed and the priority sought by Godstone over the mortgages of DUCA, Hilson and Luckevich. The Order of the Honourable Justice Hainey specifically outlined the process to deal with the priority over the mortgages of DUCA, Hilson, Luckevich claimed by Godstone.

Sixth Report of the Receiver, April 2, 2018, para. 8, Motion Record, Tab 2

12. On February 22, 2018, the Honourable Justice Hainey determined that Godstone did not have priority over the mortgages of DUCA, Hilson and Luckevich (the "Priority Order").

Sixth Report of the Receiver, April 2, 2018, para. 9, Motion Record, Tab 2

13. On March 20, 2018, the Receiver was advised that Godstone has issued a Notice of Appeal in reference to the Priority Order.

Sixth Report of the Receiver, April 2, 2018, para. 31, Motion Record, Tab 2

14. As of April 2, 2018, the Receiver has not been served with a motion by Godstone seeking a stay of the Priority Order.

Sixth Report of the Receiver, April 2, 2018, para. 32, Motion Record, Tab 2

15. The Receiver anticipates that the priority issues between DUCA, Hilson and Luckevich are continuing by way of a hybrid trial and determined outside of the Receivership.

Sixth Report of the Receiver, April 2, 2018, para. 34, Motion Record, Tab 2

16. With the completion of the APS, the receipt and review of the claims as outlined in the Claims Procedure Order, the Receiver believes that it has, subject to the relief requested on this motion, completed its mandate under the Receivership Order (and subsequent Orders made and directions given by the court in these proceedings) in all material respects.

Sixth Report of the Receiver, April 2, 2018, para. 38, Motion Record, Tab 2

17. The priority dispute has been determined in reference to Godstone, subject to the outcome of the Court of Appeal. This Court has dismissed the motion of Godstone in reference to its claim to priority over the mortgages of DUCA, Hilson and Luckevich.

Sixth Report of the Receiver, April 2, 2018, para. 41, Motion Record, Tab 2

18. To date, Godstone has not filed a motion for a stay of the Priority Order and therefore no stay is currently in place. As such there is no reason the funds cannot be distributed by the Receiver and the Receiver be discharged.

Sixth Report of the Receiver, April 2, 2018, para. 42, Motion Record, Tab 2

19. The Receiver has requested a statement as to the amount owing to DUCA including professional fees. The claim filed by DUCA in this proceeding was in the amount of $4,599,001.59, which incorporates additional interest of $314,387.34 from March 2, 2017 to April 17, 2018 and professional fees of $318,437.57 from January 10, 2017 to March 27, 2018. This amount exceeds the funds held by the Receiver subject to the approval of its professional fees and that of its counsel.

Sixth Report of the Receiver, April 2, 2018, para. 43, Motion Record, Tab 2

20. Given that the court has determined that Godstone's claim does not have priority over the claims of DUCA, Hilson, and Luckevich, there is no purpose, at this time, for the Receiver to review Godstone's claim further. Regardless, it remains the Receiver opinion that the claim as filed by Godstone in the claims process is not supportable.

Sixth Report of the Receiver, April 2, 2018, para. 45, Motion Record, Tab 2

21. The Receiver is seeking approval of its fees in the sum of $773,099.50 (not including HST) for the period of July 8, 2015 to March 31, 2018 (the "Receiver's Fees").

Sixth Report of the Receiver, April 2, 2018, para. 46, Motion Record, Tab 2
Affidavit of Angela K. Pollard, sworn April 2, 2018, para. 4, Motion Record, Tab M

22. The Receiver is seeking approval of the fees of its counsel in the sum of $223,752.50 (not including HST) and disbursements in the amount of $12,140.47 (not including HST) for the period of July 29, 2015 to March 31, 2018 ("Counsel's Fees").

Sixth Report of the Receiver, April 2, 2018, para. 48, Motion Record, Tab 2
Affidavit of Sara Mosadeq sworn April 2, 2018, para. 3, Motion Record, Tab N

23. The administration of the Receivership is substantially complete as the Receiver has a number of administrative matters to complete which include the following (a) issuance of the 346(3) notices as required under the Bankruptcy and Insolvency Act, (b) payment to DUCA, (c) finalization of its trust accounts (d) storage of administration records (d) storage of Godstone records and (f) other minor administrative matters.

Sixth Report of the Receiver, April 2, 2018, para. 44, Motion Record, Tab 2

24. The Receiver estimates that counsel for the Receiver fees and expenses in order to complete the administration of the estate in the amount of $10,000 plus HST.

Sixth Report of the Receiver, April 2, 2018, para. 51, Motion Record, Tab 2

25. The Receiver estimates that its fees and expenses in order to complete the outstanding administrative matters will be $20,000 plus HST.

Sixth Report of the Receiver, April 2, 2018, para. 52, Motion Record, Tab 2

26. The Receiver's Interim Statement of Receipts and Disbursements indicate that the Receiver is presently holding $5,486,593.51 in its trust account as at March 31, 2018.

Sixth Report of the Receiver, April 2, 2018, para. 54, Motion Record, Tab 2

27. The Receiver's Proforma Statement of Receipts and Disbursements outlines the proposed distribution of funds currently held by DUCA assuming approval by the court of the distribution, the fees and disbursements of counsel of the Receiver assuming approval by the court, the Receiver's fees assuming approval by the court including accruals for additional professional fees.

Sixth Report of the Receiver, April 2, 2018, para. 54, Motion Record, Tab 2

THE LAW

Discharge of Receiver

28. Pursuant to Rule 41.06 of the *Rules of Civil Procedure,* a receiver may be discharged only by the order of a judge.

Rules of Civil Procedure **R.R.O 1990, REG. 194, r. 41.06**

29. It is reasonable to seek a discharge of the Receiver at this time as there are no further assets of Godstone to be sold.

Stay of Proceedings

30. Rule 63.01(1) of the *Rules of Civil Procedure* provides as follows:

> The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of an order for the payment of money, except a provision that awards support or enforces a support order.

Rules of Civil Procedure **R.R.O 1990, REG. 194, r. 63.01**

31. Rule 63.01(1) is confined to orders that fall within its mandatory compass, which is an order that creates a fixed debt obligation.

32. Where the principal relief ordered was declaratory and in the absence of a term in the order under appeal which creates a fixed debt obligation, the automatic stay for which rule 63.01(1) provides is not engaged by delivery of a notice of appeal.

Fontaine v. Canada (Attorney General) **2012 ONCA 206, at para 39-41.**

33. The Order of Justice Hainey is in respect of declaratory relief and does not provide for the payment of money, as such the automatic stay provisions of rule 63.01(1) are not applicable, and the Receiver is entitled to proceed with the within motion.

34. Where a stay of proceedings is not automatic, the appellant may bring a motion for an order on such terms as are just.

***Rules of Civil Procedure* R.R.O 1990, REG. 194, r. 63.02(1)**

35. Unless and until a motion for stay of proceeding is brought before the court and such motion is in fact successful, there is no stay of proceeding. As such the Receiver is entitled to an order for distribution and discharge.

PART IV – ORDER SOUGHT

36. The Receiver requests an Order:

(a) An Order, if necessary, abridging the time for service and validating service of the Notice of Motion and Motion Record on the service list, such that the hearing of the motion is properly returnable before the Court on April 17, 2-18 and dispensing with further service of the Notice of Motion and Motion Record;

(b) An Order accepting and approving the activities of the Receiver as set out in the Sixth Report of the Receiver;

(c) An Order approving the distribution of funds held by the Receiver to DUCA in the amount of $4,579,091.07;

(d) An Order approving the fees and expenses of counsel for the Receiver in the amount of $235,892.97 plus HST;

(e) An Order approving the fees of the Receiver in the amount of $773,099.50 plus HST;

(f) An Order approving the estimated accrual of the fees and expenses of counsel for the Receiver in the amount of $10,000.00 plus HST;

(f) An Order approving the estimated accrual of the fees and expenses of the Receiver in the amount of $20,000.00 plus HST;

(g) An Order approving the Receiver's Interim Statement of Receipts and Disbursements as at March 31, 2018;

(h) An Order approving the Receiver's Pro Forma Final Statement of Receipts and Disbursements;

(i) An Order approving the discharge of the Receiver upon completion of various administrative matters;

(j) Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: April 2, 2018

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Lawyers for Pollard & Associates Inc.,
in its capacity as Court-appointed Receiver of Godstone Co-Ownership Inc., limited only to the Maple Ridge Units and the Alberta Units and not in its personal capacity.

SCHEDULE A

***Rules of Civil Procedure,* R.R.0 1990, Reg. 194**

DISCHARGE

41.06 A receiver may be discharged only by the order of a judge. R.R.O. 1990, Reg. 194, r. 41.06.

AUTOMATIC STAY ON DELIVERY OF NOTICE OF APPEAL

Payment of Money

63.01 (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order. O. Reg. 465/93, s. 8.

STAY BY ORDER

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg. 465/93, s. 8.

SCHEDULE B

Fontaine v. Canada (Attorney General) **2012 ONCA 206, at para 39-41.**

2012 ONCA 206
Ontario Court of Appeal

Fontaine v. Canada (Attorney General)

2012 CarswellOnt 3598, 2012 ONCA 206, 213 A.C.W.S. (3d) 7, 289 O.A.C. 190

Larry Philip Fontaine in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, Michelline Ammaq, Percy Archie, Charles Baxter Sr., Elijah Baxter, Evelyn Baxter, Donald Belcourt, Nora Bernard, John Bosum, Janet Brewster, Rhonda Buffalo, Ernestine Caibaiosai-Gidmark, Michael Carpan, Brenda Cyr, Deanna Cyr, Malcolm Dawson, Ann Dene, Benny Doctor, Lucy Doctor, James Fontaine in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, Vincent Bradley Fontaine, Dana Eva Marie Francey, Peggy Good, Fred Kelly, Rosemarie Kuptana, Elizabeth Kusiak, Theresa Larocque, Jane McCullum, Cornelius McComber, Veronica Marten, Stanley Thomas Nepetaypo, Flora Northwest, Norman Pauchey, Camble Quatell, Alvin Barney Saulteaux, Christine Semple, Dennis Smokeyday, Kenneth Sparvier, Edward Tapiatic, Helen Winderman and Adrian Yellowknee, Plaintiffs (Respondents) and The Attorney General of Canada, The Presbyterian Church in Canada, The General Synod of the Anglican Church of Canada, The United Church of Canada, The Board of Home Missions of The United Church of Canada, The Women's Missionary Society of the Presbyterian Church, The Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, The Canada Impact North Ministries of the Company for the Propagation of the Gospel in New England (also known as the New England Company), The Diocese of Saskatchewan, The Diocese of the Synod of Cariboo, The Foreign Mission of the Presbyterian Church in Canada, The Incorporated Synod of the Diocese of Huron, The Methodist Church of Canada, The Missionary Society of the Anglican Church of Canada, The Missionary Society of the Methodist Church of Canada (Also Known as the Methodist Missionary Society of Canada), The Incorporated Synod of the Diocese of Algoma, The Synod of the Anglican Church of the Diocese of Quebec, The Synod of the Diocese of Athbasca, The Synod of the Diocese of Brandon, the Anglican Synod of the Diocese of British Columbia, the Synod of the Diocese of Calgary, The Synod of the Diocese of Keewatin, The Synod of the Diocese of Qu'Appelle, The Synod of the Diocese of New Westminister, The 2 Synod of the Diocese of Yukon, the Trustee Board of the Presbyterian Church in Canada, the Board of Home Missions and Social Service of the Presbyterian Church of Canada, the Women's Missionary Society of the United Church of Canada, Sisters of Charity, a Body Corporate also Known as Sisters of Charity of St. Vincent de Paul, Halifax, also Known as Sisters of Charity Halifax, Roman Catholic Episcopal Corporation of Halifax, Les Soeurs de Notre Dame-Auxiliatrice, Les Soeurs de St. Francois D'Assise, Insitut des Soeurs du Bon Conseil, Les Soeurs de Saint-Joseph de Saint-Hyancithe, Les Soeurs de Jesusmarie, Les Soeurs de L'Assomption de la Sainte Vierge, Les Soeurs de L'Assomption de la Saint Vierge de L'Alberta, les Soeurs de la Charite de St.-Hyacinthe, Les Oeuvres Oblates de L'Ontario, Les Residences Oblates du Quebec, La Corporation Episcopale Catholique Romaine de la Baie

2012 ONCA 206, 2012 CarswellOnt 3598, 213 A.C.W.S. (3d) 7, 289 O.A.C. 190

James (the Roman Catholic Episcopal Corporation of James Bay), The Catholic Diocese of Moosonee, Soeurs Grises de Montréal/Grey Nuns of Montreal, Sisters of Charity (Grey Nuns) of Alberta, Les Soeurs de la Charité des T.N.O., Hotel-Dieu de Nicolet, the Grey Nuns of Manitoba Inc.-Les Soeurs Grises du Manitoba Inc., La Corporation Episcopale Catholique Romaine de la Baie D'Hudson — The Roman Catholic Episcopal Corporation of Hudson's Bay, Missionary Oblates — Grandin Province, Les Oblats de Marie Immaculee du Manitoba, The Archiepiscopal Corporation of Regina, The Sisters of the Presentation, the Sisters of St. Joseph of Sault St. Marie, Sisters of Charity of Ottawa, Oblates of Mary Immaculate — St. Peter's Province, The Sisters of Saint Ann, Sisters of Instruction of the Child Jesus, the Benedictine Sisters of Mt. Angel Oregon, Les Peres Montfortains, The Roman Catholic Bishop of Kamloops Corporation Sole, The Bishop of Victoria, Corporation Sole, The Roman Catholic Bishop of Nelson, Corporation Sole, Order of the Oblates of Mary Immaculate in the Province of British Columbia, The Sisters of Charity of Providence of Western Canada, La Corporation Episcopale Catholique Romaine de Grouard, Roman Catholic Episcopal Corporation of Keewatin, La Corporation Archiépiscopale Catholique Romaine de St. Boniface, Les Missionnaires Oblates Sisters de St. Boniface-The Missionary Oblates Sisters of St. Boniface, Roman Catholic Archiepiscopal Corporation of Winnipeg, La Corporation Episcopale Catholique Romaine de Prince Albert, The Roman Catholic Bishop of Thunder Bay, Immaculate Heart Community of Los Angeles Ca, Archdiocese of Vancouver — The Roman Catholic Archbishop of Vancouver, Roman Catholic Diocese of Whitehorse, The Catholic Episcopale Corporation of Mackenziefort Smith, The Roman Catholic Episcopal Corporation of Prince Rupert, Episcopal Corporation of Saskatoon, OMI Lacombe Canada Inc. and Mt. Angel Abbey Inc., Defendants (Appellants)

David Watt J.A.

Heard: March 2, 2012
Judgment: March 27, 2012
Docket: CA M41060, M41077, C54782

Counsel: Sheila Read, for Appellant / Moving Party
Susan Vella, for Respondents, Windigo First Nations Council, Nishnawbe Aski Nation

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

Related Abridgment Classifications

Aboriginal law
XI Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.3 Notice of appeal
XXIII.3.c Time for filing and service
Civil practice and procedure
XXIII Practice on appeal
XXIII.12 Staying of proceedings pending appeal
XXIII.12.a General principles

Headnote

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — General principles

First Nations, government of Canada, and various religious institutions reached Indian Residential Schools Settlement Agreement ("Agreement") pursuant to class actions — Agreement identified institutions whose residents were entitled to compensation — Court decision allowed adding of two new residential schools to schedule in Agreement — Addition of two schools entitled former students of institutions to apply for benefits under Agreement provided they satisfied criteria — Attorney General appealed decision — Attorney General brought motion for stay of order under appeal — Motion dismissed — Components of three-part test to determine if stay should be entered were: serious question; irreparable harm; and, balance of convenience — Onus was on moving party to establish case for stay — Principle relief ordered was declaratory — In absence of term under court order that created fixed debt obligation under Rule 63.01(1) of Rules of Civil Procedure, automatic stay was not engaged by notice of appeal — Addition of two schools did not create fixed debt obligation for defendants — Issue was serious — Compensation to non-entitled applicants could be difficult to recoup once repaid — Balance of convenience factor, however, was in favour of respondents — Entry of stay would shorten already short period for applicants of newly added schools seeking compensation under Agreement.

Civil practice and procedure --- Practice on appeal — Notice of appeal — Time for filing and service

First Nations, government of Canada, and various religious institutions reached Indian Residential Schools Settlement Agreement ("Agreement") pursuant to class actions — Agreement identified institutions whose residents were entitled to compensation — Court decision allowed adding of two new residential schools to schedule in Agreement — Addition of two schools entitled former students of institutions to apply for benefits under Agreement provided they satisfied criteria — Reasons for decision were released August 16, 2011 — Formal order upon which parties agreed was settled on November 16, 2011 — Attorney General delivered notice of appeal on December 16, 2011 — Attorney General appealed decision — Respondents brought cross-motion for directions about commencement date from which time for delivery of notice of appeal began to run — Cross-motion dismissed — As general rule, time period in which notice of appeal was to be delivered began to run on date order under appeal was pronounced by oral or written reasons — Time began to run from date judgment was pronounced, not from date it was signed or entered — Nothing of substance remain undecided after reasons were released on August 16, 2011 — Notice of appeal was delivered out of time — In absence of motion to quash appeal, date for service and filing were extended nunc pro tunc to December 16, 2011 in order to regularize appellate process.

Aboriginal law --- Miscellaneous

Residential schools.

Table of Authorities

Cases considered by *David Watt J.A.*:

Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc. (2003), 62 O.R. (3d) 647, 28 C.P.C. (5th) 258, (sub nom. *Byers v. Pentex Print Master Industries Inc.*) 167 O.A.C. 159, 2003 CarswellOnt 18 (Ont. C.A.) — referred to

Fontaine v. Canada (Attorney General) (2011), 2011 ONSC 4938, 2011 CarswellOnt 8366 (Ont. S.C.J.) — referred to

Horsefield v. Ontario (Registrar of Motor Vehicles) (1997), 30 M.V.R. (3d) 81, 102 O.A.C. 285, 35 O.R. (3d) 304, 118 C.C.C. (3d) 184, 1997 CarswellOnt 3024 (Ont. C.A. [In Chambers]) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1986), 1986 CarswellOnt 525, 21 C.P.C. (2d) 252 (Ont. C.A.) — referred to

Longley v. Canada (Attorney General) (2007), 2007 CarswellOnt 1804, 223 O.A.C. 102, 2007 ONCA 149, 153 C.R.R. (2d) 224 (Ont. C.A. [In Chambers]) — referred to

Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440 (1998), 1998 CarswellOnt 1787, (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440*) 110 O.A.C. 297, (sub nom. *Ogden Entertainment Services v. Kay*) 43 C.L.R.B.R. (2d) 48, (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440*) 38 O.R. (3d) 448, 98 C.L.L.C. 220-046 (Ont. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — referred to

Rules considered:

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

R. 63.01(1) — considered

R. 63.02(1) — considered

R. 63.02(1)(b) — considered

MOTION by Attorney General for stay of proceedings pending appeal; CROSS-MOTION by First Nations for directions about commencement date from which time for delivery of notice of appeal began to run.

***David Watt J.A.*:**

1 This motion and cross-motion originate in an order made by the Chief Justice of Ontario adding two new residential schools to a schedule under the Indian Residential Schools Settlement Agreement (IRSSA). An appeal from that order is listed for argument before a panel of this Court on May 16, 2012.

2 The effect of the order under appeal is to permit former students of the added residential schools to become eligible to apply for two types of benefits payable under and in accordance with the terms of IRSSA.

3 The reasons that follow explain why I dismiss both the motion and cross-motion, but order that the hearing of the appeal be expedited to take place in April, 2012.

The Procedural Background

4 IRSSA represents the resolution of a national class action proceeding. The Government of Canada, various religious institutions and the class members, First Nations people who attended Indian Residential Schools across Canada, agreed to dispute resolution schemes authorizing payment of various benefits including compensation, for former students with validated claims.

5 About five years ago, nine provincial and territorial superior courts across Canada issued orders approving a pan-Canadian settlement in the litigation arising out of the joint operation of these residential schools by the Government of Canada. The court-approved settlement identified over 130 residential schools and other institutions as approved and listed under two schedules, "E" and "F", of the Agreement.

The Authority to Add Schools

6 The IRSSA permits applications to add further residential schools and other institutions to Schedule "F" of the Agreement and describes the procedure to be followed to do so.

7 In early October 2007, Windigo First Nations Council (Windigo) and Nishnawbe Aski Nation (NAN) submitted a request to the Government of Canada to add Stirland Lake (Stirland) and Cristal Lake (Cristal) high schools. In late May 2008, Canada rejected the request.

8 In December 2008, Windigo and NAN applied to Chief Justice Winkler under Article 12 of IRSSA for an order adding Stirland Lake and Cristal Lake to schedule "F" of the Agreement.

The Decision Under Appeal

9 On August 16, 2011 [*Fontaine v. Canada (Attorney General)*, 2011 CarswellOnt 8366 (Ont. S.C.J.)], the Chief Justice released his Reasons for Decision. He concluded that Stirland and Cristal satisfied the requirements of Article 12 of IRSSA and directed that both institutions be added to Schedule "F" of the Agreement.

10 The addition of Stirland and Cristal to Schedule in "F" of IRSSA entitles former students of both institutions to apply for benefits under the Agreement. The Chief Justice directed the parties "to meet with Court Counsel for the purposes of settling the terms of the order that will flow from these reasons".

The Available Benefits

11 Under the Agreement, former residents of institutions listed in Schedule "F" may apply for and be entitled to two types of benefits provided they satisfy the relevant criteria.

12 The Common Experience Payment (CEP) is available to former students of listed institutions solely because they were residents of the institution. The amount of compensation to which a former resident is entitled depends on the number of years of residence. Eligibility is subject to validation in a documents-based hearing. The CEP benefit is paid out of a trust fund.

13 The second benefit, the Independent Appeal Process (IAP), requires former students of listed institutions to complete a detailed application and collect and file "mandatory" records. The IAP also involves an in-person hearing. The applicant testifies before an adjudicator. Typically, counsel appears for the Government.

14 Compensation under the CEP provides redress for the fact that the former students were put into an institutionalized residential schooling system typically operated as a joint venture by the Government of Canada and religious or other institutions.

15 The IAP provides redress for validated claims of physical and sexual abuse and other wrongful conduct as defined in the enabling provisions. As a general rule, IAP awards exceed those under the CEP.

16 Despite their differences, the CEP and IAP share common features. Each requires an application. Each includes temporal restrictions and compensatory limits. Each demands satisfaction of various criteria. And each imposes an onus on the applicant. Neither issues as of right.

The Formal Order

17 The formal order of November 16, 2011, refers to the Reasons for Decision of August 16, 2011, declares that both Stirland and Cristal satisfy the applicable requirements of IRSSA and directs that both institutions be added "forthwith" to Schedule "F" of IRSSA. The order establishes a period of six months within which former residents can apply for CEP, attaches relevant notices, and declares that supplementary orders may issue about the documents necessary to verify the attendance of residents/students at the added institutions.

18 The formal order also directed the parties to deliver their submissions on costs by specified dates.

The Grounds of Appeal

19 In its amended Notice of Appeal of December 16, 2011, the Attorney General alleges three errors:

1. The judge erred in law by concluding that the Institutions proposed by the Applicant met the test prescribed by Article 12.01 of the Indian Residential Schools Settlement Agreement;

2. The judge committed a palpable and overriding error by failing to consider relevant evidence that could have been determinative of the issue;

3. The judge committed a palpable and overriding error by drawing wrong inferences from factual conclusions.

The Motion

20 The principal remedy the Attorney General seeks on its motion is a stay of the order under appeal.

The Positions of the Parties

21 For the Attorney General, Ms. Read advances two alternative grounds upon which she submits the order under appeal is or should be stayed pending final disposition of the appeal.

22 First, Ms. Read invokes rule 63.01(1). She says that the order under appeal contains a provision for the payment of money, thus delivery of the notice of appeal automatically stayed the provision. The order added Stirland and Cristal to schedule "F" of IRSSA, thus made them residential schools or institutions for the purposes of the Agreement. Once added, residents/students at the schools qualified for CEP. Under Article 5.01 of IRSSA, the submission continues, the trustee of the Fund must make a payment to every former resident/student who resided at either school prior to December 31, 1997, was alive on May 30, 2005, and submitted an application for CEP. Thus, the order provides for the payment of money and is automatically stayed by delivery of the notice of appeal.

23 Second, and in the alternative, Ms. Read contends that the Attorney General has satisfied the requirements imposed by rule 63.02(1)(b) for entry of a stay until disposition of the appeal.

24 Ms. Read says that the appeal raises a serious legal issue, the interpretation of Article 12 of IRSSA. This issue has never been considered by an appellate court. The legal error, the failure to consider both parts of the test for inclusion of a residential school or institution in Schedule "F", was compounded by palpable and overriding factual errors that consisted of failure to consider relevant evidence and drawing unsupported inferences. Ms. Read reminds that the threshold to establish this requirement is low and is met by a demonstration that the appeal is neither frivolous nor vexatious.

25 Ms. Read points out that failure to enter a stay will cause irreparable harm to the appellant. Once made, CEP payments will be almost impossible to recover if the appeal is successful. Failure to recover unauthorized payments will prejudice the other CEP claimants and residual beneficiaries of the remainder of the trust fund.

26 According to the appellant, the balance of convenience tilts in favour of entry of the stay. The only prejudice to former residents/students of Stirland and Cristal if the schools were properly added to Schedule "F" is that their CEP payments will be delayed. An expedited hearing of the appeal will reduce any delay to a minimum.

27 For the respondent, Ms. Vella says that rule 63.01(1) is of no avail to the appellant. This order contains no provision for the payment of money. She submits that rule 63.01(1) has been narrowly interpreted, confined to orders that create a fixed debt obligation. The obligation must be actual, not prospective or contingent. This order simply declared entitlement, said another way, created an opportunity for members of a certain class, former residents/students at Stirland and Cristal, to participate in compensation schemes in accordance with and upon satisfaction of their requirements.

28 Ms. Vella urges rejection of the appellant's claim for a discretionary stay under rule 63.02(1)(b). She acknowledges that the appeal cannot be characterized as frivolous or vexatious and that compliance with the order would cause irreparable harm to non-Stirland and non-Cristal class members who may be entitled to participate in any surplus in the CEP Trust Fund. She points out that refusal of the stay, as the appellant concedes, causes no harm to IAP claimants.

29 Ms. Vella centres her opposition to a discretionary stay on the balance of convenience factor. The judgment is presumptively correct. To stay its operation works substantial prejudice against residents/students of Stirland and Cristal because the period within which they could apply for compensation under CEP and IAP would be so short as to render their entitlement more illusory than real.

The Governing Principles

30 The principles that govern motions for stays under rules 63.01(1) and 63.02(1) are familiar. Brief reference to some of their features will suffice.

31 Courts have interpreted rule 63.01(1) narrowly. To qualify as an order "for the payment of money" under the rule, the order or applicable term must create a fixed debt obligation: *Longley v. Canada (Attorney General)* (2007), 223 O.A.C. 102 (Ont. C.A. [In Chambers]) (Ch'rs), at para. 11. The debt obligation created must be actual, not prospective or contingent on some other determination or satisfaction of various conditions precedent: *Longley*, at para. 12.

32 Where a party invokes rule 63.02(1) to stay an order pending disposition of an appeal, courts apply a three-stage test to determine whether a stay should be entered. Stated in short form, the components of the test are:

- serious question
- irreparable harm
- balance of convenience

See, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at p. 334.

33 The first component, whether there is a serious question to be determined on the appeal, requires a preliminary assessment of the merits of the appeal: *RJR-MacDonald Inc.*, at p. 334.

34 The preliminary assessment of the merits begins with a presumption of correctness of the decision under appeal: *Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (Ont. C.A.), at p. 450. The onus is on the moving party to establish a case for a stay: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.), (Ch'rs), at p. 255. The threshold to be met in connection with this first component of the test is a modest one: *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1997), 35 O.R. (3d) 304 (Ont. C.A. [In Chambers]) (Ch'rs), at p. 311; *RJR-MacDonald Inc.*, at p. 337. The moving party must demonstrate that the appeal is not frivolous or vexatious: *Longley*, at para. 16; *International Corona*, at p. 255.

35 The irreparable harm component has to do with the nature, not the magnitude of the harm: *RJR-MacDonald Inc.*, at p. 341. It refers to harm that cannot be quantified in monetary terms or that cannot be cured, for example, because one party cannot collect damages from the other: *RJR-MacDonald Inc.*, at p. 341.

36 The balance of convenience constituent of the test involves a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay pending the disposition of the appeal on the merits: *RJR-MacDonald Inc.*, at p. 342. The factors relevant for consideration in determining where the balance of convenience settles varies from one case to the next: *RJR-MacDonald Inc.*, at pp. 342-343.

The Principles Applied

37 Rule 63.01(1) does not provide for an automatic stay at the order under appeal and I would not summon rule 63.02(1)(b) as a discretionary substitute.

38 We confine rule 63.01(1), perhaps because of its mandatory effect, to orders that fall plainly within its compass. No term of the order in this case creates a fixed debt obligation.

39 The principal relief ordered was declaratory. The Chief Justice considered whether two residential schools/ institutions satisfied the requirements of IRSSA for inclusion in Schedule "F". He decided that both Stirland and Cristal met those requirements. He ordered that both schools be added to the schedule.

40 The addition of Stirland and Cristal to Schedule "F" did not create any fixed debt obligation for the appellant. The addition entitles residents/students of Stirland and Cristal to apply for compensation under CEP and IAP. To obtain

compensation, each former resident/student of the added institution must meet the eligibility requirements imposed under IRSSA. It is then, and only then, that the appellant is required to pay compensation in accordance with the applicable scheme. The obligation is not fixed by any term of the order, rather prospective and contingent on satisfaction of the relevant criteria.

41 In the absence of a term in the order under appeal that creates a fixed debt obligation, the automatic stay for which rule 63.01(1) provides is not engaged by delivery of the notice of appeal.

42 The discretionary stay authority rule 63.02(1), which the appellant invokes as an alternative, also eludes the appellant's grasp.

43 The respondent acknowledges that the appeal involves a serious issue, the interpretation of Article 12 of IRSSA, a controversy that has thus far not ripened for appellate review. That said, it is worth mention that the grounds of appeal advanced include two questions of fact that are subject to a standard of review of palpable and overriding error, a standard more difficult to satisfy than to express. The grounds advanced, the failure to consider relevant evidence and drawing erroneous inferences, are notoriously impervious to appellate intrusion.

44 As for the irreparable harm constituent, payments of CEP compensation to unentitled applicants may be difficult to recoup once paid. And the payments would reduce any surplus in the Trust Fund, thus any further payments from the residue to those entitled to them. That said, we have no concrete evidence about the time involved in processing the applications and forwarding payments, much less the likelihood of substantial payments prior to the disposition of the appeal.

45 More importantly, however, the balance of convenience settles in favour of the respondents.

46 Compared to the residents/students of schools or institutions contained in the original Schedule "E" and Schedule "F" of IRSSA, residents/students of Stirland and Cristal have a significantly shorter time within which to apply for compensation under CEP. Despite the order under appeal, applications from Stirland and Cristal residents/students have not been processed, in part because the appellant has declined to add the names of the schools to schedule "F". Entry of the stay would shorten the period even further. For those who seek compensation under IAP, the complexity of the application process and the need for legal assistance in compiling and filing the necessary documents exacerbates the prejudice.

47 The motion for a stay until the disposition of the appeal is dismissed.

The Cross-motion

48 By cross-motion, the respondents seek two orders, only one of which is controversial. Unopposed is the cross-motion to expedite the hearing of the appeal currently scheduled for May 16, 2012. In dispute is a cross-motion for directions about the commencement date from which the time for delivery of the notice of appeal began to run.

The Additional Background

49 The Chief Justice released his Reasons for Decision on August 16, 2011. After setting a schedule for counsel to deliver written submission on costs, the Chief Justice concluded:

> [79] In the meantime, I direct the parties to meet with Court Counsel for the purpose of settling the terms of the order that will flow from these reasons.

50 On November 16, 2011, the formal Order, upon which the parties agreed, was settled. The order was entered on November 17, 2011.

51 On December 16, 2011, the Attorney General delivered the notice of appeal.

The Positions of the Parties

52 In support of her cross-motion, Ms. Vella says that the operative date for determining whether a notice of appeal has been delivered within the prescribed time period is the date the order under appeal was pronounced, unless the order itself says otherwise. The operative date is not the date on which the formal order is signed and entered.

53 In this case, Ms. Vella continues, the order bound the parties from the moment the Reasons for Decision were issued. Nothing in the order itself, said or left unsaid, expressly or by necessary implication, shows any contrary intention. The general rule should prevail.

54 Ms. Vella submits that the only matters left unresolved by the decision were collateral issues, like timelines, the forms of notice, and directions on implementation. No issues of substance remained unresolved and no reconsiderations were sought or undertaken.

55 Ms. Read characterizes the cross-motion as a thinly disguised or poorly veiled attempt to have the appeal quashed. Such a remedy, she submits, is not available from a chambers judge only from a panel of the court. Nor should the respondent be permitted to achieve indirectly what they cannot do directly.

56 At all events, Ms. Read says the operative date in this case is the date of the formal order. The Reasons for Decision make it clear that issues of substance were left unresolved and required collaboration among the parties. As an alternative, she seeks an extension of the time for delivery of the notice of appeal until the actual service and filing date of December 16, 2011.

The Governing Principles

57 As a general rule, the time period within which a notice of appeal is to be delivered begins to run on the date the order under appeal is pronounced by oral or written reasons: *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.* (2003), 62 O.R. (3d) 647 (Ont. C.A.), at para. 31. In other words, the time begins to run from the date a judgment is pronounced, and not from the date that it is signed and entered: *Byers*, at para. 31.

58 The general rule derives from the settled principle to which rule 59.01 gives effect that the binding effect of a judgment or order commences the date on which it is pronounced: *Byers*, at para. 31.

59 The general rule is not unqualified. The judgment itself may provide otherwise: *Byers*, at para. 31. Sometimes, the judgment is uncertain on an issue. Clarification may be required. Something of substance may have been missed. In these cases, the time runs from entry, not pronouncement: *Byers*, at paras. 33 and 34.

60 Where a court determines issues of costs in discrete proceedings, after the decision on the merits has been given, the general rule that time runs from pronouncement is not displaced: *Byers*, at paras. 36 and 43.

The Principles Applied

61 In this case, I see no basis upon which to depart from the general rule that the operative date for the purposes of calculating the time within which the notice of appeal was to be delivered was August 16, 2011, the date the Reasons for Decision were released. Nothing of substance remained undecided.

62 It follows that the notice of appeal was delivered out of time. In the absence of a motion to quash the appeal, I would extend the date for service and filing to the date each occurred, namely, December 16, 2011.

Conclusion

63 For these reasons, the motion and cross-motion are dismissed. To regularize the appellate process, the time for service and filing of the notice of appeal is extended, *nunc pro tunc*, until December 16, 2011.

64 Both parties agree that the hearing of the appeal should be expedited. The hearing is expedited to a date in April 2012, agreeable to counsel, to be fixed by the Registrar.

65 The costs of these motions are reserved to the panel hearing the appeal.

Motion and cross-motion dismissed.

GODSTONE CO-OWNERSHIP INC. Applicant	and	MAPLE RIDGE REAL ESTATE INVESTMENTS CORP. ET AL Respondents	**Court File No.** CV-12-9934-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL COURT
Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER OF GODSTONE CO-OWNERSHIP INC.

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