

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF S. 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF *THE COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED AND SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990 C.C. 30, AS AMENDED

B E T W E E N:

**KREK SLOVENIAN CREDIT UNION LTD.**

Applicant

- and -

**ELGIN LIMITED PARTNERSHIP I and  
INPARTNR INC.**

Respondents

**FACTUM AND BOOK OF AUTHORITIES OF ROSEN GOLDBERG INC.  
COURT-APPOINTED RECEIVER OF ELGIN LIMITED PARTNERSHIP I  
AND INPARTNR INC.**

October 23, 2015

**DICKINSON WRIGHT LLP**

Barristers & Solicitors

199 Bay Street

Suite 2200, P.O. Box 447

Commerce Court Postal Station

Toronto, Ontario M5L 1G4

**DAVID P. PREGER (36870L)**

Email: [dpreger@dickinsonwright.com](mailto:dpreger@dickinsonwright.com)

Tel: (416) 646-4603

**LISA S. CORNE (27974M)**

Email: [lcorne@dickinsonwright.com](mailto:lcorne@dickinsonwright.com)

Tel: (416) 646-4608

Fax: (416) 865-1398

Lawyers for Rosen Goldberg Inc.

Court-appointed Receiver of Elgin Limited

Partnership I and Inpartnr Inc.

**SERVICE LIST**

**TO: GARFINKLE, BIDERMAN LLP**

Barristers & Solicitors  
1 Adelaide Street East  
Dundee Place, Suite 801  
Toronto, Ontario, M5C 2V9

**WENDY GREENSPOON-SOER**

Email: [wgreenspoon@garfinkle.com](mailto:wgreenspoon@garfinkle.com)

**BARRY POLISUK**

Email: [bpolisuk@garfinkle.com](mailto:bpolisuk@garfinkle.com)

Tel: (416) 869-7615

Fax: (416) 869-0547

Lawyers for the Applicant

**AND STABLE PROFESSIONAL  
TO: CORPORATION**

Barrister, Solicitor & Notary Public  
11 Director Court  
Suite 201  
Woodbridge, ON L4L 4S5

**SABATINO STABILE**

Email: [stabilesam@gmail.com](mailto:stabilesam@gmail.com)

Tel: (905) 851-6711

Fax: (905) 850-4516

Lawyers for the Purchaser

**AND MINISTRY OF FINANCE**

**TO:** Legal Services Branch  
6<sup>th</sup> Floor, 33 King Street West  
Oshawa, ON L1H 8H5

**KEVIN O'HARA**

Email: [kevin.ohara@fin.gov.on.ca](mailto:kevin.ohara@fin.gov.on.ca)

Tel: (905) 433-6934

Fax: (905) 436-4510

Lawyers for Ministry of Finance for Ontario

AND **NESBITT COUTER LLP**  
TO: Barristers & Solicitors  
35 Perry Street  
Woodstock, Ontario, N4S 3C4

**ENNIO MICACCHI**  
Email: [emicacchi@nesbittlaw.com](mailto:emicacchi@nesbittlaw.com)  
Tel: 1(519) 539-1234  
Fax: 1(519) 539-3314

Lawyers for 598013 Ontario Ltd.

AND **SISKINDS LLP**  
TO: Barristers & Solicitors  
680 Waterloo Street  
P.O. Box 2520  
London, Ontario, N6A 3V8

**WADE W. SARASIN**  
Email: [wade.sarasin@siskinds.com](mailto:wade.sarasin@siskinds.com)  
Tel: 1(519) 660-7888  
Fax: 1(519) 660-7889

Lawyers for Prouse Electric Limited  
and Prouse Mechanical Ltd.

AND **GIBSON BENNETT GROOM &  
SZORENYI**  
TO: Barristers & Solicitors  
36 Broadway  
P.O. Box 5  
Tillsonburg, Ontario, N4G 4H3

**MICHAEL G. SZORENYI**  
Email: [mszorenyi@tillsonburglawyers.com](mailto:mszorenyi@tillsonburglawyers.com)  
Tel: 1(519) 842-3658  
Fax: 1(519) 842-5001

Lawyers for Prouse Electric Limited  
and Prouse Mechanical Ltd.

AND **MONTY FORDHAM**  
TO: Barrister & Solicitor  
4 Elgin Street  
St. Thomas, Ontario, N5R 3L6

Email: [montyfordham@4elgin.ca](mailto:montyfordham@4elgin.ca)  
Tel: 1(519) 633-4000  
Fax: 1(519) 633-1371

Lawyers for Jake Zacharias Excavating Inc.

AND **DEVRY SMITH FRANK LLP**  
TO: Lawyers & Mediators  
95 Barber Greene Road  
Suite 100  
Toronto, Ontario, M3C 3E9

**LARRY W. KEOWN**  
Email: [keown@devrylaw.ca](mailto:keown@devrylaw.ca)

Tel: (416) 446-5815  
Fax: (416) 449-7071

Lawyers for Into Electronics Inc.

AND **LERNERS LLP**  
TO: 88 Dufferin Avenue  
P.O. Box 2335  
London, Ontario N6A 4G4

**LIANNE J. ARMSTRONG (40332S)**  
Email: [larmstrong@lernalers.ca](mailto:larmstrong@lernalers.ca)

Tel: 1(519) 640-6320  
Fax: 1(519) 932-3320

Lawyers for St. Thomas Custom Drywall Inc.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF S. 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF *THE COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED AND SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990 C.C. 30, AS AMENDED

B E T W E E N:

**KREK SLOVENIAN CREDIT UNION LTD.**

Applicant

- and -

**ELGIN LIMITED PARTNERSHIP I and  
INPARTNR INC.**

Respondents

**FACTUM AND BOOK OF AUTHORITIES OF ROSEN GOLDBERG INC.  
COURT-APPOINTED RECEIVER OF ELGIN LIMITED PARTNERSHIP I  
AND INPARTNR INC.**

**PART I - INTRODUCTION**

1. Rosen Goldberg Inc. (the “**Receiver**”), in its capacity as court-appointed receiver and construction lien trustee of Elgin Limited Partnership I and Inpartnr Inc. (collectively, the “**Debtors**”) files this factum in support of the Receiver’s motion for approval of a proposed distribution of funds in its possession in the amount of \$346,640.00 (the “**Fund**”).

2. The Fund represents the balance of holdback funds retained under the *Construction Lien Act* (“**CLA**”) by Krek Slovenian Credit Union (“**Krek**”) from amounts advanced by Krek to the Debtors. Krek’s advances to the Debtors were made for the purposes of financing the construction of a one story building located on the outskirts of St. Thomas, Ontario, to be used as a residence for seniors (the “**Project**”).

## PART II - SUMMARY OF FACTS

3. In its Second Report dated May 26, 2014, the Receiver reported that it had reviewed the amounts withheld by Krek from its construction advances and concluded that Krek fulfilled its obligations under the *CLA*, such that the Fund satisfies the holdbacks required under the *CLA*. In addition, the Receiver reported in its Second Report that it would be reserving funds from the sale of the Project in respect of the potential claims by the lien claimants under the *CLA* of \$350,000.

4. The lien claimants were served with the Second Report on May 29, 2015 in connection with the Receiver's motion for an order approving a sale of the Project. None of the lien claimants objected to the Second Report. Accordingly, on June 12, 2014, the Honourable Mr. Justice Brown granted an Amended Approval and Vesting Order pursuant to which he approved the Receiver's Second Report and the activities of the Receiver set out therein.

5. The lien claimants have not sought to set aside, vary or amend the Amended Approval and Vesting Order or appeal therefrom.

6. Accordingly, it is respectfully submitted that the lien claimants are estopped from raising any objection to the amount of the holdback which the Receiver has reserved from the sale proceeds.

7. With the exception of the lien in favor of St. Thomas Custom Drywall Inc., the balance of the lien claimants who had commenced actions pursuant to the *CLA* failed to set the actions down for trial within the two year period required until the *CLA*. As a result, certain lien actions had been dismissed by the court for delay.

8. Subsequent to the Receiver's Third Report recommending a distribution of the Fund, the Receiver's counsel reviewed the decisions in *Deslaurier v. Le Groupe Brigil* ("*Deslaurier*")<sup>1</sup> and *RSG Mechanical Incorporated v. 1398796 Ontario Inc.* ("*RSG*").<sup>2</sup>

---

<sup>1</sup> 2012 ONSC 3350 (CanLII)

<sup>2</sup> 2015 ONSC 2070 (CanLII)

9. In *Deslaurier*, Master MacLeod held that a lien under the *CLA* will not expire even if the action commenced to enforce it is not set down within two years, provided that there is another action in which such lien may be enforced, which has been set down for trial within the two year period.

10. In *RSG*, the court held that where each lien claimant has contracted directly with the owner, the amount of the holdback available to each lien claimant is limited to 10% of the value of services or materials actually supplied under the lien claimant's specific contract, and not 10% of the value of services delivered under all contracts entered into for the project.

11. In light of the foregoing legal principles, in June 2015, the Receiver forwarded to all lien claimants a revised proposed scheme of distribution in respect of the Fund. The revised distribution proposed by the Receiver reflects that:

- (a) All of the preserved lien claims may be proved in the St. Thomas Custom Drywall Inc. action, such that all of those lien claimants are entitled to shelter and share in the distribution of the holdback, subject to obtaining orders setting aside the dismissal of their actions; and
- (b) Each lien claimant is only entitled to receive 10% of the value of the goods and services supplied under the lien claimant's specific contract, less any amounts previously received.

12. On June 5, 2015, counsel for the Receiver circulated to counsel for the lien claimants a schedule detailing the revised distribution proposed by the Receiver.

13. At the request of the lien claimants, the Receiver agreed to adjourn this motion which was then scheduled for June 11, 2015, to a 9:30 a.m. appointment on July 14, 2015. On July 14, 2015, the motion was further adjourned at the request of the lien claimants and on the consent of the Receiver until August 17, 2015.

14. On August 17, 2015, Justice Mew established a timetable for the hearing of the Receiver's motion which required the lien claimants to deliver all responding material by

September 15, 2015. On consent of the lien claimants, Justice Mew also scheduled the hearing of the motion for October 26, 2015.

15. No further responding materials were delivered by the lien claimants.

16. The Receiver has provided all additional information requested by counsel for the lien claimants.

### **The Importance of Finality**

17. It is respectfully submitted that if this court permits the lien claimants to challenge the amount of the holdback or the amount reserved by the Receiver from the proceeds of sale of the Project, after the same were approved by the court in the Approval and Vesting Order, the principle of finality that is crucial to the proper administration of justice will be undermined.

18. It is trite law that subject to a right of appeal, a judgment, order or other ruling of a court or judicial officer is final. Finality and certainty of court orders is an important value:

It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.<sup>3</sup>

19. The policy favouring the finality of court orders is essential not only for the certainty of transactions between the parties, but to the integrity of the judicial process. The importance of finality was discussed at length by the Court of Appeal for Ontario in *Tsaoussis (Litigation Guardian of) v. Baetz*:<sup>4</sup>

Litigation by instalment is not tolerated: *Toronto General Trusts Corp. v. Roman*, [1963] 1 O.R. 312 (Ont. C.A.); affd. [1963] S.C.R. vi (S.C.C.). ***Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved***: *R. v. Thomas*, [1990] 1 S.C.R. 713 (S.C.C.); *R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.); *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), at 757.

...

---

<sup>3</sup> *Hoque v. Montreal Trust Co. of Canada*, 1997 CarswellNS 427, 1997 NSCA 153, [1997] N.S.J. No. 430, 162 N.S.R. (2d) 321, 485 A.P.R. 321, 75 A.C.W.S. (3d) 541 at para. 68.

<sup>4</sup> *Tsaoussis (Litigation Guardian of) v. Baetz*, 1998 CarswellOnt 3409, [1998] O.J. No. 3516, 112 O.A.C. 78, 165 D.L.R. (4th) 268, 27 C.P.C. (4th) 223, 41 O.R. (3d) 257 at para. 16 [*Tsaoussis*].



Attempts, whatever their form, to reopen matters which are the subject of a final judgment must be carefully scrutinized. ... I think Anderson J. struck the proper judicial tone on applications to reopen final judgments in *L.M. Rosen Realty Ltd. v. D'Amore* (1988), 29 C.P.C. (2d) 106 (Ont. H.C.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

...Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition. [Emphasis added]

### **Abuse of Process**

20. It is respectfully submitted that it would be manifestly unfair, and amount to an abuse of process or collateral attack upon the Approval and Vesting Order, should the lien claimants be permitted to relitigate the sufficiency of the holdback retained by Krek.

21. The lien claimants were served with notice of the Receiver's motion for the Approval and Vesting Order and the Second Report, and ought to have raised any objections at that time, and yet they chose not to do so.

22. The lien claimants have not put forward any facts or evidence which would justify a variation or setting aside of the Approval and Vesting Order.

23. The circumstances in which the court may vary or set aside an Order pursuant to Rule 59.06(1) are extremely limited. There must be an error arising from an accidental slip, fraud, facts arising or discovered after the Order is made, or failure by the court to adjudicate upon an issue.

24. In addition, a party seeking to set aside or vary an Order must act with reasonable diligence.<sup>5</sup> More than a year has elapsed after the date of the Approval and Vesting Order before the lien claimants, took any steps to object, and they have still not moved to set aside or vary the Approval and Vesting Order.

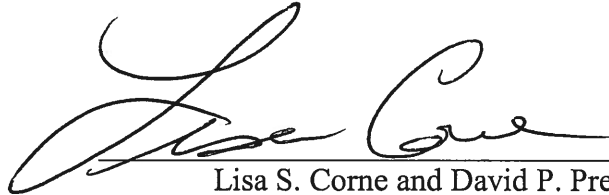
---

<sup>5</sup> *Saviro International v. Cadillac Gage Company*, 1992 CarswellOnt 349, aff'd 1993 CarswellOnt 381 (C.A.) leave to appeal refused (SCC)

**ORDER REQUESTED**

25. The Receiver respectfully requests that this honourable court grant an order approving the distribution of the funds as set out in Exhibit F to the Receiver's Supplementary Report to the Third Report.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of October, 2015.



---

Lisa S. Corne and David P. Preger

**DICKINSON WRIGHT LLP**

Barristers & Solicitors  
199 Bay Street  
Suite 2200, P.O. Box 447  
Commerce Court Postal Station  
Toronto, Ontario M5L 1G4

**DAVID P. PREGER (36870L)**

Email: [dpreger@dickinsonwright.com](mailto:dpreger@dickinsonwright.com)  
Tel: (416) 646-4603

**LISA S. CORNE (27974M)**

Email: [lcorne@dickinsonwright.com](mailto:lcorne@dickinsonwright.com)  
Tel: (416) 646-4608  
Fax: (416) 865-1398  
Lawyers for Rosen Goldberg Inc.  
Court-appointed Receiver of Elgin Limited  
Partnership I and Inpartnr Inc.

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Deslaurier v. Le Groupe Brigil*, 2012 ONSC 3350 (CanLII);
2. *RSG Mechanical Incorporated v. 1398796 Ontario Inc.*, 2015 ONSC 2070 (CanLII)
3. *Hogue v. Montreal Trust Co. of Canada*, 1997 CarswellNS 427, 1997 NSCA 153, [1997] N.S.J. No. 430, 162 N.S.R. (2d) 321, 485 A.P.R. 321, 75 A.C.W.S. (3d) 541
4. *Tsaoussis (Litigation Guardian of) v. Baetz*, 1998 CarswellOnt 3409, [1998] O.J. No. 3516, 112 O.A.C. 78, 165 D.L.R. (4th) 268, 27 C.P.C. (4th) 223, 41 O.R. (3d) 257
5. *Saviro International v. Cadillac Gage Company*, 1992 CarswellOnt 349, aff'd 1993 CarswellOnt 381 (C.A.) leave to appeal refused (SCC)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS *Rules of Civil Procedure*, R.R.O.

1990, Reg. 194,

#### **Amending**

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

#### **Setting Aside or Varying**

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

**KREK SLOVENIAN CREDIT UNION LTD.**  
Applicant

- and -  
Respondents

**ELGIN LIMITED PARTNERSHIP I AND INPARTNR INC.**

Court File No. CV-12-9916-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF ROSEN GOLDBERG INC.**

**DICKINSON WRIGHT LLP**  
Barristers & Solicitors  
199 Bay Street  
Suite 2200, Box 447  
Commerce Court Postal Station  
Toronto, Ontario M5L 1G4

**DAVID P. PREGGER (36870L)**  
Tel: (416) 646-4603  
Fax: (416) 865-1398

**LISA S. CORNE (27974M)**  
Tel: (416) 646-4608  
Fax: (416) 865-1398

Lawyers for Rosen Goldberg Inc.  
Court-appointed Receiver of Elgin  
Limited Partnership I and Inpartnr Inc.