IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

ROBERT PARSONS ENGLE

APPLICANT

- AND -

MARGARET LUCILLE CARSWELL

RESPONDENT

TRANSCRIPT OF THE ORAL DECISION DELIVERED BY THE HONOURABLE JUSTICE R.P. FOISY, SITTING IN YELLOWKNIFE, IN THE NORTHWEST TERRITORIES, ON THE 18TH DAY OF JANUARY, A.D. 2006.

APPEARANCES:

MR. W. KENNY: COUNSEL FOR THE APPLICANT

MS. K. PETERSON, Q.C.: COUNSEL FOR THE RESPONDENT

THE COURT: FIRSTLY, I WANT FOR THANK BOTH COUNSEL FOR THEIR VERY WELL ORGANIZED PRESENTATIONS. IT IS ALWAYS APPRECIATED WHEN COUNSEL CAN PUT THE ISSUES SQUARELY BEFORE THE COURT IN A SUCCINCT AND CONVINCING MANNER.

I WILL DEAL FIRSTLY WITH THE ISSUE OF CONFLICT.

I HAVE CONCLUDED THAT I HAVE NO EVIDENCE BEFORE ME THAT MR. ENGLE AS AN INDIVIDUAL WAS EVER A CLIENT OF THE FIRM PETERSON, STANG & MALAKOE. THIS FIRM HAS ACTED, AND ACTS, AS A REGISTERED OFFICE AND HAS FILED ANNUAL REPORTS FOR PERSONAL COMPANIES OF THE APPLICANT AND APPARENTLY NOTHING MORE. THE ONE EXCEPTION MAY BE FOUND IN A RATHER UNCLEAR EMAIL MARKED EXHIBIT "C" TO THE AFFIDAVIT OF ELAINE DEMERS. AT BEST, IT SEEMS THAT ON A LEASE BEING DISCUSSED IN THAT EXHIBIT, THE FIRM MILLER THOMPSON WOULD END UP ACTING FOR MR. ENGLE AND NOT THE PETERSON FIRM.

WHILE THERE ARE CASES THAT, BECAUSE OF A HISTORY WHERE A FIRM HAS ACTED FOR AN INDIVIDUAL AND ALSO ON BEHALF OF A PERSONAL CORPORATION, IT HAS BEEN HELD THAT THE INDIVIDUAL WAS INDEED THE CLIENT AS WELL AS THE PERSONAL CORPORATION, AND IN EFFECT, WHERE THE CORPORATE VEIL WAS LIFTED, I HAVE CONCLUDED THAT THIS IS NOT THE CASE HERE. I HAVE NO EVIDENCE THAT THE PETERSON FIRM HAS EVER

ACTED FOR MR. ENGLE PERSONALLY. THERE IS NO SUGGESTION THAT THE PETERSON FIRM HAS ANY CONFIDENTIAL INFORMATION OR THAT A BREACH OF CONFIDENTIALITY IS REMOTELY POSSIBLE.

WHILE I ACKNOWLEDGE THAT I AM BOUND BY THE RULE ENUNCIATED BY THE SUPREME COURT OF CANADA IN NEIL, I HAVE CONCLUDED THAT IT HAS NO APPLICATION HERE BECAUSE THE CLIENTS ARE NOT THE SAME. THE FIRM IN QUESTION DOES ROUTINE FILING FOR THE CORPORATION AND IS THE ADDRESS FOR SERVICE OF THE COMPANY, NOT MR. ENGLE. ACCORDINGLY, THAT APPLICATION IS DISMISSED.

WITH RESPECT TO THE RULE 327(1)(B) APPLICATION, I HAVE CONCLUDE THAT THE RULE HAS BEEN CONTRAVENED AND THE ACTION SHOULD BE DISMISSED. IN THIS CASE, AND SINCE THERE REMAINS NOTHING WITHIN THE ACTION BUT THE PROPERTY DISPUTES, DISMISSING THE ACTION HAS THE RESULT OF PREVENTING THE RESPONDENT FROM REVIVING ANY FURTHER CLAIMS FOR PROPERTY DIVISION EXCEPT AS HEREINAFTER DSCRIBED. UNDER THE ORDER OF MR. JUSTICE MILLER, IT IS INCUMBENT UPON THE RESPONDENT TO PURSUE ANY CLAIM FOR A DIVISION OF SPECIFIC PROPERTIES, INCLUDING THE YELLOWKNIFE PROPERTY, AND SHE HAS NOT DONE SO. NOTHING HAS BEEN DONE FOR A PERIOD OF OVER FIVE YEARS IN THIS REGARD.

HER COUNSEL ARGUES THAT SOME OF THE REMEDIES CLAIMED IN THE ORIGINAL PETITION WERE ALSO PURSUED IN CALIFORNIA AND THAT SHOULD CONSTITUTE A STEP THAT IS MATERIALLY ADVANCING THIS ACTION. COUNSEL AGREED THAT THE CALIFORNIA LITIGATION NECESSITATED A NEW AND SEPARATE ACTION IN CALIFORNIA. IN MY VIEW, STEPS IN THAT ACTION ARE NOT STEPS IN THIS ACTION.

MS. PETERSON ARGUES THAT THE APPLICANT CANNOT USE RULE 327(1)(B) TO STRIKE OUT HIS OWN ACTION. FIRSTLY, THE RULE DOES NOT RESTRICT ITS APPLICATION THUS. SECONDLY, THE RESPONDENT HAS THE ONUS OF APPLYING TO THE COURT FOR RELIEF, AND SHE HAS NOT DONE SO. SHE HAS FILED A COUNTERCLAIM AND HAS DONE NOTHING TO ADVANCE THE CLAIM FOR A PERIOD IN EXCESS OF FIVE YEARS. THE DUTY TO ADVANCE HER CLAIM LIES ON HER AND NOT ON THE APPLICANT.

IN ANY EVENT, THE RESPONDENT ARGUES THAT SINCE THE APPLICANT FILED A MOTION IN MAY OF 2005, WHICH, IF PROCEEDED WITH, WOULD HAVE MATERIALLY ADVANCED THE PROCEEDINGS, IT IS CLEAR THAT THE NOTICE OF MOTION WAS NOT SERVED AND EVENTUALLY, IN JULY OF 2005, WAS STRUCK FROM THE LIST. IN MY VIEW, THE RESPONDENT MUST FAIL ON THIS POINT AS WELL. FIRSTLY, THE NOTICE OF MOTION IN MAY 2005 WAS AFTER THE FIVE-YEAR PERIOD

AND THE RULE IS MANDATORY. IF SOMEHOW A NOTICE OF MOTION LIKE THE MOTION FILED BY THE APPLICANT IN MAY 2005 COULD HAVE HAD THE EFFECT OF EXTENDING THE TIME UNDER THE RULE, IT DID NOT DO SO IN THIS CASE BECAUSE IT WAS NEVER SERVED NOR PROCEEDED WITH.

IN GRANTING THE APPLICATION TO DISMISS, I AM MINDFUL OF MR. KENNY'S REPRESENTATION TO THE COURT THAT THE RESPONDENT IS NOT STATUTE-BARRED FROM PROCEEDING AGAINST THE APPLICANT FOR HER SHARE OF THE YELLOWKNIFE RESIDENCE. THE OFFER OF PAYMENT OF $197,000 MORE OR LESS BY THE APPLICANT TO THE RESPONDENT STILL STANDS. THE RESPONDENT MAY WANT TO LITIGATE THE VALUE GIVEN IN THE APPRAISAL OR OTHER RELEVANT OR PERTINENT MATTERS RELATING TO THE YELLOWKNIFE RESIDENCE. MR. KENNY ASSURES ME THAT SHE MAY DO SO IF SHE CHOOSES AS HER ACTION IS NOT NOW STATUTE-BARRED. THE OTHER PROPERTY OUTSIDE THE NORTHWEST TERRITORIES MAY BE THE SUBJECT OF A LIMITATION DEFENCE IF THE RESPONDENT CHOOSES TO COMMENCE AN ACTION REGARDING THOSE PROPERTIES. MR. KENNY HAS CLEARLY INDICATED THAT THE LIMITATION DEFENCE WOULD BE RAISED REGARDING THE B.C. AND PALM SPRINGS PROPERTIES. WHETHER THIS DEFENCE WOULD SUCCEED IS NOT FOR ME TO SAY. ACCORDINGLY, THE ACTION IS DISMISSED.

COUNSEL WANT TO SPEAK TO COSTS?

MR. KENNY: IT SEEMS TO ME WE HAVE A DRAW.

MS. PETERSON: I AGREE, SIR.

THE COURT: OKAY. EACH PARTY WILL BEAR HIS OR HER COSTS.

MR. KENNY: THANK YOU.

MS. PETERSON: THANK YOU, SIR.

THE COURT: THANK YOU VERY MUCH. IF THERE'S NOTHING ELSE, WE'LL ADJOURN.

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CERTIFIED PURSUANT TO RULE 723
OF THE RULES OF COURT

JANE ROMANOWICH, CSR(A), RPR
COURT REPORTER