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COURT FILE NUMBER:	1601 - 11552
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	NATIONAL BANK OF CANADA, IN ITS CAPACITY AS ADMINISTRATIVE AGENT UNDER THAT CERTAIN AMENDED AND RESTATED CREDIT AGREEMENT DATED JANUARY 15, 2016, AS AMENDED
RESPONDENT	TWIN BUTTE ENERGY LTD.
DOCUMENT	Brief of the Trade Creditor Balanced Energy Oilfield Services Inc.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF THE PARTY FILING THIS DOCUMENT	MacLachlan McNab Hembroff LLP 1003 – 4th Ave. South Lethbridge, AB T1J 0P7 Attn: Thomas B. MacLachlan Ph: 403.381.4966 Fax: 403.329.9300 File: 2821001

Overview:

1. This Brief is submitted by Balanced Energy Oilfield Services Inc.("Balanced Energy") a trade creditor of Twin Butte Energy Ltd. ("Twin Butte") in support of the Receiver's recommendations and in opposition to the Application filed by the *Ad Hoc* Committee.
2. Despite the *Ad* Hoc Committee's contentions, the Receiver's interpretation of the Convertible Debenture Indenture dated December 13, 2013 (the "Debenture"), as outlined in the Eighth and Ninth Receiver's Reports and the Receiver's Brief filed June 20, 2017 is correct based on the clear and explicit wording of the Debenture.
3. The Receiver, acting on behalf of all creditors of Twin Butte is required to distribute the remaining funds in accordance with the respective priorities of the various creditors. This necessarily requires the Receiver to present its position to the court in the fulfillment of its obligations where the clear wording of a contract is disputed by a group of creditors seeking to improve their position contrary to their contractual agreement.

Facts:

4. The facts as outlined in the Receiver's Eighth Report contain the relevant material for the determination of the application, particular note is directed to the portions of the indenture agreement highlighted in the Receiver's Eighth Report.
5. We adopt the recitation of facts as contained in paragraphs 14-30 of the Brief of the Court-Appointed Receiver.

Issue:

6. Whether the Debenture holders should be bound by the subordination provisions contained in the Convertible Debenture Indenture dated December 13, 2013, or whether the Debenture holders may share *pari passu* with the unsecured creditors which did not subordinate?

Analysis:

Role of Receiver

7. The Receiver, as an Officer of this Honourable Court, must act in the best interests of all creditors[1]. The decision of the Court in *Simmons Drilling* was based on the facts at issue and is distinguishable. In *Simmons Drilling*, the Receiver breached its duty of due diligence, thereby placing another creditor in a more favourable position, and then proceeded to advocate for the creditor the Receiver's breach favoured.
8. Subsequent judicial consideration of *Simmons Drilling* indicates that this decision stands for the proposition that "a court cannot approve the actions of a receiver as the Court's officer which have the effect of changing the rights of competing creditors"[2].

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[1] *Canadian Commercial Bank v Simmons Drilling Ltd.*, [1989] S.J. No. 481, 62 D.L.R. (4th) 243, at para 26, (*Simmons Drilling*).
[2] *Arthur Andersen Inc. v Merit Energy Ltd.*, 2002 SKCA 105, at para 36, (*Arthur Andersen*), (emphasis added).

9. In *Arthur Andersen* the Court noted that the Receiver is acting on behalf of all creditors where it is seeking to determine the priority of various claimants, as determining priorities is not changing the priorities of the various creditors[3].
10. The Receiver by appearing and arguing in this application is merely seeking to determine the priority of creditors in order to allow it to disburse funds to the proper parties in line with the Receiver's obligations. Accordingly, the actions of the Receiver in appearing on this application is not contrary to the interest of any creditor, but is merely acting to determine what those interests are. Determining the priorities of creditors, as between themselves, is in the interests of all creditors and the proper functioning of the receivership.

Subordination of Debenture Holders

11. The terms the Debenture, as contained in the Receiver's Eighth Report are clear with respect to the subordination of the debenture holders (the "Subordinated Debentures").
12. Article 5.1 of the Debenture is explicit "[t]he Debenture Liabilities shall be subordinated and postponed and subject in right of payment ... to the prior full and final payment of all Senior Indebtedness of the Corporation".
13. Further at Article 5.2(a) "all Senior Indebtedness shall first be paid indefeasibly in full, or provision made for such payment ... before any payment is made on account of ... any other liability or obligation in respect of the indebtedness evidenced by the Debentures".
14. The intent of the drafters to subordinate the Subordinated Debentures is clear from the language used in the contractual drafting.
15. As outlined in paragraph 23(b) of the Brief of the *Ad Hoc* Committee, contracting parties are presumed to have intended what they have said in their agreement. The parties have been explicit in their intention to subordinate the Subordinated Debentures. The clear language of the Debenture leads to this result.

No Action Required by Holders of Senior Indebtedness

16. The Debenture provides in Article 5.7 for a process by which the holders of the Senior Indebtedness could obtain confirmation of the seniority of their debt through a written agreement.
17. Article 5.7 is also explicit that "nothing herein shall impair the rights of any Senior Creditor who has not entered into such an agreement". Thus the Debenture unequivocally states that no Senior Creditor is required to obtain any sort of agreement to obtain priority over the Subordinated Debentures.
18. Clearly the holder of the Senior Indebtedness is not required to take any action to obtain priority. The priority of the Senior Indebtedness is granted by the Subordinated Debentures pursuant to the Debenture agreement reached between the Subordinated Debentures and Twin Butte Energy Ltd.
19. This result accords with practical commercial reality as Senior Indebtedness includes, amongst others, accounts payable to trade creditors. Trade creditors encompass a whole host of suppliers from sophisticated and large multinational corporations down to sole proprietorships.

[3] Ibid, at para 38; see also *Toronto Dominion Bank v Wheatland Industries (1990) Ltd.*, 2009 SKQB 516, at para 9, (reversed on other grounds).

20. Within the range of trade creditors are a large number of trade creditors who have neither the time nor resources to analyze the various security documents granted by a potential customer to determine if they should obtain a priority agreement prior to extending credit in the form of goods or services provided on payment terms. Requiring such due diligence to be exercised on the wording of the Debenture at issue will effectively result in denying all, or a majority of, trade creditors, without the resources to analyze their customers various security agreements, the benefit of any subordination provisions which were entered into to ensure that such trade credit would continue to flow to Twin Butte.
21. This result also places a portion of the loss incurred by the Subordinated Debentures on creditors who were unable to negotiate their position, as opposed to the Subordinated Debentures who already had the opportunity to consider their position prior to investing and were compensated for the risk taken.

Relief Sought:

22. The trade creditor, Balanced Energy, respectfully requests that this Honourable Court deny the application of the *Ad Hoc* Committee and direct the Receiver to distribute the remaining funds in accordance with the priorities of the creditors as established by the Debenture.

All of which is respectfully submitted this 26th day of June, 2017

MACLACHLAN MCNAB HEMBROFF LLP

Per:____________________________

Thomas B. MacLachlan

Counsel for Balanced Energy Oilfield Services Inc.

Table of Authorities

Case References	Tab
Canadian Commercial Bank v Simmons Drilling Ltd., [1989] S.J. No. 481, 62 D.L.R. (4th) 243, at para 26	**1**
Arthur Andersen Inc. v Merit Energy Ltd., 2002 SKCA 105, at para 36 and 38	**2**
Toronto Dominion Bank v Wheatland Industries (1990) Ltd., 2009 SKQB 516, at para 9	**3**

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Arthur Andersen Inc. v. Merit Energy Ltd. | 2002 SKCA 105, 2002 CarswellSask 593, [2003] 2 W.W.R. 303, 220 D.L.R. (4th) 351, 117 A.C.W.S. (3d) 376, 227 Sask. R. 44, 287 W.A.C. 44, [2002] S.J. No. 535 | (Sask. C.A., Sep 18, 2002)

1989 CarswellSask 48
Saskatchewan Court of Appeal

Canadian Commercial Bank v. Simmons Drilling Ltd.

1989 CarswellSask 48, [1989] C.L.D. 1276, [1989] S.J. No. 481, 17 A.C.W.S. (3d) 493, 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 78 Sask. R. 87

CANADIAN COMMERCIAL BANK v. SIMMONS DRILLING LTD.

Vancise and Sherstobitoff JJ.A. and Osborn J. (ad hoc)

Heard: June 5, 1989
Judgment: September 14, 1989
Docket: No. 115

Counsel: *L. Andrychuk*, for appellant.
J. Ehmann, for Deloitte, Haskins and Sells.
T. Stodalka, for Oil Patch.
M. Sawatsky, for Shell Products.

Subject: Corporate and Commercial; Insolvency; Contracts

Related Abridgment Classifications
Construction law

IV Construction and builders' liens
IV.6 Holdback
IV.6.f When payable

Construction law

IV Construction and builders' liens
IV.6 Holdback
IV.6.g Miscellaneous

Construction law

IV Construction and builders' liens
IV.7 Trust fund
IV.7.f Distribution of fund

Headnote
Construction Law --- Construction and builders' liens — Holdback — When payable

Construction Law --- Construction and builders' liens — Holdback

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Construction Law --- Construction and builders' liens — Trust fund — Distribution of fund

Secured creditors — Mechanics' liens — Receiver-manager appointed by court at instance of debenture holder — Receiver-manager having funds remaining after payment of subcontractors with registered liens out of receivables from contracts — Receiver-manager failing to discover unpaid subcontractors without registered liens until expiration of one-year limitation period for claims against lien trust fund — Receiver-manager actions constituting default of positive obligations under Business Corporations Act and Builders' Lien Act, and of responsibility to court — Receiver-manager and debenture holder not to benefit from default — Court directing payment of unpaid subcontractors out of funds received on account of contracts.

The plaintiff held a debenture secured by the assets of the defendant. In March 1987, at the instance of the plaintiff, the court appointed a receiver-manager of the defendant under the provisions of the Saskatchewan Business Corporations Act. The order permitted distribution of moneys held by the receiver only by direction of the court. By 31st March 1987 the defendant had completed various drilling contracts. The receiver-manager paid those subcontractors with registered builders' liens from the moneys received under the contracts and had funds remaining in hand. Upon completion of a review of the defendant's records in March 1988, the receiver-manager discovered that certain subcontractors who had not registered liens were unpaid. In June 1988 the receiver-manager applied for directions as to its obligation to pay these subcontractors in light of the expiration of the one-year limitation period for claims against the lien trust fund under s. 19 of the Builders' Lien Act. The judge declined to answer the question before him but found that the subcontractors had valid unregistered liens, enforceable against the funds received by the receiver-manager. The plaintiff appealed.

Held:

Appeal dismissed.

The trial judgment could not stand because under ss. 70 and 71 of the Act, the bank, holding security that arose prior to the lien, had priority in any event over the unregistered liens.

Pursuant to s. 7 of the Builders' Lien Act, when the receiver-manager was appointed, all of the receivables which eventually were converted into cash came into his possession and under his control impressed with the trust. As the defendant was prohibited from dealing with the receivables by s. 91 of the Business Corporations Act, the receiver-manager was de facto trustee of the trust fund. In addition, the receiver-manager was responsible to the court under s. 92 of the Business Corporation Act and the terms of the order appointing it for the receivables and moneys paid on that account. Section 89 of the Business Corporations Act, together with s. 7 of the Builders' Lien Act, imposed a positive obligation upon the receiver-manager to pay the subcontractors from the trust fund within a reasonable time. The receiver-manager's failure to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period was in default of those statutory obligations. The receiver-manager's actions were the actions of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default. The receiver-manager, and through it the plaintiff, must bear responsibility for the consequences of the unpaid subcontractors being deprived of the right to realize their claims from the trust fund. Accordingly, the receiver-manager should pay the claims of the subcontractors from the funds received on account of the appropriate contracts.

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Cases considered:

Cornish, Re; Ex parte Bd. of Trade, [1896] 1 Q.B. 99 (C.A.) — *distinguished*

Gen. Rolling Stock Co., Re (1872), 7 Ch. 646 — *distinguished*

Harrisson v. Duignan (1842), 2 Dr. & War. 295 — *distinguished*

Parsons v. Sovereign Bank of Can., [1913] A.C. 160 (P.C.) — *considered*

Plisson v. Duncan (1905), 36 S.C.R. 647 [N.W.T.] — *referred to*

Wrixon v. Vize (1842), 3 Dr. & War. 104 — *distinguished*

Statutes considered:

Builders' Lien Act, S.S. 1984-85-86, c. B-7.1

s. 7

s. 15

s. 16

s. 19

s. 27

s. 33

s. 34

s. 40 [am. 1986, c. 8, s. 3]

s. 49(5)

s. 70

s. 71

Business Corporations Act, R.S.S. 1978, c. B-10

s. 89

s. 91

s. 92

s. 95(d)

Authorities considered:

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Bennett on Receiverships (1985), pp. 15-16.

39 Hals. (4th), para. 877.

Kerr on Receivers, 15th ed. (1978), pp. 130, 142, 159.

Appeal from order of Geatros J., 73 C.B.R. (N.S.) 73, 33 C.L.R. 238, 73 Sask. R. 140, enforcing payment of unregistered liens from funds held by receiver-manager.

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

1 The determinative issue in this appeal [from 73 C.B.R. (N.S.) 73, 33 C.L.R. 238, 73 Sask. R. 140] is whether a court-appointed receiver-manager, and the secured creditor at whose instance the receiver-manager was appointed, are entitled to rely upon the time limitation in s. 19(1) of the Builders' Lien Act, S.S. 1984-85-86, c. B-7.1, to obtain priority for the secured creditor over a debt to a stranger to the action, secured by a statutory trust fund, when the time limitation did not elapse until after the appointment of the receiver-manager.

2 These are the relevant provisions of the Builders' Lien Act:

7(1) All amounts:

(*a*) owing to a contractor, whether or not due or payable; or

(*b*) received by a contractor;

on account of the contract price of an improvement constitute a trust fund for the benefit of:

(*c*) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and

(*d*) labourers who have been employed by the contractor for the purpose of performing the contract.

(2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor ...

15 In addition to any other priority which a beneficiary of a trust constituted by this Part may have at law, a beneficiary has priority over all general or special assignments, security interests, judgments, attachments, garnishments and receiving orders, whenever received, granted, issued or made, of or in respect of the contract or subcontract price or any portion of the contract or subcontract price ...

19(1) On the expiry of one year after the contract is completed or abandoned:

(*a*) a person who is a trustee under this Part is discharged from his obligations as trustee; and

(*b*) no action to enforce the trust may be commenced.

(2) Subsection (1) does not affect the ability to commence and maintain a prosecution.

3 In 1980 the appellant Canadian Commercial Bank obtained a debenture, including a fixed and floating charge, over the present and future assets of Simmons Drilling Limited. Validity of the debenture and default thereunder were not disputed.

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4 Deloitte, Haskins & Sells Ltd. was appointed receiver-manager of the business and property of Simmons at the instance of the bank by the Court of Queen's Bench of Alberta on 20th February 1987 and by the Court of Queen's Bench of Saskatchewan on 3rd March 1987. The orders contain no unusual provisions. They prohibit any action against Simmons or the receiver without the leave of the court. They also permit distribution of any moneys in the hands of the receiver, after payment of expenses, only by the direction of the court.

5 Simmons had drilling contracts with several oil and gas operators in Saskatchewan and had completed various wells between 5th December 1986 and 31st March 1987. The receiver, between 15th May 1987 and 5th February 1988, received moneys due under the contracts and paid therefrom those subcontractors who had registered builders' liens. There remained, in the receiver's hands, about $141,000. During a review of Simmons' records by the receiver conducted between December 1987 and March 1988, it was discovered that there were some subcontractors, including the respondents Oil Patch Group Ltd., J-& L Supply Co. Ltd. and Shell Canada Products Limited, who had supplied services and materials in connection with the drilling of the wells, who were unpaid, and had not registered liens. The receiver applied, on 30th June 1988, to the Queen's Bench for the following relief:

> ... advice and directions as to its obligation, if any, with respect to the possible claims of certain subcontractors of SDL in relation to the proceeds of certain drilling contracts received by the receiver, in light of the provisions of s. 19 of *The Builders' Lien Act*, S.S. 1984-85, c. B-7.1, which proceeds are claimed by the plaintiff Canadian Commercial Bank ("CCB") pursuant to its security interests.

6 Geatros J. declined to answer the question put to him, but found, by application of ss. 27, 33, 34, 40 and 49(5) of the Act, that the respondents had valid unregistered liens, enforceable against the funds received by the receiver under the contracts which constituted holdbacks required by the Act. His judgment cannot stand because, even if the liens were valid (and we pass no judgment on that issue), he misconstrued ss. 70 and 71 of the Act, which gave priority to a secured creditor over a lienholder where the security was given before the lien arose. Thus, the bank had priority in any event over the unregistered liens. We are therefore left to determine the original question which was unanswered below.

7 The issue to be decided is the effect of s. 19 of the Act on priority between the bank as secured creditor and the respondents as beneficiaries of the trust created by s. 7 and given priority by s. 15. That raises the following questions. At what date are priorities determined: the date of appointment of the receiver, the date of receipt of the moneys, the date of application to the court, or the date of distribution? Is a court-appointed receiver entitled to affect priorities between competing creditors by permitting limitation periods to expire even if done inadvertently? Even assuming that s. 19 does not apply to prevent any claim against the trust fund, what moneys are affected: all moneys received on account of the contracts, or only moneys actually received within a year of completion of the contracts?

8 As to the last question, s. 7 makes all amounts owing to a contractor under a contract, whether due and payable or not, a part of the trust fund. Thus, when the receiver was appointed, all of the receivables which eventually were converted into cash came into his possession and under his control impressed with the trust. The date of actual receipt of moneys is therefore irrelevant since the payment simply converted the assets in the trust from receivables to cash to the extent of the payments. There were, at all relevant times, assets in some form in the trust fund sufficient to meet the claims of the respondents.

9 The first two questions must be answered together.

10 The respondents argued that time did not run against them under s. 19 from the date of appointment of the receiver. They relied principally on two cases. *Re Cornish; Ex parte Bd. of Trade*, [1896] 1 Q.B. 99 (C.A.), was a case concerning the application of s. 8 of the Trustee Act, 1888, to a trustee in bankruptcy.

11 The court said at p. 104:

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> The other point taken was that s. 8 of the Trustee Act, 1888, applies to the case. In my opinion s. 8, which limits the time for making claims upon trustees, has nothing to do with an officer of the Court who is required by the Court to account. If it had, it would equally apply to a receiver and to other officers of the Court who have been put by the Court in possession of property, and are required to account to the Court. I have never yet heard it suggested that s. 8 of the Trustee Act applied to such cases as that. Moreover, if it did apply, it would not apply to the present case, because if upon taking the account it should appear that the trustee has money in his hands which he has not properly applied, he would come within the exception in s. 8 of the Act, and the limitation of the liability of a trustee would not apply to him at all.

12 In *Re Gen. Rolling Stock Co.* (1872), 7 Ch. 646, the court said this concerning a compulsory winding-up order [pp. 649-50]:

> That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the *Statute of Limitations* does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.

13 These cases do not apply. They dealt with fact situations and with statutes unrelated to those before us. While *Cornish* mentioned receivers, the reference was obiter dictum. *Rolling Stock*, and the cases upon which it relied, as well as those which followed it, did not deal with receivers.

14 The appellant relied on the common law with respect to receivers and reasoned as follows. A receiver appointed by the court becomes a principal and is answerable to the court which appointed him. As a principal, he is not the agent of the security holder, the debtor or of any particular creditor. He has a duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary man would give to his own and if he fails to provide this standard of care he may be liable for his negligence: Bennett on Receiverships (1985), pp. 15-16; *Plisson v. Duncan* (1905), 36 S.C.R. 647 [N.W.T.]. The powers and duties of a court-appointed receiver are summarized in *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160 at 167 (P.C.), by Viscount Haldane:

> A receiver and manager appointed ... is the agent neither of the debenture-holders whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs ...

15 Unlike a trustee in bankruptcy, a receiver does not become vested with title to the debtor's property. He only has possession and custody of them. As stated in Kerr on Receivers, 15th ed. (1978), at p. 130:

> The appointment of a receiver does not in any way affect the right to the property over which he is appointed. The court takes possession by its receiver, and his possession is that of all parties to the action according to their titles ... [*Re Butler* (1863) 13 L.R. Ir. 456; *Bertrand v. Davies* (1862) 31 Beav. 436.]

The appellant argued that the key portion of this passage was the statement that the possession of the court was the possession only of the parties to the action, and not the possession of all persons who might be interested in the property of the debtor. He cited two cases in support of that proposition: *Harrisson v. Duignan* (1842), 2 Dr. & War. 295, and *Wrixon v. Vize* (1842), 3 Dr. & War. 104. Both cases dealt with receivers appointed by the court to protect the interest of minors in land. The first case held that the appointment of a receiver did not affect the operation of a Statute of Limitations against a stranger to the action. The second case held that the appointment of a receiver did prevent a Statute of Limitations from operating in favour of a stranger to the action. The appellant concluded, relying as well on the

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interpretation of the same cases in Kerr at pp. 142 and 159, and 39 Halsbury's Laws of England, 4th ed., para. 877, that the application of limitation periods to the recovery of property or the enforcement of encumbrances against an estate in receivership depended entirely upon who was a party to the action. If the person claiming a paramount right was a party to the action, the possession of the receiver was his possession and therefore the appointment of the receiver would prevent the running of the limitation period. If he was a stranger to the action and was out of possession, time would continue to run against him as the possession of the receiver was not his possession. Thus the appellant said, in this case, the respondents being strangers to the action, time ran against them under s. 19, the trust terminated, and the bank had priority.

16 While the foregoing is, in our opinion, an accurate statement of the common law as it existed at the dates of the cases decided, we do not agree that the venerable cases cited by the appellant apply to this case. They were concerned with use of receiverships to protect the property of minors, a procedure long since fallen into desuetude, and were concerned with adverse possessory claims to land where actual possession was always a crucial factor in determining whether and when limitation periods ran. Furthermore, we are dealing in this case with receivables and cash where actual possession has no bearing on right to claims of entitlement to it. Most importantly, Saskatchewan legislation now governs the appointment and delineates some of the duties of the receiver, and in this case, the receiver has additional obligations superimposed by the Builders' Lien Act.

17 The receiver was appointed under the provisions of the Business Corporations Act, R.S.S. 1978, c. B-10. The relevant provisions of the Act are as follows:

> 89. A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property and pay the liabilities connected with the property and realize the security interest of those on behalf of whom he is appointed, but, except to the extent permitted by a court, he may not carry on the business of the corporation.
>
> 91. If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
>
> 92. A receiver or receiver-manager appointed by a court shall act in accordance with the directions of the court.
>
> 95. Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing:
>
> (*d*) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve any such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager.

18 Thus the receiver held the receivables and moneys paid on account thereof in two representative capacities — as receiver-manager responsible to the court (s. 92 of the Business Corporations Act, and the terms of the order appointing the receiver) and as trustee under s. 7 of the Builders' Lien Act. We reject the argument of the bank that the latter statute made Simmons only the trustee, and that the appointment of the receiver, which gave only the right to possession and not ownership of the receivables, could not substitute the receiver as trustee in the place of Simmons. The receiver received the receivables impressed with the trust. Section 16 of the Builders' Lien Act made anyone who had effective control of a corporation or its relevant activities liable for any breach of trust by the corporation, if assented to or acquiesced in. Simmons was prohibited from dealing with the receivables by s. 91 of the Business Corporations Act. Thus, the receiver became the de facto trustee.

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19 The intent of the Builders Lien Act was that the trust fund be used to pay unpaid subcontractors. That did not happen because the directors of Simmons could not do so by reason of s. 91 of the Business Corporations Act and the receiver, for unexplained reasons, did not discover the existence of the unpaid subcontractors until after the time limitation in s. 19 had expired.

20 The material before us discloses that nine or ten months elapsed between the date of appointment of the receiver and the commencement of the review of accounts that disclosed the trust claims of the subcontractors. Another two or three months elapsed before the review was completed, and another three months elapsed before the receiver applied to the court for directions with respect to the claims. No explanation was given for the delays, nor was there any suggestion or evidence of any improper motive on the part of the receiver, and in particular, no suggestion that the receiver deliberately sought to affect priorities between the subcontractors and the bank. Nevertheless, the failure to discover the claims and to apply to the court for directions until about 16 months after the date of the appointment must be considered a breach of the receiver's obligation to the court to act with diligence and within a reasonable time. The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.

21 What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.

22 The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, for he is an officer of the court. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

23 The receiver and the bank argued that the onus was on the subcontractors to assert their claims, rather than on the receiver to discover and pay them. That might be so in other claims against a receiver or the person at whose instance he was appointed. However, in this case, as noted above, we view s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act, taken together, as imposing a positive obligation on the receiver to pay the subcontractors from the trust fund within a reasonable time.

24 The court has the power to direct payment to the subcontractors by virtue of s. 92 of the Business Corporations Act and by virtue of the terms of the order appointing the receiver, both of which make distribution by the receiver subject to the direction of the court. The bank, at whose instance the order was obtained, is bound by those provisions.

25 If there is any doubt about the right of the court to act under s. 92 or the order, we would invoke the provisions of s. 95(*d*) of the Business Corporations Act, which permits the court to require the receiver and the bank to make good any default in respect of the receivership. The failure of the receiver to discover and pay the claims of the subcontractors within a reasonable time is such a default and is deserving of remedy by requiring payment by the receiver to the subcontractors from the moneys which would have constituted the trust fund created by the Builders' Lien Act.

26 The court did not consider whether the receiver was in a fiduciary relationship to all interested persons, whether parties to the action or not, either at common law, or by reason of the relevant provisions of the Business Corporations

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Act, or the Builders' Lien Act, and if so, the effect of that relationship. That question is left open. However, reference must be made to the position of the receiver on an application such as this. The receiver, in its factum, strongly supported the position of the bank. At the opening of the hearing of the appeal, counsel for the receiver was asked why, since the receiver was not the agent of the bank, but an officer of the court, it was taking a position favouring one party against the other. Counsel indicated that he would take no position in argument. Nevertheless, he spoke, when the time came, in favour of the position of the bank. The court took exception to this for two reasons. First, it gave the appearance that the receiver felt itself to be agent of the bank and acted accordingly, which would not be a proper position for an officer of the court. Secondly, since the receiver's failure to act promptly gave rise to the bank's claim to priority, the position taken again gave the appearance of favouring its own interest and that of the bank against another party. We do not suggest any improper motives or lack of good faith on the part of either the receiver or counsel, but take the opportunity to re-emphasize that a court-appointed receiver is not an agent of the secured creditor or anyone else, but is an officer of the court. He must act accordingly.

27 The appeal must therefore fail. The order below is now inappropriate. The application was for advice and directions. It is declared that the receiver shall pay the claims of the respondent subcontractors from the funds received on account of the appropriate contract or contracts. The respondents will have their costs under double col. V.

Appeal dismissed.

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TAB 2

2002 SKCA 105
Saskatchewan Court of Appeal

Arthur Andersen Inc. v. Merit Energy Ltd.

2002 CarswellSask 593, 2002 SKCA 105, [2002] S.J. No. 535, [2003] 2 W.W.R. 303, 117 A.C.W.S. (3d) 376, 220 D.L.R. (4th) 351, 227 Sask. R. 44, 287 W.A.C. 44

ARTHUR ANDERSEN INC. (APPELLANT / APPLICANT) and ARTISAN CORPORATION (RESPONDENT / RESPONDENT)

Vancise, Gerwing, Jackson JJ.A.

Heard: June 11, 2002
Judgment: September 18, 2002
Docket: 443

Proceedings: affirming (2001), 212 Sask. R. 157 (Sask. Q.B.)

Counsel: *Mr. Michael Milani, Q.C.*, *Mr. Frank Dearlove*, for Appellant
Mr. Paul Harasen, for Respondent

Subject: Contracts; Corporate and Commercial

Related Abridgment Classifications
Construction law

IV Construction and builders' liens
IV.1 Right to lien
IV.1.b When lien arising

Headnote
Construction law --- Construction and builders' liens — Right to lien — When lien arising

A Corp. and ME Ltd. entered into agreement to drill oil wells on several sites — Documents relating to oil wells included standard daywork contract, daybid work sheet, and well specifications — ME Ltd. paid some of amounts owing relating to wells — Receiver was appointed for ME Ltd., who later also became trustee of estate in bankruptcy — Receiver denied A Corp.'s lien claim on ground that lien was not general claim according to s. 29 of Builder's Lien Act — A Corp.'s application for order confirming validity of lien was granted — Receiver brought application for directions — Receiver instructed to pay lien — Receiver appealed — Appeal dismissed — Documentation of agreement and oral representations, taken as whole, constituted single contract which contained all necessary elements under s. 29 of Act — Single contract governed all well drilling projects, rather than individual contracts relating to specific sites and specific aspects of project — When right to lien is established, Act must be applied liberally — A Corp. was entitled to full amount of lien claims — Builder's Lien Act, S.S. 1984-85-86, c. B-7.1, s. 29.

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Ontario Lime Assn. v. Grimwood (1910), 22 O.L.R. 17 (Ont. Master) — considered

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Rudco Insulation Ltd. v. Toronto Sanitary Inc., 1998 CarswellOnt 3970, 41 C.L.R. (2d) 1, 114 O.A.C. 272, 167 D.L.R. (4th) 121, 42 O.R. (3d) 292 (Ont. C.A.) — followed

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s. 22 — considered

s. 22(2) — considered

s. 29 — considered

s. 100 — referred to

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Generally — referred to

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APPEAL by receiver from judgment reported at 2001 SKQB 506, 2001 CarswellSask 725, 212 Sask. R. 157 (Sask. Q.B.), ordering receiver to pay lien claim.

***Vancise J.A.*:**

Introduction

1 Artisan Corporation entered into a contract in June 1998 with Merit Energy Ltd. to drill a number of oil wells for Merit for the compensation set out on two Bid Sheet and Well Specifications Forms. Artisan subsequently drilled 20 oil and gas wells for Merit in Alberta and Saskatchewan between June and September of 1999. Artisan was paid for some but not all of the work and services provided to Merit. The amount outstanding for the work and services provided to Merit is $718,526.82. There is no issue or dispute that the work was done or the amount owing.

2 Arthur Andersen was appointed Receiver and Manager of the property and assets of Merit by order of the Court of Queen's Bench of Alberta on April 12, 2000. The Receiver was also appointed Receiver and Manager of Merit's assets in Saskatchewan on June 1, 2000 by an order of Noble J. [1] The Receiver is also the Trustee in Bankruptcy of the estate of Merit.

3 Artisan requested a builder's lien pursuant to the provisions of *The Builders' Lien Act* [2] at the Saskatchewan Mineral Rights Branch, Department of Energy and Mines, on November 1, 1999, as a result of the non-payment by Merit of Artisan's account for labour and materials provided pursuant to the Canadian Association of Drilling Contractors ("C.A.O.D.C.") contract. Artisan filed proof of its lien with the Receiver who denied the lien claim by Artisan on the basis that the lien was not a general lien pursuant to the terms of s. 29 of the *Act*. Artisan applied to the Alberta Court of Queen's Bench for an order confirming the validity of its lien. On June 1, 2001, Judge LoVecchio of the Alberta Court of Queen's Bench requested the Court of Queen's Bench of Saskatchewan determine the validity of Artisan's lien on the Saskatchewan properties. The Receiver subsequently applied for directions pursuant to the terms of the orders of LoVecchio and Noble JJ. respecting the validity of Artisan's builders' lien in Saskatchewan.

4 Kraus J. found that Artisan and Merit entered into a "single contract" with the result that the Artisan builders' lien was a valid general lien as contemplated by s. 29 of the *Act*. He also found that if he was wrong in that finding, Artisan could avail itself of the curative provisions of s. 100 of the *Act*.

5 The Receiver appeals that decision.

Facts

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6 On or about June 1998, Merit and Artisan entered into a Standard Daywork Contract on the form issued by the C.A.O.D.C. The contract contained no specific terms relating to work to be performed because it contemplated the completion of bid sheet and well specifications in the following terms:

> **HOUR, EQUIPMENT, MATERIALS, SUPPLIES AND SERVICES**
>
> 2.1 Contractor shall furnish the labour, equipment, materials, supplies and services described in Exhibit "A" necessary to drill and complete the Well unless otherwise provided in this Agreement or Exhibit "A".
>
> 2.2 Certain materials, supplies, equipment and services necessary to the drilling and completion of the Well shall be furnished at the Well location by the party designated in Exhibit "A". If other materials, supplies, equipment and services not identified in Exhibit "A" are required to drill or complete the Well, the cost of such materials, supplies, equipment and services and how and by whom they are to be provided shall require the further agreement of Operator and Contractor. [3]

7 Artisan submitted two Bid Sheet and Well Specifications pursuant to Article 2 of the contract which were accepted by Merit. The first, dated June 7, 1999, dealt with "3-5 Wells @ 12-19 W3; Plus Single Wells at 14-34-4-27 W3; 10-36-6-27 W3; 10-11-8-25 W3, for a total of up to 8 Wells." [4]

8 Artisan drilled a total of 20 wells in Saskatchewan pursuant to this contract.

9 Merit failed to pay the amount owing to Artisan and other creditors with the result that proceedings were commenced in Alberta for the appointment of a receiver. Arthur Andersen was appointed Receiver by an order of the Court of Queen's Bench of Alberta on April 12, 2000. The Receiver, based in part on comity and at the request of the Alberta Court of Queen's Bench, was also appointed Receiver in Saskatchewan by Noble J. of the Saskatchewan Court of Queen's Bench on June 1, 2000. The Receiver is the receiver and manager of the property, assets and undertakings of Merit and also the Trustee in Bankruptcy of the estate of Merit which declared bankruptcy on September 22, 2000.

10 The Artisan lien was registered at Saskatchewan Energy and Mines on November 1, 1999, as document no. 3119, in the amount of $926,185.39. The proving affidavit claimed $828,677.01 and claimed that Artisan had a general lien on each property with the result that each liened property is available to satisfy the total amount owing for the value of the services performed or payments made in respect of any particular property.

11 Artisan received some payments after registering its builders' lien in Saskatchewan and, as a result, claimed $718,526.82 as the amount owed to it by Merit. That claim is made up of the following amounts remaining unpaid on a land by land basis as follows:

Location	Crown Lease No.	Amount Owing
S.E. 1/4 33-14-19 W3	PN 29503	$ 55,408.54
N.W. 1/4 34-4-27 W3	PN 29956	$ 60,882.73
S.E. 1/4 3-15-19 W3	PN 41223	$ 45,430.06
N.E. 1/4 1-12-19 W3	PN 22648	$ 42,331.48
N.E. 1/4 25-3-27 W3	P 8376	$151,687.69
S.E. 1/4 12-12-19 W3	PN 31654	$ 50,376.67
S.E. 1/4 1-12-19 W3	PN 34897	$118,003.88
N.E. 1/4 31-3-26 W3	GP 9399 & PN 12118	$136,648.88
N.W. 1/4 11-12-19 W3	PN 20688	$ 57,756.89
Total		$718,526.82 [5]

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12 A procedure to prove the builders' liens in Saskatchewan was established by Hunter J. of the Saskatchewan Court of Queen's Bench. [6] Artisan filed a proving affidavit pursuant to that procedure.

13 The Receiver and others filed notices of objection, and a representative of Artisan was cross-examined on his affidavit with respect to the validity of the builders' lien. The Receiver held that the lien was not a general lien under s. 29 of the *Act* and was invalid.

14 Clause 11.1 of the Bid Sheet and Well Specifications dated June 7, 1999 named Champion Rig #33 as the equipment to be used to drill the wells. Artisan claims that the invoices received by Merit are linked to this bid because they refer to the work done by Champion Rig #33. Details of the claim are set out in the Affidavit of Mr. T. Medvedic, treasurer of Artisan, as follows: [7]

Invoice #	Invoice Date	Location	Job #	Work Commenced (SPUD)	Work Complete (Release)	Amount	Balance
2316-1	5-Jul-99	North—Premier—07-33-14-19w3	D933-073	28-Jun-99	3-Jul-99	$55,408.54	$55,408.54
2363-1	13-Jul-99	North—Premier—02-33-14-19w3	D933-074	4-Jul-99	9-Jul-99	$43,490.15	$0
2440-1 (addition to 2316)	22-Jul-99	North—Premier—07-33-14-19w3	D933-073	28-Jun-99	3-Jul-99	$1,284.00	$0
2441-1 (addition to 2363)	22-Jul-99	North—Premier—02-33-14-19w3	D933-074	4-Jul-99	9-Jul-99	$1,284.00	$0
2438-1	22-Jul-99	North—Premier—08-03-15-19w3	D933-075	10-Jul-99	15-Jul-99	$45,430.06	$45,430.06
2477-1	28-Jul-99	Butte—09-01-12-19w3	D933-076	17-Jul-99	23-Jul-99	$53,214.31	$0
2529-1	4-Aug-99	Butte—14-01-12-19w3	D933-077	23-Jul-99	29-Jul-99	$52,813.06	$0
2530-1 (missed from 2477)	4-Aug-99	Butte—09-01-12-19w3	D933-076	17-Jul-99	23-Jul-99	$599.20	$0
2548-1	6-Aug-99	Butte—02-12-12-19w3	D933-078	30-Jul-99	4-Aug-99	$50,376.67	$50,376.67
2642-1	18-Aug-99	Butte—07-01-12-19w3	D933-080	11-Aug-99	12-Aug-99	$12,929.88	$12,929.88
2641-1	18-Aug-99	Butte—01-01-12-19w3	D933-079	4-Aug-99	10-Aug-99	$52,408.60	$52,408.60
2680-1	25-Aug-99	Butte—11-11-12-19w3	D933-081	13-Aug-99	19-Aug-99	$55,142.45	$55,142.45
2742-1	30-Aug-99	Butte—07-01-12-19w3	D933-082	19-Aug-99	24-Aug-99	$41,993.22	$0
2819-1	7-Sep-99	Butte—08-01-12-19w3	D933-083	24-Aug-99	30-Aug-99	$52,665.40	$52,665.40
2840-1 (addition to 2680)	9-Sep-99	Butte—11-11-12-19w3	D933--081	13-Aug-99	19-Aug-99	$2,614.44	$2,614.44

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2820-1	7-Sep-99	Butte—10-01-12-19w3	D933-084	1-Sep-99	6-Sep-99	$47,325.03	$42,331.48

15 The second Bid Sheet and Well Specifications dated June 29, 1999 dealt with "10-31-3-27 W3 Plus additional locations as designated (Approximately 7 to 9 wells)." [8] The rig specified in the Bid Sheet and Well Specifications is Champion No. 25. Artisan claims the invoices received by Merit link to this bid because the work is done by Champion Rig No. 25. Details of that claim are also set out in Mr. Medvedic's affidavit as follows: [9]

Invoice	Invoice Date	Location	Job #	Work Commenced (SPUD)	Work Complete (Release)	Amount	Balance
2398-1	15-Jul-99	Consul 14-34-04-27w3	D925-008	8-Jul-99	14-Jul-99	$60,882.73	$60,882.73
2422-1 (addition to 2398)	21-Jul-99	Consul 14-34-04-27w3	D925-008	8-Jul-99	14-Jul-99	$513.33	$0
2527-1	4-Aug-99	Battle Creek HZ 16-25-03-27w3	D925-009	19-Jul-99	5-Aug-99	$153364.92	$153364.92
2665-1	24-Aug-99	Battle Creek HZ 10-31-03-26w3	D925-010	6-Aug-99	21-Aug-99	$136648.88	$136648.88
2664-1 (addition to 2398)	24 Aug 99	Consul 14-34-04-27w3	D925-008	8 Jul 99	14 Jul 99	$2,337.95	$0
2734-1 (to correct 2527-1)	30-Aug-99	Battle Creek HZ 16-25-03-27w3	D925-009	19-Jul-99	5-Aug-99	$5,136.00	$0
2869-1 (credit to 2527-1)	13-Sep-99	Battle Creek HZ 16-25-03-27w3	D925-009	19-Jul-99	5-Aug-99	($1,677.23)	($1,667.23)

16 The Receiver does not deny that $718,526.82 is owing or that the work and services were provided by Artisan, which properly gives rise to the lien claim under the *Act*. The Receiver does not, however, agree that Artisan has a valid general lien pursuant to s. 29 of the *Act*. In other words, Artisan may have had a valid lien on the individual properties which it did not register but does not have a valid general lien under s. 29 of the *Act*.

17 The Receiver was charged with the responsibility of negotiating the sale of Merit's assets in both Alberta and Saskatchewan subject to the approvals of the Alberta and Saskatchewan Courts of Queen's Bench.

Relevant Statutes

18 *The Builders' Lien Act*, ss. 22, 29 and 100:

22(1) A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.

(2) Where services or materials are provided:

(a) preparatory to:

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(b) in connection with; or

(c) for an abandonment operation in connection with;

the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials, the lien given by subsection (1) is also a lien on:

(d) all the estates or interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding that fee simple has expressly requested the services or materials;

(e) the mineral when severed and recovered from the land while it is in the hands of the owner, and to the proceeds of the mineral and to the amounts to be paid in lieu of the proceeds of the mineral to the owner by a person that operates the mine, oil well or gas well;

(f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines, mining claim or land, oil or gas well and the appurtenances thereto;

but, in all other respects, this Act applies to the lien existing by virtue of this subsection notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.

. . .

29 Where an owner enters into a single contract for improvements on more than one parcel of land owned by him, any person providing services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a lien against each parcel for the price of all services and materials provided by him to all of the parcels of land.

. . .

100(1) No certificate of substantial performance, written notice of a lien, claim of lien or any other prescribed form is invalidated by reason only of a failure to comply strictly with the prescribed forms or subsection 50(2) unless, in the opinion of the court, a person has been prejudiced thereby and then only to the extent of the prejudice suffered.

(2) Nothing in subsection (1) shall be construed as dispensing with the registration of the claim of lien as required by this Act.

Issues

19 There are, essentially, three issues on this appeal:

1. is it appropriate for the Receiver to appeal the decision of the Court of Queen's Bench responding to the Receiver's request for advice regarding the validity of Artisan's lien?

2. if the answer to number 1 is yes, did the chambers judge err in holding that Artisan had a valid general lien pursuant to s. 29 of the *Act*?

3. if the answer to number 2 is yes, do the curative provisions of s. 100 of the *Act* apply so that Artisan has valid individual liens against each of the properties against which the general lien was registered?

Analysis

A. Preliminary Objection — power or authority of Receiver to appeal

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20 Artisan contends that the Receiver has no authority, either under the terms of his appointment or applicable statute or the common law, to appeal the advice and directions given it by the Court of Queen's Bench. Artisan states that the Receiver's application for service and directions was consistent with a court-appointed receiver taking a neutral position and seeking advice on behalf of all creditors, secured and unsecured.

21 Paragraph 17 of the order of Noble J. dated June 1, 2000, provides that the Receiver may apply to the Court of Queen's Bench for "directions and guidance in discharge of its duties hereunder". Artisan concedes that the motion for advice, as framed in the Court of Queen's Bench, permitted the presentation of all arguments concerning the validity of claims on the assets of Merit, including that of Artisan. Artisan contends, however, that once having received advice, the Receiver has no authority to appeal the decision because to do so violates its position of neutrality and, in effect, by so doing the Receiver becomes an advocate for the unsecured creditors. It further argues that the Receiver, having sought the advice of the Court of Queen's Bench, has fulfilled its mandate and nothing further is required.

22 There is a certain purity and simplistic logic to the argument. It is, however, not as straight-forward as first appears. The Receiver concedes that, typically, a court-appointed receiver has no "interest" in the outcome of a priority dispute between the parties (it cannot prefer one party over another), but it contends that it has a legitimate interest in ensuring that the priorities and claims are decided according to law.

23 In the present receivership, however, the Receiver has been particularly active. There have been 59 applications to the Court of Queen's Bench of Alberta and ten applications of substance in Saskatchewan pertaining to the distribution of the assets of Merit. The majority of those applications in Saskatchewan dealt with the procedure to be followed for proving lien claims. The Receiver has, pursuant to the orders of LoVecchio J. and various judges of the Court of Queen's Bench in Saskatchewan, received the proofs of claim, rejected some for being out of time, analysed the claims as against the records of Merit, and made certain recommendations to the courts regarding claims which should be allowed or denied. Of necessity, this means that the Receiver will favour one claimant's position over another, but those decisions are all made in the context of taking a neutral position in the overall administration of the estate.

24 This Court cannot lose sight of the fact that the Receiver is also the Trustee in Bankruptcy of the estate of Merit. The Receiver, therefore, is aware of the interests of the unsecured creditors of Merit. The Receiver contends that it has an obligation, which is entirely consistent with the various orders of the Court of Queen's Bench in both provinces, to ensure that any person asserting a priority or a preferred claim is entitled to do so. It is for that reason, the Receiver argues, that it has been involved in the proving process and the litigation surrounding the validity of the builders' liens. The unsecured creditors in this case have not directly disputed Artisan's claim to be entitled to a builders' lien, but have advised the Receiver that they expect it (the Receiver) to advance the appropriate arguments in favour of their claims and disputing the lien claim of Artisan.

25 The orders of Noble J. and Hunter J. provided a mechanism for proving lien claims. Artisan was required pursuant to those orders to prove its lien which was reviewed and assessed by the receiver and other interested creditors. The receiver then advised Artisan that it believed that Artisan did not have a valid lien.

26 Prior to the application for directions being brought in the Court of Queen's Bench, counsel for the Receiver and Artisan discussed the procedure to be followed to obtain advice and directions regarding the validity of the Artisan lien. The Receiver proposed that a committee of creditors be formed to decide on the validity of the lien. Artisan advised in due course that they disagreed with that procedure.

27 When they could not agree on that issue, the matter was placed before LoVecchio J. of the Alberta Court of Queen's Bench who ordered that the matter should be determined by the Saskatchewan Court of Queen's Bench. The Receiver then brought the subject application for directions which it contends is the proper procedure as contemplated by paragraph 17 of the order of Noble J.

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28 Artisan took no issue with the way in which the application for direction was presented to the chambers judge. The Receiver contends that it is taking the same approach on the appeal as it took before the chambers judge and respectfully requests this Court to either confirm or disagree with the advice and directions given by the chambers judge in the court below.

29 The chambers judge noted that no creditor appeared on the application for directions. Significantly, he added:

> the material shows that the unsecured creditors expect the applicant (Receiver) to take all appropriate steps to maximize recovery for them. [10]

30 Artisan contends that by bringing this appeal, the Receiver has contravened the principles of neutrality outlined by this Court in *Canadian Commercial Bank v. Simmons Drilling Ltd.* [11] Before examining that argument, it would be useful to set out the classic statement of the legal position of court-appointed receivers stated by Viscount Haldane in *Parsons v. Sovereign Bank of Canada*: [12]

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him. . . . The company remains in existence, but it has lost its title to control its assets and affairs . . . [13]

31 *Bennett on Receiverships* [14] points out that the court-appointed receiver also owes a duty to all persons with an interest in the property:

> A court-appointed receiver and manager represents neither the security holder nor the debtor. As an officer of the court, he is not an agent but a principal entrusted to discharge the powers granted to him *bona fide*. Accordingly, he has a fiduciary duty to comply with such powers provided in the order and to act in the best interests of all interested parties connected with the debtor's assets. His primary duty is to account for the assets under his control and in his possession. This duty is owed to the court and all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. The court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership. [15]

32 In addition to the common law, personal property legislation in various provinces regulates the appointment and powers of receivers. In Saskatchewan, s. 64(8)(a) of *The Personal Property Security Act, 1993* [16] confers authority on the court to appoint a receiver and authorizes the court to give the receiver directions on any matter pertaining to its duties. That section reads as follows:

> 64(8) On application by an interested person, the court may:
>
> (a) appoint a receiver;
>
> (b) remove, replace or discharge a receiver, whether appointed by a court or pursuant to a security agreement;
>
> (c) give directions on any matter relating to the duties of a receiver.
>
> . . .

"[A]n interested person" may make an application to determine priority to collateral pursuant to s. 66(1)(a). That section reads as follows:

> 66(1) On an application of an interested person, the court may:

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(a) make an order determining questions of priority or entitlement to collateral.

. . .

33 The parties agreed in this application that the Receiver was an interested person to bring the application for determination of the validity of the lien filed by Artisan in Saskatchewan. Artisan now contends that having received that opinion and advice no appeal lies to this Court. Viewed from a pure *P.P.S.A.* perspective, it is arguable that since the Receiver had original status, the Receiver, in furtherance of its obligation to represent the interests of all creditors, should be permitted to appeal. Indeed, s. 66(2) of the *P.P.S.A.* specifically provides a right of appeal to the Court of Appeal from an "order, judgment or direction of a court made pursuant to this Act".

34 Is it possible to reconcile this statutory regime, which provides a right of appeal, with the role of a court-appointed receiver at common law? The court-appointed receiver is not an agent, but does have a fiduciary responsibility to all persons with an interest in the property. If, in the interests of ensuring that the interests of all creditors are protected, would it be inconsistent with the fiduciary duty owed by the Receiver to all interested persons *not* to appeal? In the circumstances of this case, where the unsecured creditors *expected* the Receiver to take all measures necessary to maximize recovery, can it be said that the Receiver is taking an advocacy position?

35 Artisan relies on *Simmons Drilling* as authority for the principle that any actions by a receiver favouring one claimant over another are inconsistent with the receiver's duty of neutrality. The Receiver takes no issue with that basic principle but contends the circumstances in this case are distinguishable. In *Simmons Drilling*, the receiver, in breach of its duty of due diligence and by its own action put one of the claimants in a more favourable position. The receiver failed to act promptly to protect the entitlement of the unpaid lien claimants to receivables impressed with a trust with a *Builder's Lien Act*. At the time the receiver was appointed, the unpaid sub-contractors were entitled to payment from the trust fund. It was this failure by the receiver to discover and pay the unpaid claims against the trust before the liens expired that deprived the sub-contractors the right to realize their claims from the trust fund. The result of the breach of its duty was to put one of the claimants in a more favourable position compared to the others. The receiver sought to use *The Limitation of Actions Act* [17] to advance the priority of the bank over the lien claimants. I agree that *Simmons Drilling* is distinguishable.

36 The ratio of this Court's decision in *Simmons Drilling* is that a court cannot approve the actions of a receiver as the Court's officer which have the effect of changing the rights of competing creditors.

37 Sherstobitoff J.A., speaking for the Court stated:

> [26] At the opening of the hearing of the appeal, counsel for the receiver was asked why, since the receiver was not the agent of the bank, but an officer of the court, it was taking a position favouring one party against the other. Counsel indicated that he would take no position in argument. Nevertheless, he spoke, when the time came, in favour of the position of the bank. The court took exception to this for two reasons. First, it gave the appearance that the receiver felt itself to be agent of the bank and acted accordingly, which would not be a proper position for an officer of the court. Secondly, since the receiver's failure to act promptly gave rise to the bank's claim to priority, the position taken again gave the appearance of favouring its own interest and that of the bank against another party. We do not suggest any improper motives or lack of good faith on the part of either the receiver or counsel, but take the opportunity to reemphasize that a court-appointed receiver is not an agent of the secured creditor or anyone else, but is an officer of the court. He must act accordingly. [18]

38 In the present case the situation is quite different. The Receiver is acting on behalf of all creditors to determine the priority of the various claimants. Its actions in bringing the appeal will not change the various priorities between the various claimants. It is indeed arguable that it would be a breach of the receiver's fiduciary duty not to appeal so as to

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determine whether the lien registered by Artisan was indeed a valid lien and with the result that Artisan is entitled to priority over the unsecured creditors.

39 The Receiver contends that in appealing it is following the directions given to it under various orders directing the administration of the receivership of Merit and is not acting as an agent of the ordinary creditors to the detriment of Artisan.

40 The Receiver can, in the discharge of its appointment, act as a representative of the Court. It is "neutral" as between itself and the competing parties. It is expected to submit the position of all the creditors of Merit to the Court for a determination of the priorities and the validity of the lien. The argument of Artisan that the Receiver cannot in the present circumstances appeal the decision of the chambers judge because to do so would be favouring the position of the unsecured creditors is not well taken. Normally a court would expect one of the parties adversely affected to bring the appeal. That did not happen in this case because none of the unsecured parties appeared on the application for directions in the court below. In my opinion, the Receiver, in the discharge of its responsibilities and its fiduciary obligation, is justified in seeking a further opinion to ensure that the "correct" advice was given. This is even more appropriate where some of the parties affected were not represented by counsel on the initial application.

41 I conclude that the Receiver is not precluded from appealing the decision of the chambers judge giving directions on the validity of Artisan's lien claim. It is therefore necessary to consider the validity of the lien filed by Artisan.

Validity of Lien

42 The validity of Artisan's lien depends on whether the contract between Merit and Artisan is a "single contract" as contemplated by s. 29 of the *Act* which I reproduce for the sake of convenience:

> 29 Where an owner enters into a single contract for improvements on more than one parcel of land owned by him, any person providing services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a lien against each parcel for the price of all services and materials provided by him to all of the parcels of land.

43 The Artisan lien of $926,185.39 was registered at Saskatchewan Energy and Mines for the total amount of services rendered and materials supplied by Artisan to Merit in Saskatchewan. It claims to be a general lien claim because it claims from each property against which it is registered the total value of services rendered in respect of all Saskatchewan properties.

44 A general lien was originally a judicial addition to the Mechanic's (Builder's) Lien legislation. In *Ontario Lime Assn. v. Grimwood,* [19] Middleton J. stated:

> [W]here one owner chooses to enter into an entire contract for the supply of material to be used upon several buildings . . . the claimant can ask to have his lien follow the form of the contract, and that it be for an entire sum, upon all the buildings. [20]

Various provincial legislatures enacted provisions similar to s. 29 of the *Act* to formalize that judicial remedy.

45 A general statutory lien was described in these terms by Laskin J.A. in *Gillies Lumber Inc. v. Kubassek Holdings Ltd.* [21]

> [12] Ordinarily, a supplier will claim a lien against land only for the price of the services or materials provided to that land. Cases arise, however, where a supplier provides labour or materials to two or more parcels of land belonging to the same owner and the supplier is unable to allocate the price of its labour or materials to each individual parcel. These cases typically arise in housing subdivisions where the supplier's contract or subcontract may call for the supplier to provide all the labour or materials to be used in constructing every house in the subdivision. To avoid

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> the difficulty of allocating the amount owing for each individual house, the Act, in s. 20, created the concept of a general lien, which permits a lien claimant to preserve a lien against each parcel of land for the total price of labour and materials supplied to all the parcels of land. [22]

46 I agree with that description and characterization of a general lien.

47 Before considering the essential issues under s. 29 of the *Act*, I will set out what is not in dispute between the parties. It is not disputed that Artisan furnished services and materials to Merit. Section 22 of the *Act* sets out the criteria for a person who supplies services or materials for an owner having a lien on the estate or interests of an owner etc. Section 22(2) specifically provides for a lien where services and materials are provided in connection with the recovery of a mineral. The lien commonly known as a mechanic's lien, now a builder's lien was unknown to the common law and thus owes its existence to a series of statutes. Because it constitutes an abrogation of the common law, and because but for the statute a charge upon an owner's land would not exist, certain principles of construction have been developed dealing with the entitlement of a claimant to rely on the protection of the *Act*. In *Ace Lumber Ltd. v. Clarkson Co.* [23] the Supreme Court of Canada set out the principles of interpretation to be applied when construing lien legislation. Ritchie J. speaking on behalf of the court stated:

> With the greatest respect, I am, however, of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. [pp. 710-11], where he says that,
>
>> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.
>
> The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures Inc. v. C.W.S. Grinding & Machines Works* (1951), 229 Pac. (2d) 623 at p. 629, where it was said:
>
>> We agree with defendant that the right to a lien is purely statutory, and a claimant to such a lien must in the first instance bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment. [24]

48 In *Rudco Insulation Ltd. v. Toronto Sanitary Inc.* [25] the Ontario Court of Appeal reiterated the reasons for strictly construing the *Act* to determine whether the person is entitled to benefit under the *Act*. O'Connor J.A. stated that:

> The first principle that I draw from the cases is the following: because the legislation creates a preference and a security for certain creditors that did not otherwise exist at common law, it ought to be given a strict interpretation in determining whether a particular creditor is a person to whom the benefit is given. [26]

49 Thus, on a strict interpretation of the *Act*, Artisan is a person to whom a lien is given by the terms of the *Act*. It is a person contemplated by the *Act* and there is no question as between the parties that lienable services and materials were supplied by Artisan to Merit. Having decided that Artisan has a lienable interest it is entitled in a determination of what rights the *Act* confers on it to a liberal interpretation. As noted above in *Timber Structures v. C.W.S. Grinding & Machine Works*, [27] once the claimant's right has been clearly established the law will be liberally interpreted toward accomplishing the purposes of the *Act*, that is protecting the interests of those who have improved the property of others.

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50 Unlike the situation in *Gillies* where it was conceded there was not a single contract, Artisan contends that it has one contract of services albeit contained in more than one document. Artisan argues that the C.A.O.D.C. Standard Daywork Contract [28] and the Standard Daywork Bid Sheet and Well Specifications [29] which are specifically contemplated by the contract as well as the oral agreements between the parties altering the normal time for payment provided for the C.A.O.D.C. contracts contain all the essential terms of the contract between the parties with the result that it (Artisan) is entitled to claim a general lien under s. 29 of the *Act* against all the properties of Merit.

51 Specifically, Artisan contends that the documents contain all the terms and conditions associated with the drilling services to be provided to merit and as such constitutes a defined contractual arrangement as follows:

(a) The C.A.O.D.C. (the Contract) obligates Artisan to perform certain drilling services and to furnish the labour, equipment, materials, supplies and services necessary to drill and complete wells. [30]

(b) The Contract required Merit to pay for the services, materials, supplies, and equipment supplied by Artisan. [31]

(c) The Exhibits "A" Standard Daywork Contract Bid Sheet and Well Specifications which are "to be attached hereto and made part here of" provided further particulars of the work to be performed under the Contract. [32]

(d) Standard Daywork Contract Bid Sheet and Well Specifications provide some specific well locations and state that additional wells may be assigned. Such additional wells were in the vicinity of the well location and the land descriptions. [33]

(e) Well specifications were disclosed and a guaranteed amount of work was contracted. [34]

(f) A relaxation of the ordinary terms of payment was also agreed to orally. [35]

52 Artisan relies on *Kevel Holdings Ltd. v. 408230 Alberta Ltd.* [36] as authority for the principle that the contact can be found in a number of documents and all representations. In *Kevel,* Miller J. stated:

> [38] There are also several authorities, earlier referred to, which establish that the writing need not necessarily be a formal type of document. Indeed, it may be made up of several pieces of writing provided the Court can clearly identify that an agreement had been reached and was documented in some understandable form. I find that in this case the oral negotiations between the solicitors plus the letters and the existence of the second Amendment Agreement itself, signed by the seller, which I earlier detailed, complies with the requirement of writing set out in the *Statute of Frauds* and makes the agreement enforceable in our Courts. [37]

53 The Receiver does not disagree with the general principle that a contract can be found in more than one document but argues that in the context of this case the various documents do not contain all the essential terms of the contract with the result that there is no single contract and that s. 29 does not apply.

54 The Receiver argues that the relationship between the parties was not covered by a single contract contained in several documents but is rather a series of individual contracts consisting of:

1) the work contemplated within the C.A.O.D.C. contract which was to be preformed by Artisan between June to September of 1999; or separate contacts under the June 7th bid and June 29th bid with a number of wells being drilled under each of these contacts; or,

2) separate contracts between the parties each time that Artisan provided drilling services to Merit. It contends that the contractual arrangements that Artisan argues is a single contract do not contain all the essential terms and conditions agreed to between the parties and as such is not enforceable.

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55 The Receiver relies on *Schlumberger Holdings (Bermuda) Ltd. v. Merit Energy Ltd.* [38]

56 The Receiver contends that the C.A.O.D.C. contract and the two bids dated June 1999 do not contain all the essential terms of a single contract for drilling services because there was no agreement as to what work would be performed and when. It argues that at best, there was a framework agreement including pricing that would be incorporated into contracts for specific wells at future dates. The Receiver argues that the description of the work to be done in the two bids as of June 29, that is:

> (a) "Well Name MERIT SW SASKATCHEWAN Province of Saskatchewan Well Location and Land Description 3-5 Wells @ 12-19 W3; Plus Single Wells at 14-34-4-27 W3; 10-36-6-27 W3; 10-11-8-25 W3 for a total of up to 8 Wells".
>
> (b) "Well Name MERIT SHAUNAVAN Province of Saskatchewan Well Location and Land Description 10-31-3-27 W3 Plus additional locations as designated (Approximately 7-9 Wells)". [39]

are not complete enough to be enforceable terms of the contract. In its submission there is insufficient information in the C.A.O.D.C. contract or bids to identify the specific number of wells to be drilled and at what location. In the absence of such information, it argues there are no enforceable drilling contracts. At best, according to the Receiver there were individual contracts formed on a well for well basis as evidenced by the fact that each well was assigned a different job number by Artisan as they were drilled and subsequently billed. [40]

57 In the alternative the receiver contends that there are two contracts, as evidenced by the bids of June 7, 1999 and June 29, 1999. The receiver contends that there is no combination of documents which "contain all the essential elements" of the contract.

58 To resolve the differences between these two competing points of view one must give s. 29 of the *Act* "a liberal interpretation with respect to the rights conferred upon those to whom the *Act* applies." [41] When the right to a lien has been established as it was here, the *Act* will then be liberally interpreted toward accomplishing its objectives. The equivalent of s. 29 of the *Act*, s. 32(2) [42] of *The Mechanics' Lien Act* (the "*Ontario Act*") [43] then in force was interpreted by the Ontario Court of Appeal in *Boake v. Guild.* [44] Although s. 32(2) of the *Ontario Act* refers to "an entire contract" and the Act refers to a "single contract" there is no practical difference. [45] More importantly, the Ontario Court of Appeal held in *Boake* that the general lien provisions of the *Ontario Act* should be liberally construed. The Court stated:

> With respect I am also unable to assent to the opinion expressed by the learned Assistant Master, where he states that the statutory provision in question should be strictly construed. On the contrary, having in mind the nature of this legislation generally, and the evident intention that persons supplying material for the erection of buildings on property, whereby the value of the latter is greatly enhanced, should not suffer a complete loss, but should benefited as in the Statute provided, I think a reasonably liberal construction should be adopted, in so far as the language permits. I think that an analysis of the decisions of the Courts of this Province extending over many years, will show that this has been the prevailing opinion.

The Ontario Court of Appeal went on to find in *Boake* that the claimant had a valid general lien. In so doing it quoted with approval *Fulton Hardware Co. v. Mitchell* [46] of the Ontario Court of Appeal and *Whitlock v. Loney* [47] a decision of the Supreme Court of Saskatchewan as setting out a correct standard of the law. In *Whitlock*, Lamont J. set out the general principle as follows:

> Where, however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items; and in order that the contract may be a continuing one within this rule it is

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not necessary that all work or materials should be ordered at one time, that the amount of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon, or the time of payment fixed; but a mere general arrangement to furnish labour or materials for a particular building or improvement is sufficient, if complied with, even though the original agreement was not legally binding. [48]

59 In the instant case an examination of the relevant documents supports Artisan's position that there is a single contract entered into between the parties contained in more than one document. The C.A.O.D.C. contract provides the contractor (Artisan) agrees in clause 1 to provide the services, that is to drill and complete the well described in the Bid Sheet and Well Specification in accordance with the terms of the C.A.O.D.C. contract and Bid Sheet Well Specifications. In clause two, the contractor (Artisan) agrees to supply the labour, equipment, materials, supplies and services described in the bid sheet and well specifications. The C.A.O.D.C. contract dated June 1, 1999 sets out the framework under which the work including, the furnishing of materials and labour, the specification of the well or wells to be drilled and completed, the specification of the amount to be payable for services rendered as well as when payment shall be made.

60 Indeed, all relevant matters between Artisan as contractor and Merit as operator are contained in the C.A.O.D.C. contract. These include such matters as the stoppage of work by the operator, take-over by the operator, the casing program, the drilling methods, reports, insurance, etc. Exhibit A or the Bid Sheet and Well Specifications contain details such as the location or locations of the well or wells and the specifications for the drilling of the well or wells, as well as the rates to be charged for the services to be rendered by Artisan to Merit. The invoices for services rendered are based on the rates set out on the bid sheet and well specifications. All the essential terms of the contract are contained in these three documents and the oral agreement to modify the terms of payment, that is: the obligation of Artisan to perform certain drilling services and to furnish certain labour and materials to drill and complete the wells; the requirement that Merit pay for the services; the Standard Daywork Contract Bid Sheet and Well Specifications which are appended to the contract which are contemplated by and made part of the contract provide further particulars to be performed; the standard day work contract and bid sheet and well specifications provide specific well locations and state that additional wells may be assigned; well specifications were disclosed; and, a relaxation of the ordinary terms of payment were agreed to orally.

61 I agree with the conclusion of the chambers judge that the parties entered in to a single contract; that the specifications form part of the contract; and, the essential terms of the agreement between the parties are found in the contract.

62 The single contract meets the requirements of s. 29 of the *Act* and the lien filed by Artisan is valid.

63 Having concluded that the lien is valid, it is not necessary for me to answer the third question, that is whether the lien can be saved under s. 100 of the *Act*.

64 The appeal is dismissed and Artisan is entitled to its costs on double Column V.

Gerwing J.A.:

I concur.

Jackson J.A.:

I concur.

Appeal dismissed.

Footnotes

1 See Appendix A.

2 S.S. 1984-85-86, c. B-7.1 [hereinafter called "the *Act*"].

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3 Appeal Book at p. 274a.

4 Appeal Book at p. 105a.

5 Factum of the Respondent, p. 2.

6 See Appendix B.

7 Factum of the Appellant at pp. 9-10; Chart compiled from invoices in Artisan Proving Affidavit and the Responses of Mr. Medvedic, Exhibits "C" and "A" respectively of the Appeal Book at p. 119a.

8 Appeal Book at p. 112a.

9 Factum of the Appellant at p. 11; Chart compiled from invoices in Artisan Proving Affidavit and the Responses of Mr. Medvedic, Exhibits "C" and "A" respectively of the Appeal Book at p. 119a.

10 Appeal Book at p. 304a, para. 3.

11 (1989), 78 Sask. R. 87 (Sask. C.A.).

12 (1912), [1913] A.C. 160, 9 D.L.R. 476 (Ontario P.C.).

13 *Ibid.* at p. 167 (A.C.).

14 Frank Bennett, *Receiverships* (Toronto: Carswell, 1999).

15 *Ibid.* at 117-18.

16 S.S. 1993, c.P-6.2 [hereinafter the *P.P.S.A.*].

17 R.S.S. 1978. c.L-15.

18 *Supra*, Note 11 at para 26.

19 (1910), 22 O.L.R. 17 (Ont. Master).

20 *Ibid.* at p. 21.

21 (1999), 176 D.L.R. (4th) 334 (Ont. C.A.).

22 *Ibid.* at p. 340.

23 (1963), 36 D.L.R. (2d) 554 (S.C.C.).

24 *Ibid.* at pp. 557-58.

25 (1998), 42 O.R. (3d) 292 (Ont. C.A.).

26 *Ibid.* at p. 298.

27 229 P.2d 623 (U.S. Or. S.C. 1951).

28 Appeal Book at p. 274a.

29 Appeal Book at 98a - 118a.

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30 Appeal Book at p. 274a, Clause 2.

31 Appeal Book at p. 274a, Clause 3.

32 Appeal Book, at pp. 98a-118a.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 [1994] 5 W.W.R. 435 (Alta. Q.B.).

37 *Ibid.* at para. 38.

38 [2001] 5 W.W.R. 560 (Alta. Q.B.) at paras. 18-19.

39 .Appeal Book at pp. 105a and 112a.

40 Appeal Book at p. 119a.

41 *Supra*, Note 23 at p. 557.

42 32(2) Where an owner enters in to an entire contract for the supply of material to be used in several buildings the person supplying such material may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but in case the owner has sold one or more of such buildings, the judge or officer shall have jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

43 R.S.O. 1927, Chap. 173.

44 [1932] O.R. 617 (Ont. C.A.).

45 See comments of the Ontario Court of Appeal at p. 625: "From the views expressed in the decisions from which excerpts have been given above, it will, I think, be abundantly clear that when the word "entire" is used to describe the kind of contract in contemplation all that is meant is that it should be "one" contract as distinguished from two or three separate contracts."

46 (1923), 54 O.L.R. 472 (Ont. C.A.).

47 (1917), 38 D.L.R. 52 (Sask. C.A.).

48 *Ibid.* at p. 56.

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TAB 3

Most Negative Treatment: Reversed
Most Recent Reversed: Toronto Dominion Bank v. Wheatland Industries (1990) Ltd. | 2011 SKCA 107, 2011 CarswellSask 622, [2012] 2 W.W.R. 1, 208 A.C.W.S. (3d) 203, 375 Sask. R. 253, 525 W.A.C. 253, 81 C.B.R. (5th) 298, 340 D.L.R. (4th) 671 | (Sask. C.A., Sep 28, 2011)

2009 SKQB 516
Saskatchewan Court of Queen's Bench

Toronto Dominion Bank v. Wheatland Industries (1990) Ltd.

2009 CarswellSask 862, 2009 SKQB 516, 183 A.C.W.S. (3d) 908, 352 Sask. R. 22, 62 C.B.R. (5th) 181

TORONTO-DOMINION BANK (Plaintiff) and WHEATLAND INDUSTRIES (1990) LTD. (Defendant)

J.D. Koch J.

Judgment: December 31, 2009
Docket: Saskatoon Q.B.G. 252/07

Counsel: David G. Gerecke for Applicant, PricewaterhouseCoopers Inc., Receiver and Manager of Wheatland Industries (1990) Ltd.
Jeffrey M. Lee for Plaintiff, Toronto-Dominion Bank
Murray R. Sawatzky, Q.C., Sonia L. Eggerman for CNH Capital Canada Ltd., CNH Canada Ltd.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
Personal property security

IV Priority of security interest
IV.5 Subordination and postponement

Headnote
Personal property security --- Priority of security interest — Subordination and postponement

Debtor was farm equipment dealer that had dealership agreement with supplier — Debtor received financing from both supplier and bank — Bank and supplier entered into priority agreement that gave supplier priority over debts relating to its own unpaid equipment — Debtor defaulted on bank financing — Bank successfully brought application for appointment of receiver and manager in respect of all of debtor's assets — Receiver brought application for determination of who was entitled to credit for parts returned to supplier and whether supplier was required to accept return of parts ordered through supplier but shipped directly from third parties — Application granted — Receiver was entitled to credits for returned parts and supplier was statutorily obligated to accept return of parts even if shipped directly from third parties — Critical issue was distinction between whether debtor had already paid for parts or whether they were still being financed by supplier — This approach was essential intent behind priority agreement — Debtor had already paid for parts so bank's security took priority in relation to parts — Section 50 of Agricultural Implements Act required supplier to accept return of parts even if shipped directly from third parties — These parts were commonplace items that did not fall within meaning of "specially ordered" parts in s. 50(14)(c) of Act.

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Arthur Andersen Inc. v. Merit Energy Ltd. (2002), 227 Sask. R. 44, 287 W.A.C. 44, 2002 SKCA 105, 2002 CarswellSask 593, (sub nom. *Arthur Andersen Inc. v. Artisan Corp.)* 220 D.L.R. (4th) 351, [2003] 2 W.W.R. 303 (Sask. C.A.) — followed

R. v. T. Eaton Co. (1973), 14 C.C.C. (2d) 124, 12 C.P.R. (2d) 276, 1973 CarswellMan 109 (Man. Q.B.) — considered

Statutes considered:

Agricultural Equipment Dealerships Act, S.S. 1999, c. A-9.1
s. 5 — referred to

Agricultural Implements Act, R.S.S. 1978, c. A-10
Generally — referred to

s. 50 — referred to

s. 50(2) — considered

s. 50(3) — considered

s. 50(14) — considered

s. 50(14)(c) — considered

s. 50(22) — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — referred to

s. 244 — referred to

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2
s. 64(8) — referred to

Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01
s. 65(1) — referred to

Regulations considered:

Agricultural Implements Act, R.S.S. 1978, c. A-10
Agricultural Implements Regulations, 1982, R.R.S. c. A-10, Reg. 1

s. 25(d) "supplier's current price list" — considered

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APPLICATION by receiver for determination of who was entitled to credit for parts returned to supplier and whether supplier was required to accept return of parts shipped directly from third parties.

***J.D. Koch J.*:**

1 Beginning in the 1990s and leading up to February 2007, Wheatland Industries (1990) Ltd. ("Wheatland") carried on business as a farm equipment dealer at separate locations at Rosetown, Saskatchewan, and Elrose, Saskatchewan. Wheatland entered into dealership agreements with equipment suppliers, including New Holland Canada, Ltd./ Ltée, Case Canada Corporation and Flexi-Coil Ltd. The respective financing corporations of each of the supplier corporations granted Wheatland lines of credit on the security of present and after-acquired product inventory. By 2003, the three suppliers mentioned had become part of CNH Canada Ltd. ("CNH Canada"). Dealer financing for CNH Canada has been provided by CNH Capital Canada Ltd. ("CNH Capital").

2 In 1999 Toronto-Dominion Bank ("TD") granted Wheatland a credit facility of $500,000 plus an additional $20,000 in Visa credit, all financed by means of a general security agreement pledging Wheatland's present and after-acquired personal property with personal guarantees from two individuals. On April 13, 1999, TD registered its security interest with the Saskatchewan Personal Property Registry.

3 On May 18, 1999, TD, New Holland (Canada) Credit Company and Wheatland entered into a priority agreement whereby TD postponed its Wheatland security in favour of New Holland as to what is described in the agreement as "NHCC Financed Collateral". New Holland postponed its Wheatland security in favour of TD as to assets of Wheatland, other than NHCC Financed Collateral. On May 15, 2002, TD entered into a virtually identical agreement with Case Canada Corporation, Case Credit Ltd. and Wheatland. There may be a similar agreement involving Flexi-Coil, but it has not been provided. The existence and circumstances of the priority agreements are not contentious. The interpretation of them is. In general terms, the agreements provide that the security of New Holland (Canada) Credit Company and Case Credit Ltd. is to have priority over the TD security with respect to property sold to Wheatland by New Holland Canada, Ltd./Ltée and Case Canada Ltd. that Wheatland has not paid for in full. TD security is to have priority with respect to other chattel property which it contends includes property supplied by New Holland and Case that Wheatland has paid for. The CNH companies contend that TD does not have priority with respect to credits for returned parts. That is the primary issue now before the Court. It is not in dispute that CNH Canada and CNH Capital stand as successors to the respective contracting parties, and have assumed their respective rights and obligations relating to the TD priority agreements.

4 By April 2006 Wheatland was having financial difficulties. It was in default in its obligations to TD. On May 11, 2006, when Wheatland owed TD approximately $470,000, TD demanded payment and gave notice pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, of its intention to enforce its security.

5 In July and August 2006 CNH Canada applied to the Court under s. 5 of the *Agricultural Equipment Dealerships Act*, S.S. 1999, c. A-9.1, for determination as to whether CNH Canada had cause to terminate the Wheatland dealership agreement with New Holland Canada, Ltd./Ltée, dated January 1, 2000, and the Wheatland dealership agreement with Case Canada Corporation, dated July 18, 2002. Thereafter, Wheatland attempted to sell the dealership properties as functioning businesses but was unsuccessful. In orders dated February 8, 2006, and February 9, 2006, the respective applications of CNH Canada to terminate the dealership agreements were granted.

6 On February 27, 2007, TD commenced the present action against Wheatland, claiming $490,404.02 with ongoing interest. On February 28, 2007, the *ex parte* application of TD to appoint PricewaterhouseCoopers Inc. ("PwC") as interim receiver of Wheatland pursuant to s. 47 of the *Bankruptcy and Insolvency Act* was granted. The order was to expire March 15, 2007, unless extended in the meantime upon notice to Wheatland and other interested parties. It was extended to March 26, 2007. When the matter came before the Court again on March 26, 2007, TD applied to terminate the appointment of PwC pursuant to the February 26, 2007 order and to appoint PwC as receiver and manager in respect

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of all of the Wheatland assets, undertakings and properties pursuant to ss. 65(1) of *The Queen's Bench Act*, S.S. 1998, c. Q-1.01, and ss. 64(8) of *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2. Both aspects of the application were granted.

7 PwC, as receiver/manager, liquidated the Wheatland property. However, disputes arose between PwC and CNH Canada and CNH Capital. The first was as to the priority of the CNH Capital security over the TD security as to credits to Wheatland arising from the return of parts inventory. The second related to whether CNH Canada was obligated to accept the return of parts ordered by Wheatland from Case Canada but shipped directly to Wheatland by third party suppliers. Accordingly, PwC has applied for the advice and direction of the Court as to the following:

> (a) whether the Case New Holland group ("CNH") is obliged to pay certain amounts to the Receiver, as set out in the Report of the Receiver dated July 10, 2008 re: Issues Concerning CNH Group (the "Report"), in respect of credit balances of Wheatland and parts returned by the Receiver; and
>
> (b) whether CNH was required to purchase certain parts from the Receiver, mainly comprised of Direct Ship Items (as defined in the Report) from the Receiver, and whether CNH is obliged to pay certain amounts to the Reciever [*sic*], as set out in the Report, in respect of such parts.

8 The Receiver, as an officer of the Court, has filed a report outlining the background facts in detail. The parties have filed affidavits with exhibits. However, as counsel have advised, there are no facts in dispute. The issues relate only to the interpretation of the respective priority agreements between TD and the CNH companies and to the interpretation of s. 50(14) of *The Agricultural Implements Act*, R.S.S. 1978, c. A-10 (the "*AIA*") as to the return of direct ship parts.

9 The CNH companies object to the propriety of a court-appointed receiver taking the side of a competing creditor in a priority dispute amongst creditors. In the context in which the issue has arisen here, this is a collateral matter which has no impact on the outcome, except as to costs. Therefore, I reject the objection, relying on the Saskatchewan Court of Appeal decision in *Arthur Andersen Inc. v. Merit Energy Ltd.*, 2002 SKCA 105, 227 Sask. R. 44 (Sask. C.A.). The Receiver, in bringing this application, is acting on behalf of all creditors to determine priority between competing claimants. That is not the same as the Receiver seeking to change the priorities as between the respective claimants.

Parts and Service Manuals Returned by the Receiver to CNH Canada

10 In the course of liquidating the personal property of Wheatland, the Receiver returned parts and service manuals to CNH Canada. These returns, along with a warranty credit of $1,861.40, resulted in credits in four distinct parts accounts totalling $235,336.96. The Receiver contends that these credits are assets of Wheatland and seeks to recover the total value of them from CNH Canada and CNH Capital. CNH Canada and CNH Capital, relying on the provisions of the respective priority agreements, claim that they are entitled to set off these credits against debits in other Wheatland accounts relating to the sale of whole goods and against debits in Wheatland accounts relating to the financing of trade-in inventory. This issue turns on the wording of certain provisions of the priority agreements. As the provisions of the New Holland (Canada) Credit Company agreement and the Case Canada Corporation agreement relevant for present are identical, references herein will be only to the New Holland (Canada) Credit Company agreement.

11 The operative provisions of the priority agreement are in paragraphs 4.1 and 4.2 as follows:

> 4.1 The Bank hereby agrees that the Bank Security is hereby postponed and subordinated in all respects to the NHCC Security on the NHCC Financed Collateral. The Bank further agrees that NHCC shall also be absolutely entitled to any conditional sale contracts or other chattel paper.... The Bank further agrees that the NHCC Security in the Credits included in the NHCC Finance [*sic*] Collateral and all Proceeds thereof shall at all times remain prior to and rank ahead of the Bank's Security in such Credits.
>
> 4.2 NHCC hereby agrees that the NHCC Security is hereby post-poned [*sic*] and subordinated in all respects to the Bank Security on all the present and future assets of the Dealer [other] than the NHCC Financed Collateral.

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> NHCC further agrees that the NHCC Security related to any new or used Goods forming part of the NHCC Financed Collateral, and all Proceeds of the Goods, is hereby postponed and subordinated in all respects to the Bank Security related to the new or used Goods and the Proceeds thereof, effective upon NHCC having been paid by the Dealer in full for such Goods. NHCC further agrees that the NHCC Security related to any trade-in Goods forming part of the NHCC Financed Collateral and all Proceeds of such trade-in Goods is hereby postponed and subordinated in all respects to the Bank Security related to the Trade-in Goods and the Proceeds thereof, effective upon the purchase price for the new Goods acquired by the Dealer's customer who delivered the trade in Goods to the Dealer as part consideration for the new Goods acquired by such customer, having been paid in full.

The parties are on common ground that in order to correctly express what was agreed upon, the word "other" must be added in the first sentence of paragraph 4.2 to correct a typographical omission.

12 To construe these paragraphs, it is necessary to refer to the following definitions in paragraph 2.1:

> 2.1 In this Agreement, the following terms shall have the meanings attributed to them:
>
> .....
>
> (b) **"NHCC Financed Collateral"** means the following present and future assets of the Dealer:
>
> (i) All of the Dealer's present and after-acquired inventory financed by NHCC consisting of new, used and trade-in Goods and all parts and supplies for such Goods (the NHCC Inventory);
>
> (ii) all present and after-acquired Credits relating to any item of NHCC Inventory and including all credits due or accruing due to the Dealer from NHCC; and
>
> (iii) all choses in action, rights and contracts relating to the NHCC Inventory and all Proceeds realized by the Dealer from such contracts, the NHCC Inventory and Credits, other than choses in action, rights and contracts arising from the sale by the Dealer of parts and services in the ordinary course of its business.
>
> (c) **"NHCC Security"** shall mean any security documentation now or in the future held by NHCC from the Dealer charging the present and future assets of the Dealer, including without limiting the generality of the foregoing, the documents listed in Schedule B hereto, if any.
>
> (d) **"Credits"** includes all factory rebates, credits, advertising and promotional allowances, and all other amounts, credits or claims due or accruing due to the Dealer from a manufacturer or distributor of goods, parts, and supplies.
>
> (e) **"Proceeds"** means personal property in any form derived directly or indirectly from any dealing with the Dealer's assets or that indemnifies for assets of the Dealer that are destroyed or damaged.

The term "NHCC Inventory" in accordance with para. 2.1(b)(i) refers to after-acquired inventory financed by NHCC consisting of new, used and trade-in Goods and all parts and supplies for such Goods.

13 Paragraph 1.1 of the agreement stipulates that the recitals in the preamble are to be read and construed as part of the agreement. The preamble provides:

> **WHEREAS** the Dealer is in the business of selling, leasing and repairing tractors, agricultural and industrial equipment, and implements (hereinafter referred to as "Goods");

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> **AND WHEREAS** the Bank has loaned money or made other financial accommodations to the Dealer and may in future loan further monies or make further financial accommodations to the Dealer to enable the Dealer to operate its business;
>
> **AND WHEREAS** NHCC is supplying credit and may in the future supply further credit to the Dealer to enable the Dealer to acquire and hold for sale or lease, Goods and parts and supplies therefor;
>
> **AND WHEREAS** the Bank and NHCC have taken and may in future take security documents from the Dealer to secure payment of the respective present and future indebtedness and obligations of the Dealer to each of them;

The first and third recitals are particularly notable.

14 The CNH companies contend that they are entitled to claim priority on the parts credits pursuant to paragraph 4.1 of the agreement because parts are "NHCC Financed Collateral" as defined in paragraph 2.1(b)(i). This argument is supported by the first recital paragraph wherein the word "Goods" is stated is to include tractors, agricultural and industrial equipment and implements, without explicit reference to parts and supplies. It is also supported by the third recital which specifically refers to "Goods and parts", leading to the inference that parts are not included in "Goods" and must be something different than "Goods". The reference in paragraph 2.1(b)(i) is also consistent with the contention that the reference to "Goods" does not include parts or supplies. In subparagraph (i) the word "Goods" is used conjunctively with the words "parts and supplies". As well in the definition of "Credits" in paragraph 2.1(d), the word "Goods" is separated from the word "parts", albeit in a different context. The definition of "Credits" in paragraph 2.1(d) also refers to "goods" and "parts" separately and conjunctively, although in that definition, the word "goods" commences with a lowercase letter "g". This does not appear to support the CNH position. Credits are not included in the "NHCC Financed Collateral" and the "Proceeds" thereof, but they are obviously included in the present and future assets of the dealer other than the "NHCC Financed Collateral" in accordance with the first sentence of paragraph 4.2.

15 TD's priority claim is based on the first two sentences in paragraph 4.2. TD contends that the NHCC priority does not extend to parts or credit for parts. It is TD's position that the NHCC security is postponed in favour of TD as to any new and used Goods effective upon NHCC having been paid by the dealer in full for them. For this contention to prevail, the word "Goods" must be interpreted to include "parts" which in common English language usage would surely be the case.

16 The CNH companies contend that they are entitled to claim prior security to the credits generated by the parts returned based on the reasoning that parts, the proceeds of parts returned and the credits thereby generated are not included in the assets in respect of which TD is entitled to claim priority pursuant to paragraph 4.2. CNH contends that the priority extended to TD by paragraph 4.2 includes only assets that are not "NHCC Financed Collateral". Notwithstanding that the parts in issue have been, in effect, paid for, CNH contends that those parts are nevertheless "NHCC Financed Collateral".

17 I am not able to follow the fine distinctions required to support the CNH position.

18 I do not accept the submission of the CNH counsel that the goods/parts issue is the cornerstone of the priority agreement. The critical issue is the distinction between inventory and credits paid for by Wheatland and inventory and credits financed by NHCC that Wheatland has not paid for. I see that as the essential intent of the contracting parties and the impact of the agreement. If that were not the case, it would have been logical for the agreement to have contained an explicit provision that parts and supplies are not "Goods" or "inventory" for the purposes of the agreement. I note that the contrary intention of CNH is indicated in the NH policy manual. However, there is no reference to any manual or manuals in the priority agreement itself, nor is there any acknowledgement or recognition of the provisions of any NHCC policy manuals by TD.

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19 I should comment on the CNH submission that the fact that the specific reference to new goods, used goods and trade-in goods indicates that the omission of the word "parts" in these categories indicates that parts are something separate or different. This does not, in my view, serve to identify an intention on the part of TD to relinquish any rights to its security claim against paid-for parts.

20 Notwithstanding the possibility of a contrary interpretation, in accordance with the submission on behalf of CNH on this application, it seems clear that objective of the contracting parties when they entered the priority agreement was that the NHCC security would have priority over the TD security as to Wheatland inventory supplied by New Holland but not paid for by Wheatland or returned for credit. But once the inventory supplied by New Holland was paid for by Wheatland, the TD general security on Wheatland's present and after-acquired property would prevail.

21 Based on the foregoing, I find that the Receiver has proven it is entitled to recover the credits in the parts accounts. PwC is entitled to recover from CNH Canada and CNH Capital the full balances of the credit accounts totalling $235,336.96. This does not affect the rights of creditors of Wheatland, other than CNH, to contest the validity of the TD security claims.

The Direct Ship Issue

22 The second issue only arises as the result of the Receiver succeeding on the first issue. It relates to the Receiver's right to require CNH Canada to repurchase parts inventory acquired from CNH Canada or its predecessors, notwithstanding that these parts were shipped direct to Wheatland by third party suppliers at the request of CNH Capital. A direct ship transaction occurred when Wheatland ordered a part from Case or New Holland, and Case or New Holland passed on the order to a third party supplier, instructing the supplier to direct ship to Wheatland. The third party supplier would bill Case or New Holland; Case or New Holland would bill Wheatland; Wheatland would pay Case or New Holland. The only link between Wheatland and the third party supplier was that the supplier would deliver the product directly to Wheatland rather than first delivering it to Case or New Holland for shipment to Wheatland. Orders placed by Wheatland in respect of which direct shipment was contemplated were identified by a code number on the requisition form submitted to CNH by Wheatland. Wheatland had no control over whether any particular product was to be supplied directly by Case, New Holland or CNH Canada, or by a third party supplier. However, because of the use of the direct ship code number on the orders, Wheatland was presumably aware when it placed orders, that certain items were going to be direct shipped to Wheatland by third party suppliers. Pursuant to explicit provisions in the respective dealership agreements, CNH Canada was not obligated to restock direct ship parts inventory.

23 The matter does not end there, however. The contractual right of CNH Canada to refuse to restock direct ship inventory (and the corporate policy of CNH Canada to refuse to restock direct ship inventory) is subject to the provisions of s. 50 of the *AIA*. Section 50 provides in part:

> 50... (2) Within 90 days after the day an agreement expires or is terminated by the dealer or the supplier for any reason, a dealer may give to the supplier a written notice to purchase containing a request by the dealer that the supplier purchase:
>
> (a) all unused implements, unused parts, signs, computer hardware and computer software obtained from or required by the supplier; and
>
> (b) any special tools and service manuals obtained from or required by the supplier.
>
> (3) If a notice to purchase is given to the supplier in accordance with subsection (2), the supplier shall, subject to this Act and the regulations, purchase from the dealer:
>
> (a) all unused implements obtained by the dealer from the supplier;
>
> (b) all unused parts purchased as parts by the dealer from the supplier;

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(c) all signs carrying the supplier's current logo obtained from or required by the supplier within five years before the expiration or termination of the agreement;

(d) all computer hardware that:

(i) was purchased from the supplier or required by the supplier within two years before the expiration or termination of the agreement; and

(ii) was used exclusively to do business with the supplier;

(e) all computer software that:

(i) was created and owned by the supplier;

(ii) was sold directly to the dealer within two years before the expiration or termination of the agreement; and

(iii) was used exclusively to do business with the supplier;

(f) all service manuals that the dealer was required to purchase from the supplier within the two years before the expiration or termination of the agreement; and

(g) all special tools that the supplier required the dealer to purchase within the two years before the expiration or termination of the agreement and that are used exclusively for servicing the supplier's products.

. . . . .

(14) A supplier is not required to purchase any of the following:

(a) an unused part that is not clearly identified by its part number;

(b) an unused part that:

(i) is not listed in the supplier's current price list; and

(ii) is for use in an implement that was manufactured more than 10 years before the expiry or termination of the agreement;

(c) an unused part specially ordered by the dealer from the supplier on the understanding that the part was not returnable by the dealer;

(d) unused implements, unused parts, signs, computer hardware, computer software, service manuals and special tools that are subject to a lien, charge, encumbrance or mortgage in favour of a third party in an amount in excess of the amount that the supplier would be required to pay to the dealer pursuant to this section;

(e) unused implements, unused parts, signs, computer hardware, computer software, service manuals and special tools that have not been adequately prepared for shipment in accordance with clause (18)(b) within the 91-day period mentioned in subclause (16)(b)(i) or in any extension of that period granted pursuant to subsection (10).

(22) This section applies to a supplier and a dealer notwithstanding any provision to the contrary in an agreement or any other contract or arrangement between the supplier and the dealer, and, if a provision of the

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agreement is more advantageous to the dealer than the provision of this section pertaining to the same subject-matter, the more advantageous provision of the agreement applies.

Also relevant is s. 25(d) of *The Agricultural Implements Regulations, 1982*, R.R.S. A-10 Reg 1, which provides:

25 In section 50 of the Act and in these regulations:

. . . . .

(d) **"supplier's current price list"** means the latest comprehensive price list or lists of the supplier that includes all parts that may be ordered by a dealer from the supplier including parts that are ordered from the supplier that are shipped directly to the dealer from a third party;

. . . . .

24 The issue arises pursuant to s. 50(14)(c). While it is obvious that direct ship parts are contractually excluded but the question is whether the direct shipped parts in this case were "specially ordered" by Wheatland as stipulated in ss. 50(14)(c). The direct ship parts in issue consist of very ordinary articles such as nuts and bolts, washers, O-rings, seals, gaskets and bearings.

25 It is not in dispute that the value for restocking purposes of the direct ship parts that the Receiver sought to return that CNH Canada refused to accept is $107,783.85. However, the Receiver's claim is adjusted to $88,724.59 because, by agreement between CNH Canada and the Receiver, the direct ship items were sold at auction, yielding net sale proceeds to the Receiver of $19,059.26. The Receiver's net claim, therefore, against CNH Canada and CNH Capital with respect to the restocking of direct ship parts is $88,724.59.

26 The contractual provisions clearly entitle CNH Capital to refuse to restock direct ship parts. However, ss. 50(2) and (3) serve to override the contrary contractual provisions in certain circumstances. Subsection 50(14) describes situations in which a supplier is not required to repurchase. In accordance with s. 50(14)(c), the supplier's obligation to repurchase does not extend to unused parts "specially ordered" by the dealer from the supplier on the understanding that the part was not returnable by the dealer.

27 The Receiver contends that for parts to be "specially ordered", they must be unique or "one-off" items. CNH Canada contends that the word "specially" as used in s.50(14) does not mean "special", only "different", and what is different in this case is that CNH Canada and Wheatland had a mutual understanding that parts specially ordered would not be returnable. As previously indicated, there is no basis to contend that the kinds of articles involved were in any way unique. Indeed, they were commonplace articles of personal property required by a farm machinery dealer for its use and for use by its retail customers. The employment of the direct ship inventory model was supposedly for the mutual benefit of CNH Canada and Wheatland. Obviously, it would be a way to supply parts inventory more quickly. Probably the shipping costs were lower than if the respective third party suppliers shipped to CNH. There was nothing special about the product, about the dealer's use of it, about the customer's use of it or about the ability of Wheatland or any other dealer to sell the product to retail customers in the normal course of business. The single identifiable element to distinguish direct ship parts from parts shipped by CNH Canada is the mode of delivery.

28 Counsel for TD cites the decision of *R. v. T. Eaton Co.* (1973), 14 C.C.C. (2d) 124 (Man. Q.B.), wherein Wilson J. offers comment on the meaning of the words "special" and "specially", at page 127:

The word "special", or phrases incorporating that word or its adverbial derivative "specially", is not without meaning. For the lawyer, one thinks perhaps of "special damages", "special agent", or "special jury", and no doubt there are other phrases of less technical significance, say "special leave", or "special circumstances". These last bring us closer to the every-day meaning imported by the word "special", namely, something out of the ordinary, a thing exceptional, designed for a particular purpose, occasion, or person. So that, in reading the phrase "specially priced", one is entitled to expect that the amount asked represents exceptional value.

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It appears that the contractual arrangements were intended to enable CNH Canada to opt out of its *AIA* obligations to repurchase inventory from a terminated dealer (ss. 50(22)). The *AIA* does not permit or accommodate such opting out. As well, the provisions of s. 50 appear to be designed to protect the supplier as well as the dealer. To be eligible for return, a part must be unused; it must be clearly identified by a part number; it must be listed in the supplier's current price list; it must be for use in an implement that was manufactured not more than 10 years before the termination of the agreement. In addition, the supplier is entitled to discount the invoice price, supposedly to compensate for restocking.

29 I am not persuaded that the parts in issue in this case were specially ordered. On that account, the second issue is resolved in favour of the Receiver.

Conclusion

30 The Receiver, PwC is entitled to its costs of this motion, one set of costs against CNH Canada and CNH Capital together. TD, although represented before me, is not a separate party to the application, notwithstanding that the application is within the procedural framework of its action against Wheatland. Therefore TD is not entitled to costs.

Application granted.

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