

1987

S.H.61136

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

THE CANADIAN IMPERIAL BANK OF COMMERCE,  
a body corporate

PLAINTIFF

- and -

CITY OF HALIFAX, a body corporate

DEFENDANT

- and -

GERALD CATENACCI

INTERVENOR

HEARD: At Halifax, Nova Scotia, before the Honourable  
Mr. Justice David W. Gruchy, in Chambers,  
on October 10, 1990

DECISION: October 29, 1990

COUNSEL: Robert Carmichael, Solicitor for the Plaintiff  
and the Intervenor

Wylie Spicer, Solicitor for the Defendant

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INTERVENOR

This application is for the assignment of priorities to certain funds paid into Court. This action was originally commenced by an Originating Notice and Statement of Claim issued by the Canadian Imperial Bank of Commerce against the City of Halifax on June 24th, 1987. The facts set out in the Statement of Claim are largely reflected in the Agreed Statement of Facts submitted by all counsel in this matter. In order to give this decision

continuity, however, I will set forth the history of the transaction.

The Canadian Imperial Bank of Commerce sets forth in its Statement of Claim that it had taken an assignment of book debts from Maritime Formless Ltd. ("**Maritime Formless**"). The Assignment was registered on August 30, 1979, at the appropriate Registry in Halifax, pursuant to the **Assignment of Book Debts Act** (now Ch. 24 R.S.N.S., 1989).

In June, 1986, Maritime Formless commenced certain construction work pursuant to two contracts for the City and, in due course, submitted invoices to the City of Halifax for \$86,140.42.

On August 15, 1986, the Bank advised the City of Halifax of the general assignment of accounts and made demand pursuant to it. The City acknowledged same, in writing, and undertook to pay to the Bank any sums to be advanced pursuant to the contract between Maritime Formless and the City.

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The City received other competing claims to the amount owing and did not pay the Bank. The Bank took this action. The Statement of Claim issued by the Bank sets forth that as at that time, Maritime Formless was indebted to the Bank in the amount of \$38,166.20 plus interest at the agreed rate of 1½% over the Bank's prime lending rate. At the time of the issue of the Statement of Claim, the total sum claimed was \$40,140.03 plus interest at the rate of 1½% over prime on \$38,166.20.

On July 22nd, 1987, the City of Halifax filed a Defence to the Statement of Claim wherein, in effect, the City took the position that Maritime Formless had not completed the work contemplated by its contracts with the City and that Maritime Formless had abandoned the contract.

As a result, the City of Halifax having received other various claims against the money owed by it to Maritime Formless, it chose to pay the money into Court for this assignment of priorities. On June 13th, 1990, the City applied for an Order by way of interpleader pursuant to

Civil Procedure Rule 50. Notice of that application was given to the plaintiff, Maritime Formless Ltd., and to other claimants, as follows: Ocean Contractors Limited, Piercey's Supplies Limited, L.E. Shaw Limited, Gateway Materials Limited, W.N. White & Company Limited, G.R. Kelly Enterprises Limited, Halifax Equipment Rentals Sales and Service Limited, Port Paving & Contracting, Ocean Contractors Limited, all of whom were represented by George W. MacDonald, Q.C., at that time and now by Mr. Stephen Kingston. Revenue Canada was also given notice of that application, as was Linda Merriam, doing business as "East Coast Truck Brokers (1982)". The application for interpleader relief was supported by the affidavit of Gerald J. Goneau, a solicitor for the City of Halifax.

Mr. Goneau set forth that Maritime Formless had done work on a contract basis for the City of Halifax in 1986 but had abandoned the contracts. The affidavit sets forth that the City had been "served with or otherwise became aware of ... actions involving Maritime Formless Ltd., for its contractual obligations with (the City)." The affidavit sets forth that at that time, the City had obtained completion of the contracts undertaken by Maritime

Formless by obtaining bids for the unfinished work, had paid the substitute contractors, had paid the sum of \$17,014.00 to the Labour Standards Tribunal and wished to pay the sum of \$49,531.97 into Court for disposition by interpleader. By means of a supplementary affidavit, the amount held by the City of Halifax and to be paid into Court was amended to \$71,477.33, plus interest.

By Order dated June 25th, 1990, the City was allowed to pay \$71,477.33 into Court and was relieved of any liability owing by the City to the various claimants. It was further ordered that the priorities to the said funds would be determined by the Court.

On August 14th, 1990, Gerald Catenacci applied to be added as an intervenor in the proceeding pursuant to Rule 8 of the **Civil Procedure Rules**. The affidavit in support of that application set forth that Gerald Catenacci had, on July 31st, 1986, received an Assignment of the rights and interest of the plaintiff, the Canadian Imperial Bank of Commerce, in the general Assignment of Book Debts, dated August 13th, 1979, referred to above.

On August 15, 1990, Gerald Catenacci was added as an intervenor to these proceedings. On the same date, the date for the hearing of this matter was established, although subsequently postponed to October 11, 1990.

On October 9, 1990, all of the parties concerned in these proceedings signed an Agreed Statement of Facts. That Agreement is set forth in full as follows:

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**BETWEEN:**

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a body corporate,

**PLAINTIFF**

- and -

CITY OF HALIFAX, a body corporate,

**DEFENDANT**

- and -

GERALD CATENACCI,

**INTERVENOR**

**AGREED STATEMENT OF FACTS**

1. Maritime Formless Ltd. (formerly Caten Construction Limited) (the "Company") carried on business as a general construction contractor. Gerald Catenacci was, at all material times, a principal of the Company.

2. On August 13th, 1979 the Company executed a general assignment of accounts (the "Assignment of Book Debts")



in favour of the Canadian Imperial Bank of Commerce (the "Bank"). A true copy of the Assignment of Book Debts is produced as Exhibit "A".

3. On August 30th, 1979 Assignment of Book Debts was filed under the Assignment of Book Debts Act at the Office of the Registrar for the registration district of Halifax as document number 804.

4. Between January 29th, 1985 and May 1st, 1985 the Company executed a series of eight (8) promissory notes (the "Promissory Notes") to the Bank each in the principal amount of \$5,000.00. True copies of the Promissory Notes are produced as Exhibits "B".

5. In June of 1986 the Company and the City of Halifax entered into two contracts (the "Construction Contracts") whereby the Company was hired as general contractor to upgrade and renew sidewalks in different areas in the City of Halifax (the "Project"). True copies of General Terms and Conditions of the Construction Contracts are produced as Exhibits "C", and "D" respectively. The original tender value of the contracts was \$181,110.00 and \$90,600.00 respectively.

6. Ocean Contractors Limited, Piercey Supplies Limited, L.E. Shaw Limited, Gateway Materials Limited, W.N. White & Company Limited, G.R. Kelly Enterprises Limited, Halifax Equipment Rentals, Sales & Service Limited, Lorraine Landscaping Limited and Wylie H. Verge, carrying on business as Port Paving & Contractors (collectively the "Subcontractors") performed work or supplied material on the Project as Subcontractors of the Company.

7. Work on the Project proceeded through the summer of 1986 until early in August 1986 when the work ceased leaving a number of seasonal deficiencies. These seasonal deficiencies were completed by other contractors hired by the City of Halifax by October of 1987 at a cost of \$17,728.00.

8. The Company no longer carried on operations in Nova Scotia after August of 1986.

9. As of August 15, 1986 there was due and owing by the

Company to the Bank under the Promissory Notes the sum of \$38,166.20.

10. On August 15, 1986 the Bank made demand in writing on the City of Halifax under the Assignment of Book Debts for payment of all monies owing by the City to the Company. A true copy of the demand and acknowledgment by the City is produced as Exhibit "E". At no time prior to August 15, 1986 had the City of Halifax given its written consent to the Assignment of Book Debts.

11. On August 14, 1986 Ocean Contractors Limited caused to be issued an Attachment Order in proceedings bearing S.H. No. 57730. A true copy of the Attachment Order is produced as Exhibit "F". The Attachment Order was subsequently served on the City of Halifax.

12. On March 2nd, 1987 Linda Merriam, carrying on business as "Eastcoast Truck Brokers (1982)" caused judgment to be entered against the Company for the amount of \$2,506.46 in the County Court of District No. 4 in proceedings bearing C.T. No. 09452. An Execution Order was issued in the proceeding on March 2nd, 1987. A true copy of the Execution Order is produced as Exhibit "G". The Execution Order was subsequently served on the City of Halifax. The total amount of the Execution Order remains unsatisfied.

13. By a Notice of Assessment dated May 4, 1987, Maritime Formless was assessed under the Income Tax Act for the amount of \$13,338.81 consisting of \$11,259.60 on account of income tax deducted but not remitted, \$1,225.96 for penalty and the balance on account of interest. Since that date additional interest has accrued on the amount owing and legal costs in the amount of \$180.00 have been incurred bringing the total claim of National Revenue outstanding as of September 6, 1990, to the amount of \$19,677.37.

14. On May 26th, 1988 the Department of National Revenue, Taxation issued to the City of Halifax a notice of requirement to pay the sum of \$14,671.45 on account of the Company's outstanding tax liability. A true copy of the Notice is produced as Exhibit "H". The Company remains indebted to Revenue Canada for the amount \$19,677.37.

15. On June 28, 1990, the Subcontractors entered judgments against the Company in the Supreme Court in proceedings bearing S.H. No. 58412 in the following amounts:

Ocean Contractors Limited	
- concrete	: \$ 57,441.88
- contractors	: \$ 17,694.00
Piercey Supplies Limited	: \$ 2,578.09
L.E. Shaw Limited	: \$ 3,690.70
Gateway Materials Limited	: \$ 19,696.41
W.N. White & Company Limited	: \$ 5,176.07
G.R. Kelly Enterprises Limited	: \$ 21,940.00
Halifax Equipment Rentals	: \$ 2,821.14
IMP Group Limited	: \$ 2,367.61
Port Paving & Contractors	: <u>\$ 4,805.00</u>
<b>TOTAL</b>	<b>: \$142,210.09</b>

The amounts claimed relate in part to work on the Project with the City of Halifax. The parties do not agree, however, that all of the amounts claimed related to work on the Project and, if necessary, the parties agree that a determination as to the amounts which relate to work on the Project will be made at a later date.

16. A true copy of the Order for Judgment is produced as Exhibit "I". The total amount of the judgment debt remains unsatisfied.

17. As of July 24th, 1990 the Company was indebted to the Bank in the amount of \$38,166.20 together with a further additional amount for interest of \$18,930.00 as appears from the Bank's statement of account, a true copy of which is produced as Exhibit "J". The full amount of that

indebtedness remains unsatisfied.

18. On July 31st, 1990 the Bank assigned the entire indebtedness owed to it by the Company, together with the Bank's security for the indebtedness to Gerald Catenacci by an assignment of indebtedness and security dated July 31st, 1990. The total amount paid to the Bank by Mr. Catenacci in respect of the obligations of the Company to the Bank was \$46,496.99. A true copy of the Assignment of Indebtedness and Security is produced as Exhibit "K".

19. The sum of \$49,531.96 and interest of \$21,945.36 has been paid into Court by the City of Halifax pursuant to an Order of the Honourable Mr. Justice Nunn dated June 25, 1990 representing the unpaid balance of the contract price under the Construction Contracts held by the City of Halifax after payment to other contractors to complete deficiency work on the Project and a claim of the Nova Scotia Labour Standards Tribunal.

DATED at Halifax, Nova Scotia this 9th day of October, 1990.

**AGREED TO:**

(signed) \_\_\_\_\_  
W. Wylie Spicer, Esq.  
McInnes, Cooper & Robertson  
1601 Lower Water Street  
HALIFAX, Nova Scotia

Solicitor for the Subcontractors

(signed) \_\_\_\_\_  
John J. Ashley, Esq.  
Department of Justice  
4th Floor, 5161 George Street  
HALIFAX, Nova Scotia

Solicitor for Revenue Canada

(signed)

Ronald J. MacDonald, Esq.  
Burchell, MacAdam & Hayman  
Suite 700, 1646 Barrington Street  
HALIFAX, Nova Scotia

Solicitor for Linda Merriam

(signed)

Robert W. Carmichael, Esq.  
Cox, Downie & Goodfellow  
1100 Purdy's Wharf Tower  
1959 Upper Water Street  
Halifax, Nova Scotia

Solicitor for Gerald Catenacci"

I will not set forth the various exhibits but will refer to such portions of them as may be required.

At the time of the hearing of this matter, certain further evidence was submitted. That additional evidence consisted of various letters, the first of which was dated August 11th, 1986 from the Canadian Imperial Bank of Commerce to the President, Maritime Formless Ltd., in which the Bank demanded payment of the amount of \$39,284.40 for various promissory notes set forth in the letter, plus interest. Two other letters dated October 31st, 1986 from the Canadian

Imperial Bank of Commerce to Mr. Gerald Catenacci and Mary Ann Catenacci, were also produced in which the Bank called upon each of them, pursuant to certain guarantees, for the payment of \$39,063.72. As well, at the time of the hearing, the Department of National Revenue, Taxation, filed an affidavit whereby the indebtedness of Maritime Formless Ltd. in the amount of \$4,931.84 under the **Income Tax Act**, was established. As at the date of the filing of the Certificate that debt was \$4,911.84 plus interest as prescribed by the **Income Tax Act**, R.S.N.B. 1973 Chapter I-2 S.31. The Certificate, dated March 3, 1988, claimed interest on the amount of \$3,988.48 from November 24th, 1987, to date of payment. A further Certificate claimed the amount of \$9,054.43 together with additional interest pursuant to one or more of the **Income Tax Act**, the **Canada Pension Plan Act**, **Unemployment Insurance Act**, 1971 at the rates from time to time prescribed by subsections (1) and (11) of Section 161 of the **Income Tax Act**. Interest is charged on \$8,227.32 and \$827.11, compounded daily, from the 24th day of November, 1987 to the date of payment.

As at July 18th, 1990, being the date of the affidavit filed at the time of the hearing, the amount

claimed by National Revenue as the outstanding indebtedness was \$19,254.77.

The General Assignment of Accounts from Maritime Formless Ltd. to the Canadian Imperial Bank of Commerce is apparently in the "standard form". For the purposes of this matter, the relevant portions read as follows:

"1. Maritime Formless Ltd. ... hereby assign(s) and transfer(s) all debts, accounts, claims, moneys and choses in action which now are or which may at any time hereafter be due or owing to or owned by the undersigned, ... to CANADIAN IMPERIAL BANK OF COMMERCE, (herein called the "Bank") as a general and continuing collateral security for payment of all existing and future indebtedness and liability of the undersigned to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof, and as a first and prior claim upon the assigned premises.

...

5. All moneys collected or received by the undersigned in respect of the assigned premises shall be received as trustee for the Bank and shall be forthwith paid over to the Bank.

...

9. The provisions hereof shall enure

enure to the benefit of the successors and assigns of the bank and shall be binding upon the respective heirs, executors, administrators, successors and assigns of the undersigned."

The two contracts with the City of Halifax are respectively undated and dated the 26th day of June, 1986. They concerned sidewalk renewals in the City and the contracts consisted of a brief formal contract, a copy of the tender of Maritime Formless Ltd. and general provisions. The only provision of the documents of significance in this matter is paragraph 6.38 of the general provisions which reads as follows:

"6.38 Assignment

The Contractor shall not assign the Contract or sublet it as a whole or in part without the written consent of the Owner, nor shall the Contractor assign any monies due or to become due to him hereunder, without the previous written consent of the Owner. Assigning or subletting the Contract shall not relieve the Contractor of (sic) his Surety from any contract obligations."

(Presumably, "of" should read "or".)



As indicated above, Canadian Imperial Bank of Commerce gave notice of the General Assignment of Accounts to the City of Halifax. That notice was dated August 15, 1986 and demanded payment of any accounts owing by the City to Maritime Formless to be made directly to the Bank. The City acknowledged the demand as follows:

"I/We acknowledge receipt of the above notice and undertake to make payment direct to the Canadian Imperial Bank of Commerce."

That acknowledgement was dated August 15, 1986 and was signed by the "Manager, Treasury and Accounting".

The Assignment of Indebtedness and Security from Canadian Imperial Bank of Commerce to Gerald Catenacci is dated July 31, 1990. The Assignment sets forth that Maritime Formless Ltd., was indebted to the Bank in the amount of \$38,166.20 plus interest from August 20th, 1986. In consideration of the sum of \$8,000.00, the Bank assigned all of its interest in various securities, including the General Assignment of Accounts above referred to, to the intervenor. The securities so assigned are specifically

listed in the Agreement and consist of eighteen different items. The Assignment was on a non-recourse basis, without warranty, except as set forth therein.

While I do not consider the date of the various claims to be the decision factors, the time of the earliest of them is as follows. The demand made by the Bank to the City of Halifax is dated and acknowledged as of August 15, 1986. Catenacci stands in the position of the Bank in this matter. The earliest competing claim is that of Ocean Contractors Limited. In that claim, an Attachment Order was dated August 14, 1986. In fact, that was the date on which that particular action was commenced and default judgment was entered on September 15th, 1986. It is not before me as to when the Attachment Order was served upon the City of Halifax. The Agreed Statement of Facts merely says, "the Attachment Order was subsequently served on the City of Halifax". I can only conclude that the earliest that the Attachment Order could have been served was August 15, 1986.

The following positions are taken by each of the various parties:

1. The Intervenor claims that "the secured claim under the Assignment of Book Debts held by Catenacci is entitled to priority over all of the other claims including the statutory claim of Revenue Canada."
2. Revenue Canada claimed in its pre-hearing memorandum that it "ranks either first pursuant to s. 27(4) and (5) of the **Income Tax Act** or second to the claim of Catenacci." At the time of the hearing, Revenue Canada did not take issue with Catenacci's claim for priority, but claimed to be prior to creditors other than Catenacci, pursuant to "priority accorded the Crown in preference to other creditors where the claims of the Crown and the other creditors are of equal degree."
3. Ocean Contractors Limited and all other subcontractors claim:

(a) the Assignment of Book Debts from Maritime Formless to the plaintiff and the subsequent Assignment from the Bank to Gerald Catenacci are invalid and unenforceable against monies payable under the construction contracts between the company and the

City, and

(b) the intervenor does not have clean hands and is not entitled to invoke the Court's equitable jurisdiction.

4. Linda Merriam takes the same position as Ocean Contractors Limited et al and adds that irrespective of success, she is entitled to solicitor and client costs, this being an interpleader action.

#### Revenue Canada and Catenacci

It is necessary to contrast the competing claims of Revenue Canada and the intervenor by an examination of the bases for the competing claims. The claim of Revenue Canada arises from ss. 227.4 and 227.5 of the **Income Tax Act**. Virtually the same provisions are contained in the **Unemployment Insurance Act** and the **Canada Pension Plan Act**. The subsections read as follows:

"(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

(5) ... Notwithstanding any provision of the **Bankruptcy Act**, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(a) deemed by subsection (4) to be held in trust for Her Majesty, ...

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

The relevant provisions of the General Assignment of Accounts are set forth above. It is clear that the Assignment is a fixed and specific charge on the "debts, accounts, claims, monies, and choses in action which now are or which may at any time hereafter be due or owing ..." to Maritime Formless.

A case of almost identical facts and considerations was before Anderson, C.C.J., in **ADG Enterprises v. PCL Construction**, 59 N.S.R. (2d) and 125 APR, 109. There Judge Anderson had before him competing claims of the Canadian Imperial Bank of Commerce under

a General Assignment of Accounts in precisely the same terms as are before me. The Department of National Revenue made a claim pursuant to s. 71.2 of the **Unemployment Insurance Act**, S.C. 1970-71, c. 48, s.71(2), (3). Those subsections are, to all intents and purposes, identical to subsections (4) and (5) of s. 227 of the **Income Tax Act**, as set forth above. The question before Judge Anderson was succinctly put by him in the following terms:

"The Department of National Revenue (the Department) submits that the provisions of s. 71(2) and (3) of the **Unemployment Insurance Act**, and s. 24(3) and (4) of the **Canada Pension Plan Act** authorized its entitlement.

The Canadian Imperial Bank of Commerce (the Bank) submits that it is entitled to the fund because

(a) The Bank holds a general assignment of book debts of a kind held by the cases to be a specific charge on receivables and it has been held by the Supreme Court of Canada that a claim for pension plan and unemployment insurance deductions cannot affect the realization from such a charge;

(b) In any event, priority sections of the respective acts do not apply in the present situation."

Judge Anderson reviewed carefully the various provisions of the Unemployment Insurance Act and the Canada Pension Plan Act and the effect of those provisions as they were considered by Pigeon, J. in *Dauphin Plains Credit Union Limited v. Xyloid Industries Ltd. and R.* (1980), 31 N.R. 301; 3 Man. R. (2d) 283; 33 C.B.R. 107, at p. 120:

"It should first be observed that, for reasons similar to those on which the decision in the Avco case, supra, was based, the claim for Pension Plan and unemployment insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto were no longer the property of the debtor, except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions."

Judge Anderson, for reasons which do not need to be repeated here, found that the General Assignment of Accounts in question was a specific and fixed charge. I respectfully agree with his conclusion. In this regard, I have also considered *Lettner v. Poiner Truck Equipment*

Ltd. and Bank of Nova Scotia 47 WWR 343, *Boothe v. Simcoe* (1952), 1 DLR 341; *Evans, Coleman & Evans Limited v. R.A. Nelson Construction Limited* 16 DLR (2d) 123; *O'Neil & Company v. Gailbraith & Sons* VII WWR 155; *Vernon Hardware Company v. Reid & Reinhard* (1927), 2 WWR 117; *Royal Bank of Canada v. General Motors Acceptance Corporation of Canada Limited* 64 N.S.R. (2d) 424, 143 APR 424 (Trial Division) and 67 N.S.R. (2d) and 155 APR 306 (Appeal Division).

With respect to the latter case, I set forth particularly herein the reference by MacKeigan, C.J., to the Trial Division decision of Clarke, J., (as they then were) as follows:

"Mr. Justice Clarke, by his judgment under appeal, held:

'In my view the general assignment held by the Bank did not give it a specific charge over these two accounts payable by Scotsburn until they came into existence. When they did they were subject to the specific charges of GMAC which took priority or intervened, as it were, to defeat the claim of the general assignment.'

I do not disagree with the substance



of the first sentence of Mr. Justice Clarke. I would, however, prefer to say that the general assignment of book debts was from its execution a specific charge on 'all book accounts and book debts' of Kiley including all 'which may hereafter become due, owing or accruing or growing due' to Kiley. That specific charge attached to a future book debt as soon as that debt came into existence. Thus in law it attached at the moment each vehicle was delivered to Scotsburn whereupon a sale was completed and the debt came into existence.

Here the assignment of book debts on execution effectively assigned existing and future book debts to the bank. The debts as they were created thus became owned outright by the bank. Like the assignment discussed by Mr. Justice Henry in **Re Trilateral Enterprises Limited** (1977), 74 DLR (3d) 517 (Ontario H.C.), this particular assignment was not a floating charge which required any crystallization by default or notice but was a specific charge fully effective immediately but not enforceable against the debtor until notice is given: cf. the quite different floating charge form of assignment discussed in **Canadian Imperial Bank of Commerce v. Campbell**, [1976], 1 S.C.R. 341, and **Canadian Imperial Bank of Commerce v. Sitarenios et al** (1976), 14 OR (2d) 345 (Ontario C.A.)."

I therefore find that the General Assignment of Accounts given by Maritime Formless to the Canadian

Imperial Bank of Commerce was a fixed and specific charge and ranks in priority to the claim of the Department of National Revenue.

Ocean Contractors Limited et al and Catenacci

The further position of these ordinary creditors is to the effect that the General Assignment was effectively a floating charge and "... could not attach to any debts owing by the City to the Company until those debts had actually come into existence." With respect, that is not the effect of the words used in the General Assignment. Full effect must be given to the words of the Assignment and they are clear and unambiguous. I have found above that this General Assignment was a fixed and specific charge.

The position of the ordinary creditors is that Maritime Formless had promised by Article 6.38 of the General Conditions of the construction contract that monies due or to become due pursuant to the contract would not be assigned without the previous written consent of the owner. Their position is that such consent was never obtained and accordingly no valid assignment could be made of the monies due thereunder.

I cannot sustain this argument. The City had the right to enforce the provisions of the contract and especially Article 6.38. That right of the City was never assigned to any other parties, including especially the ordinary creditors. In fact, when the City was made specifically aware of the General Assignment by the demand given to it by the Bank it chose clearly not to exercise any rights it may have had arising from any alleged breach of the contract and, indeed, indicated by its acknowledgement of the demand that it would honour the demand. While it is true that the Bank, as Assignee of the Company, takes the Assignment subject to the terms and conditions of the contract, the rights of the City pursuant to Article 6.38 were rights which have never been exercised and are not now open to strangers to that contract to exercise

The ordinary creditors also say that the intervenor, Gerald Catenacci, does not have "clean hands" and therefore cannot come to equity to obtain relief by an assignment of priority in his favour. This argument also fails. The ordinary creditors position, as set out in the pre-trial memorandum, was to the effect that as

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Mr. Catenacci is the principal of Maritime Formless and to the fact that the Assignment from the Bank to Catenacci is for the stated consideration of \$8,000.00 and that, therefore, the intervenor will "realize a windfall in excess of \$48,000.00 at the expense of the subcontractors".

There is no evidence before me which would justify a finding of "unclean hands". There are many valid and honest reasons why a company such as Maritime Formless might experience financial difficulties, leading to its eventual demise. The fact that the consideration shown as flowing from Catenacci to the Bank on the Assignment is less than the potential to be realized from the fund at hand, is not evidence of bad faith. We are not privy to what other and further arrangements may have been made between the Bank and Catenacci.

I therefore conclude that as between Catenacci and the ordinary creditors, including Linda Merriam, the Catenacci claim shall take priority.

Revenue Canada v. ordinary creditors

Having found as I have above, then for the further purposes of this decision, I must treat Revenue Canada as one of the general creditors. Revenue Canada has cited **Household Realty Corporation et al v. Attorney General of Canada**, [1980], 1 S.C.R. 423. That case dealt with the Assignment of Priorities in the distribution of surplus funds arising from a foreclosure sale. In that case, Ritchie, J., of the Supreme Court of Canada, quoted the findings of the Chief Justice in **The Queen v. Bank of Nova Scotia** (1885), 11 S.C.R. 1 as follows:

" I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail ...."

Mr. Justice Ritchie in dealing with the same question said:

" I am satisfied that where a debt

I therefore conclude that as between the Department of National Revenue and the other general creditors, the right of the Crown must prevail.

Distribution

I do not have sufficient information before me to make a specific distribution as between the creditors. The priorities, however, are as set forth below and should be sufficient to permit counsel to assign the specific amount due to them from the amount in Court. There may be questions concerning the specific amounts which counsel may wish me to address and if requested, I will do so.

(1) The intervenor is entitled to first priority as to both principal and interest to be calculated in accordance with the promissory notes due to the Bank from Maritime Formless and as assigned

to the intervenor, plus costs as set out below.

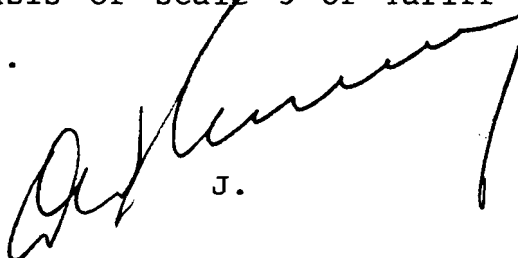
(2) Revenue Canada is entitled to second priority for its claim. I have not had before me any evidence of the manner in which Revenue Canada calculated the interest due on the account and whether that method is acceptable. I have not had any argument as to whether the full amount of interest claimed is in priority to the claims of the ordinary creditors. I do, however, decline to award any additional costs to the Department as a result of what appears on the surface to be the usurious method of calculating interest employed by the Department.

**Third Priority:** If any sum remains after the distribution of the above, it shall be prorated amongst the ordinary creditors, without costs.

#### Re Costs

As indicated above, Linda Merriam, through her counsel, took the position that she was entitled to solicitor-client costs. It is true that when interpleader actions were restricted to being a means of giving relief to a public official, such as a Sheriff, costs were almost invariably awarded on a solicitor-client basis. That rationale no

longer applies to an action such as the instant case and I can see no reason why it should. In any event, it is clear that costs are in the discretion of the Court and I decline to order costs in that manner. Costs are awarded herein to the intervenor on the basis of the amount involved, being the amount of the claim of the intervenor which as at August 15, 1986 was the sum of \$38,166.20 plus interest. Costs will be on the basis of scale 3 of Tariff A of the Tariffs of Costs and Fees.

A handwritten signature in black ink, appearing to be 'J. L. ...', written over the word 'J.'.

J.

Halifax, Nova Scotia

October 29, 1990