

Clerk's stamp:

COURT FILE NUMBER: 1603 06360

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

PLAINTIFF (APPLICANT): PRESTIGIOUS PROPERTIES INC.

DEFENDANTS (RESPONDENT): COLD LAKE ESTATES INC., NORTHERN ALBERTA ESTATES INC., THE MULLER RYAN RICHARD DEVELOPMENT GROUP INC. also known as the MRR DEVELOPMENT GROUP INC., CHARLES RYAN

DOCUMENT: **BRIEF OF THE APPLICANT**

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**BRIEF OF THE APPLICANT, PRESTIGIOUS PROPERTIES INC.,
IN SUPPORT OF AN APPLICATION FOR SECURITY FOR COSTS**

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TABLE OF CONTENTS

I. INTRODUCTION	3
II. FACTS	4
A. Parties	4
B. Litigation history	4
C. Facts supporting Prestigious' claim	6
1) The Contract	6
2) Concealed information	7
D. Dispersing of assets	11
1) CLE and Ryan transferred lands to Ryan's wife	11
E. The attempt to mislead the Court	12
F. The August 2016 affidavit and adjournment of this application	14
G. Land sales to pay the Servus Loans	15
H. The Ryan Companies have no exigible assets bearing equity and do not file tax returns	16
I. Ryan has no exigible assets or disclosed income and has not filed annual tax returns	19
J. Extant litigation involving Ryan and the Ryan Companies	20
K. Registered debts of Ryan and the Ryan Companies	21
III. ISSUES	23
IV. LAW	23
V. ARGUMENT	24
A. The law regarding security for costs	24
B. The Respondents lack exigible, readily realizable assets in Alberta	27
C. Prestigious will be unable to enforce judgment against Ryan and the Ryan Companies	28
D. The likelihood of CLE obtaining judgment against Prestigious is low	29
E. Ryan and the Ryan Companies have not shown evidence of undue prejudice	30
F. The Pre Judgment Attachment Order is not a substitute for security for costs	31
G. The quantum of security sought	32
VI. RELIEF SOUGHT	34
LIST OF APPENDICES AND AUTHORITIES	36

I. INTRODUCTION

1. This is an Application by the Plaintiff (Applicant), Prestigious Properties Inc. (“Prestigious”), for security for costs to be posted by the Defendants and Plaintiffs by Counterclaim (Respondents), Charles Ryan (“Ryan”) and three companies presently under his sole ownership and control: Cold Lake Estates Inc. (“CLE”), Northern Alberta Estates Inc. (“NAE”), and the Muller Ryan Richard Development Group Inc. (“MRR”).
2. Further relief sought includes a stay of proceedings pending the posting of such security by CLE, NAE and MRR (the “Ryan Companies”) and Ryan and dismissal of the Counterclaim filed on behalf of CLE (the “Counterclaim”) if such security is not posted as directed.
3. Ryan and the Ryan Companies derailed a previously scheduled Special Chambers hearing of this Application with a late-filed Affidavit. Subsequent testing of that affidavit evidence sworn by Ryan consistently demonstrated that neither the Ryan Companies nor Ryan will be able to satisfy a costs award against them if unsuccessful at trial.
4. The Ryan Companies are subject to several pending litigation claims and security agreements, lack exigible, equity-bearing assets in Alberta, have no current or prospective revenue stream and no other ability to pay the costs that Prestigious is likely to be awarded at the conclusion of these proceedings.
5. Ryan is subject to several pending litigation claims and security agreements, has disposed of all known exigible, equity-bearing assets in Alberta in the face of this lawsuit and has provided no evidence of current personal income or other ability to pay the costs that Prestigious is likely to be awarded at the conclusion of these proceedings.
6. Insofar as there is no evidence of undue prejudice to the Respondents’ ability to carry on with their Counterclaim or defend the Consolidated Action, it is just and equitable in all of the circumstances to order the posting of security by Ryan and the Ryan Companies.

II. FACTS

A. Parties

7. Prestigious is the registered owner of two adjoining quarter-sections of land (the “North Quarter” and the “South Quarter”, collectively, the “Property”) located in the Municipal District of Bonnyville No. 87 (the “MD of Bonnyville”) on the edge of the City of Cold Lake. Prestigious acquired the Property pursuant to a written purchase agreement between Prestigious and CLE made effective October 29, 2010 (the “Contract”).

Purchase Contract marked Exhibit D-1 to the Questioning of Charles Ryan held on July 11, 12 and 14, 2016 (“Exhibit D-1”). **[Tab 1]**

Affidavit of Thomas Beyer sworn June 5, 2015 filed June 9, 2015 (“Beyer Affidavit”) at para 4.

8. Ryan is the sole shareholder and director of the Ryan Companies.

Affidavit of Trina Jackson sworn and filed on December 1, 2015 (“Jackson December 2015 Affidavit”) at para 3 and Exhibits “A” through “C”.

9. The Ryan Companies are all Alberta corporations incorporated pursuant to the laws of the Province of Alberta.

December 2015 Jackson Affidavit at para 3 and Exhibits “A”, “B” and “C”.

B. Litigation History

10. This Action is a consolidation of three prior actions:

- a. Action No. 1401 12309 / 1503 08440, commenced by Prestigious on November 10, 2014 and transferred to Edmonton in 2015 (the “Prestigious Action”);
- b. Action No. 1503 13545, commenced by CLE on September 2, 2015 (the “Cold Lake Estates Action”); and
- c. Action No. 1503 09321, commenced by Tri City Capital Corp. (“Tri City”) as against Prestigious on June 23, 2015 (the “Tri City Action”).

11. In accordance with the Consolidation Order, Prestigious filed a consolidated Statement of Claim (the “Consolidated Action”) which:

- a. Includes allegations of fraudulent misrepresentation and conspiracy as against Ryan, the Ryan Companies, Matthys Muller (“Muller”), Roger Richard (“Richard”), and M Double M Engineering Services Inc. (“M Double M”);
- b. Seeks judgment for breach of contract, negligence and breach of fiduciary duty in relation to:
 - i. The Contract;
 - ii. Discharge of a \$2,000,000 vendor take back mortgage (the “VTB Mortgage”) and a \$4,000,000 performance incentive registered as a memorandum charging lands (the “Memorandum Charging Lands”) which Prestigious granted as security for the balance of the \$8,000,000 purchase price under the Contract (the “Purchase Price”) after supplying funds of \$2,000,000 credited as a first and second deposit of \$1,000,000 each (the “Deposits”); and
- c. Claims damages in the amount of \$5,035,000.00 or a further amount to be quantified at trial, punitive damages in the amount of \$2,000,000.00 or a further amount to be quantified at trial, and costs.

Statement of Claim filed April 11, 2016 (“Consolidated Statement of Claim”). **[TAB 2]**

Exhibit D-1, Schedules B and C. **[TAB 1]**

Affidavit of Charles Ryan sworn April 28, 2016 (“Ryan April 2016 Affidavit”) at para 12 and Exhibits 2 and 3.

12. Ryan and the Ryan Companies filed a Statement of Defence and CLE filed a Counterclaim in the Consolidated Action.

Statement of Defence of the Ryan Companies and Ryan filed May 4, 2016. **[TAB 3]**

Counterclaim filed May 4, 2016. **[TAB 4]**

13. Muller, M Double M and Richard have also filed Defences in the Consolidated Action.
14. Prestigious originally brought its Application for Security for Costs in the Cold Lake Estates Action. The Consolidation Order directs that all materials filed in the Prestigious Action, the Cold Lake Estates Action and the Tri City Action be filed in the Consolidated Action.

Application for Security for Costs filed December 1, 2015. **[TAB 5]**

Consolidation Order, para 2. **[TAB 6]**

C. Facts supporting Prestigious' claim

1) The Contract

15. Prestigious offered to purchase the Property from CLE. Ryan, along with Muller and Richard, executed the Contract ostensibly as the authorized signing officers of CLE.

Beyer Affidavit at para 5.

16. At the time the Contract was executed in October 2010, Ryan, Muller and Richard were showing on corporate registries as the registered directors and voting shareholders of CLE and held themselves out as such. In Questioning, Muller and Richard also testified to having been directors when the Contract was signed.

Beyer Affidavit at para 6 and Exhibit "B".

Transcript, Questioning of Matthys Muller held March 2, 2016 ("Muller 2016 Transcript"), 8:17-24. **[TAB 7]**

Transcript, Questioning of Roger Richard held March 1, 2016 ("Richard 2016 Transcript"), 14:12-16. **[TAB 8]**

17. In 2017, however, Ryan produced the Minute Book for CLE (the "CLE Minute Book"), which includes:

- a. Proof of filing by Counsel for the Ryan Companies and Ryan of a change of Directors at the Corporate Registry on December 29, 2010 backdating the cessation of Muller and Richard as Directors effective May 31, 2010; and
- b. Two Notices of Resignation apparently signed by Muller and Richard respectively and dated effective May 31, 2010.

Proof of Filing - Change Director/Shareholder dated 2010/12/29, excerpted from Minute Book of Cold Lake Estates Inc. marked as Exhibit 10 to Charles Ryan Questioning on Affidavit held February 23, 2017 ("CLE Minute Book"). **[TAB 9]**

Notice of Resignation of Matthys Muller dated May 31, 2010, excerpted from CLE Minute Book. **[TAB 10]**

Notice of Resignation of Roger Richard dated May 31, 2010, , excerpted from CLE Minute Book. **[TAB 11]**

18. The Contract closed on May 11, 2011 (the "Completion Date"), at which time title was transferred to Prestigious in accordance with the Contract.

Exhibit D-1, Article 1. **[TAB 1]**

Beyer Affidavit at para 4.

19. At the time the Contract was executed, Ryan, Muller and Richard were the only registered directors and voting shareholders of NAE and MRR.

Beyer Affidavit at paras 12 and 15 and Exhibits "E" and "J".

20. CLE hired NAE as a project manager in relation to an application for subdivision approval submitted in June 2010 (the "Subdivision Application"). CLE also retained MRR, which was involved in preparing and revising versions of an Area Structure Plan prepared by Muller (the "ASP"). M Double M submitted the ASP to the MD of Bonnyville on behalf of NAE as agent for CLE (the "ASP").

Beyer Affidavit at paras 10, 11, 14 and Exhibits "C", "D" and "H".

Muller 2016 Transcript, 34:14-18. **[TAB 7]**

2) Concealed information

21. Prestigious relied on Article 6.1(h) of the Contract, in which CLE warranted that it would forward all documents pertaining to the Property and its subdivision to Prestigious on or before the Completion Date.

Beyer Affidavit at para 17.

Exhibit D-1, Article 6.1. **[TAB 1]**

22. Prior to the Completion Date, CLE provided Prestigious with certain documents pertaining to the Property and its subdivision (collectively, the "Vendor Disclosure"). Ryan and the

Ryan Companies, through their Counsel, represented to Prestigious that the Vendor Disclosure was complete.

Beyer Affidavit at para 18.

Transcript, Questioning of Charles Ryan held July 11, 12 and 14, 2016 (“Ryan July 2016 Transcript”), 105:1-22, 159:1-26. **[TAB 12]**

23. On or before the Completion Date, the Ryan Companies and or their respective officers and directors, including Ryan, possessed additional documents that contained information pertaining to the Property and its subdivision, but did not disclose them to Prestigious on or before the Completion Date (collectively, the “Concealed Information”).

Beyer Affidavit at paras 20-22.

Exhibits for identification F, G, H, I, J, K, L and M marked at the Questioning of Charles Ryan held July 11, 12 and 14, 2016 (“Exhibits for Identification F through M”). **[TAB 13]**

Muller 2016 Transcript, 81:13-17, 91:20-26. **[TAB 7]**

24. The Concealed Information contradicted representations made by CLE with respect to servicing of the Property, including representations within the Vendor Disclosure.

Beyer Affidavit at para 20, 22 and Exhibits “M” and “N”.

25. The Concealed Information also included communications from the City of Cold Lake to the Defendants that pertained to the Property and its subdivision. The Concealed Information affected the value of the Property and, in particular, its development potential and the corresponding cost and time required for its development. Neither CLE nor any of the other Ryan Companies, nor Ryan, Muller, Richard or M Double M disclosed any of the Concealed Information to Prestigious before the Contract was signed or by the Completion Date.

Beyer Affidavit at paras 20, 23-25.

26. The Concealed Information included:

- a. A January 7, 2011 letter from CLE to the City of Cold Lake referencing a requirement for full municipal water and sewer servicing from the City of Cold Lake to develop the Property and the possibility that the City of Cold Lake lacked sufficient capacity to provide such water and sewer servicing for development of the Property;

F for Identification. **[TAB 13]**.

- b. A January 14, 2011 letter from the City of Cold Lake to M Double M stating, among other things, that the Property was to be serviced with “piped sewer and water to full municipal standards” and that “[t]he proposals for a trickle water reticulation system and septic tanks do not meet full municipal standards” (the “January 14, 2011 Letter”);

G for Identification. **[TAB 13]**

- c. A February 20, 2011 letter from M Double M to NAE authored by Muller and addressed specifically to Ryan and Richard enclosing the January 14, 2011 Letter and describing the increased cost and other consequences on development of the Property resulting from the water and sewer servicing requirements set out in the January 14, 2011 Letter;

H for Identification. **[TAB 13]**

- d. A March 7, 2011 letter from M Double M to the City of Cold Lake and copied specifically to Ryan and Richard for NAE as Project Manager responding to the January 14, 2011 Letter and advocating for “the finalization of the servicing standards required for the subdivision”, among other things, “so as to allow the developed of the proposed subdivision to proceed”;

I for Identification. **[TAB 13]**

- e. An inter-office memorandum dated March 13, 2011 from Muller for M Double M addressed to CLE and specifically to Ryan and Richard referencing a meeting with the City of Cold Lake on March 15, 2011, the intention behind that meeting and the City’s insistence during that meeting that “servicing be done to full municipal standards” and that the City “does not have the present capacity to provide the requested services to the subdivision”;

J for Identification. **[TAB 13]**

- f. A March 16, 2011 letter from the City of Cold Lake enclosing Minutes prepared by the City of a meeting held March 15, 2011, which minutes set out the City’s position that

“the trickle water feed system and sewage system were not accepted prior to the Intermunicipal Development Plan”, that “early discussions were based on low water demand that is not reflective of the current water requirements for the properties”, that the Property and its development “is not covered by any form of ‘Grandfather’ clause”, that “[i]n addition to treated water and wastewater, storm water flows must also be addressed to the satisfaction of the City of Cold Lake” and including as an action item that Muller would “check with the Developer if the Developer agrees to the cost” of piping for water consumption and associated wastewater volumes for the Property based on current standards;

K for Identification. [TAB 13]

- g. An April 5, 2011 letter from CLE to the MD of Bonnyville noting that “the City has stated that it is presently unable to provide the required services” for the Property, stating that “[i]t is therefore unlikely that the water and sewer services can be made available in the near future” and requesting an extension of subdivision approval for the Property beyond the usual two year period to allow “works to be implemented to the City infrastructure” and “to allow the final planning to be made for the water and sewer reticulation for the subdivision itself as well as the construction of the works”; and

L for Identification. [TAB 13]

- h. A confidential inter office memorandum dated April 8, 2011 from CLE addressed specifically to Ryan and Richard from Muller noting that “[t]he letter from Prestigious Properties dated 7 April 2011 state that they are buying not on the land but also the documents. This is correct, as the stipulation was that we have to show a development of 300 lots (breach of contract?)” and asking certain questions, including “Do we now have to provide the schematic layout of the water and sewer reticulation to meet the City standards?” and, finally, stating that “[i]t is important that we do not fall foul of anything that would cause any infringement of the purchase agreement and put us in any form of default”.

M for Identification. [TAB 13]
Beyer Affidavit at paras 23, 24.

27. Prestigious first became aware of some of the Concealed Information in November of 2013. Prestigious became aware of further Concealed Information through the litigation process and particularly the record production of the Defendants, Muller and M Double M.

Beyer Affidavit at paras 21, 22.
Exhibits for Identification F through M [TAB 13]

28. Had Prestigious been aware of the Concealed Information, it would not have entered into or closed the transaction contemplated by the Contract due to the increased cost involved and the lack of servicing options that it understood were available according to the Servicing Representation.

Beyer Affidavit at para 24.
Transcript, Questioning of Thomas Beyer held January 24-26, 2017, 91:8-19 ("Beyer January 2017 Transcript"). [TAB 14]

D. Dispersing of assets

1) CLE and Ryan transferred lands to Ryan's wife

29. Until the last quarter of 2015, Ryan was the registered owner of three properties:
- a. Lands with the short legal description 4;26;55;6;NE, being approximately 161 acres in Sturgeon County (the "Ryan Sturgeon 161 Acres");
 - b. Lands with the short legal description of 4;4;63;28;NE, being approximately 154 acres in the Municipal District of Bonnyville (the "Ryan Bonnyville 154 Acres"); and
 - c. Lands with the short legal description of 0325129;1;2, being approximately 77 acres in Sturgeon County (the "Ryan Sturgeon 77 Acres").

Jackson December 2015 Affidavit at para 6 and Exhibits "P" through "Z".
Excerpts from Questioning on Affidavit of Charles Ryan held June 9, 2016 ("Ryan June 2016 Transcript"), 57:14-19. [TAB 15]

30. Until December 23, 2015, CLE was the registered owner of four properties:

- a. Lands with the legal short description of 4;26;54;6;NE, being approximately 78 acres in Sturgeon County (the “Cold Lake Sturgeon 78 Acres”);
- b. Lands with the short legal description of 4;2;62;35;SE, being approximately 155 acres in the City of Cold Lake (the “Cold Lake SE Quarter”);
- c. Lands with the short legal description of 4;2;62;26;NE, being approximately 160 acres in the City of Cold Lake (the “Cold Lake 160 Acres”); and
- d. Lands with the short legal description of 4;2;62;26;NW, being approximately 155 in the City of Cold Lake (the “Cold Lake NW Quarter”).

Jackson December 2015 Affidavit at para 6 and Exhibits “V through “Z”.

Ryan June 2016 Transcript, 57:10-13. **[TAB 14]**

31. On December 23, 2015, Ryan transferred title and ownership of his two remaining properties – the Ryan Bonnyville 154 Acres and the Ryan Sturgeon 161 Acres (collectively, the “Transferred Ryan Lands”) – to his wife, Barbara Ryan (“Mrs. Ryan”).

Affidavit of Trina Jackson sworn on April 18, 2016 (“Jackson April 2016 Affidavit”) at paras 7, 8 and Exhibits “A” through “C”.

32. On the same date, Ryan caused CLE to transfer title and ownership of its three remaining properties – the Cold Lake SE Quarter, the Cold Lake 160 Acres and the Cold Lake NW Quarter (the “Transferred CLE Lands”) – to Mrs. Ryan.

Jackson April 2016 Affidavit at paras 12, 13 and Exhibits “F” through “H”.

April 2016 Ryan Affidavit at para 30.

E. The attempt to mislead the Court

33. Ryan swore an Affidavit on January 18, 2016 in opposition to Prestigious’ security for costs application (the “Ryan January 2016 Affidavit”).

Affidavit of Charles Ryan sworn January 18, 2016 (“Ryan January 2016 Affidavit”).

34. Despite having directed the transfers to Mrs. Ryan of the Ryan Lands and the CLE Lands on December 23, 2015, Ryan did not disclose those transfers or that neither he nor CLE held any of the Transferred Ryan Lands or the Transferred CLE Lands by the time he swore the January 2016 Ryan Affidavit.

35. On the contrary, in the Ryan January 2016 Affidavit, Ryan deposed that there exists “no persuasive evidence that the Respondents [Ryan, CLE, NAE and MRR] are impecunious or have insufficient exigible assets in Alberta as alleged”.

Ryan January 2016 Affidavit at para 3.

36. Ryan gave further sworn evidence in the Ryan January 2016 Affidavit in which he referred to the appraised values of lands and his own estimation of lands that included the Ryan Lands and the CLE Lands, implying that their values are sufficient to enable the payment of any resulting costs award against the Ryan Companies and/or Ryan notwithstanding the fact that the Transferred Ryan Lands and the Transferred CLE Lands were no longer owned by Ryan or CLE when Ryan so deposed (the “Misrepresentation”).

January 2016 Ryan Affidavit at paras 7 and 8.

37. By way of example, in the transfer of land for the Ryan Bonnyville 154 Acres from Ryan to his wife, Mrs. Ryan swore an affidavit on December 23, 2015 that the current value of those lands was \$435,000. Approximately three weeks later, Ryan deposed that the total appraised value of the Ryan Bonnyville 154 Acres, including house and land, was \$1,742,000. As discussed further below, those same lands and house were subsequently sold in November 2016 for \$395,000.

Jackson April 2016 Affidavit, paras 7-9 and Exhibit C.

Ryan January 2016 Affidavit, para 7.

Affidavit of Charles Ryan sworn October 17, 2016 (“Ryan October 2016 Affidavit”), para 9 and Exhibit “8”.

38. As a consequence of the Misrepresentation, Prestigious obtained a Pre Judgment Attachment Order (the “Pre Judgment Attachment Order”) on a without notice basis on

April 18, 2016 which was registered against the Transferred CLE Lands and the Transferred Ryan Lands (the “Transferred Lands”).

Ex Parte Pre Judgment Attachment Order. [TAB 16]

39. The January 2016 Ryan Affidavit, read in its entirety, appears intended to mislead the Court.
40. Further, although Ryan subsequently deposed that the consideration for the transfers of the Transferred Lands to Mrs. Ryan was cash and assumption of mortgages, he has admitted that:
- a. Any cash paid was nominal;
 - b. No cash was paid by Mrs. Ryan to Ryan or to CLE for the transfers of the Transferred Lands;
 - c. Any cash tendered for properties transferred since November 2015 was paid to Servus Credit Union, which has security registered against each of the Transferred Lands in relation to loans made to the Ryan Companies and/or Ryan (collectively, the “Servus Loans”).

Ryan April 2016 Affidavit at para 30.

Ryan June 2016 Transcript, 91:8-92:5, 93:9-27, 77:10 - 78:5. [TAB 15]

F. The August 2016 affidavit and adjournment of this application

41. This Application was originally set down in Special Chambers on August 24, 2016.
42. On August 12, 2016 Counsel for Ryan and the Ryan Companies served an Affidavit sworn by Ryan on August 11, 2016 in opposition to this Application (the “Ryan August 2016 Affidavit”), together with the Respondents’ Brief. Prestigious adjourned its application so as to conduct Questioning on the late-filed Affidavit.
43. Ryan deposed in the Ryan August 2016 Affidavit to a “partial list of some of my companies’ properties” consisting of ten properties, seven of which were then held by Alberta Estates Inc. (of which CLE is the sole registered shareholder) and three by CLE (collectively, the “Ryan Company Properties”).

Ryan August 2016 Affidavit, paras 9, 10 and Exhibits “F” through “P”.

44. According to Ryan, the total “value” of the Ryan Company Properties as at August 2016 was \$8,742,500. In August 2016 Ryan further deposed that the ten Ryan Company Properties had registered mortgages totaling \$3,469,350 and resulting equity of \$5,273,150.

Ryan August 2016 Affidavit, para 9.

45. In February 2017 Ryan was Questioned on the Ryan August 2016 Affidavit. When asked whether there were any inaccuracies in the evidence within it, Ryan noted that the ownership of one of the Ryan Company Properties had changed. He did not identify any change in what he had deposed to be the “value” of the Ryan Company Properties.

Transcript, Questioning on Affidavit of Charles Ryan held on February 21 and 23, 2017 (“Ryan February 2017 Transcript”), 271:4 -27; 273:12-274:2; 275:12 – 276:21. **[TAB 17]**

G. Land sales to pay the Servus Loans

46. On October 14, 2015, Ryan caused CLE to transfer title to the one of its four properties, Cold Lake Sturgeon 78 Acres, from CLE to LMH Holdings. The transfer was completed for \$620,000.00 cash.

Jackson April 2016 Affidavit at paras 14-15.

47. On November 2, 2015, Ryan transferred title to one of his four properties, the Ryan Sturgeon 77 Acres, to 473938 Alberta Ltd. The transfer was completed for \$315,000.00 cash.

Affidavit of Trina Jackson sworn April 18, 2016 (“Jackson April 2016 Affidavit”), paras 9, 10 and Exhibits “D” and “E”.

Ryan June 2016 Transcript, 77:10-13. **[TAB 15]**

48. The funds from the sale of the Ryan Sturgeon 77 Acres and the Cold Lake Sturgeon 78 Acres to third parties were applied by Servus Credit Union to pay down the Servus Loans, which were guaranteed by Ryan and the Ryan Companies.

Ryan April 2016 Affidavit at para 25.

Ryan February 2017 Transcript, 176:10-11; 189:25-27. **[TAB 17]**

49. As noted above, Ryan deposed in October 2016 that Mrs. Ryan received an offer from Neil and Stephanie Young dated August 22, 2016 to purchase the Ryan Bonnyville 154 Acres for

\$395,000. The transfer of land to Neil Young was registered on December 1 and payments totaling \$383,155.62 were made from the sale proceeds to the Servus Loans.

Affidavit of Charles Ryan sworn October 17, 2016 ("Ryan October 2016 Affidavit"), para 9 and Exhibit "8"

Ryan February 2017 Transcript, 140:25 – 141:13. **[TAB 17]**

Undertaking 23 of Charles Ryan from Questioning on Affidavit held February 21 and 23, 2017. **[TAB 18]**

50. In January 2017 Ryan further deposed that the Cold Lake 160 Acres, Cold Lake NW Quarter and Cold Lake SE Quarter were listed for sale in November 2016 at \$900,000, \$900,000 and \$1,100,000 respectively for a total of \$2,900,000. Although each of the listing agreements was made between Mrs. Ryan and Sterling Real Estate, Ryan testified that the properties were listed for sale on Kijiji and he did not know if they were listed on the Sterling website as well.

Affidavit of Charles Ryan sworn January 20, 2017 ("Ryan January 2017 Affidavit"), paras 7, 8, 12 and Exhibits "4" and "10".

Ryan February 2017 Transcript, 134:22-25. **[TAB 17]**

Transcript, Questioning on Undertakings of Charles Ryan held May 15, 2017 ("Ryan May 2017 Transcript"), 329: 10 – 330: 1; 331:4-8. **[TAB 19]**

51. In January 2017, Brenmar Holdings Ltd. offered to purchase Cold Lake 160 Acres, Cold Lake NW Quarter and Cold Lake SE Quarter for a total of \$1,725,000 plus GST (the "Brenmar Sale"). Net proceeds of the Brenmar Sale totaling \$935,471.06 (payments of \$89,276.00 and \$846,195.06) were applied to the Servus Loans on April 5, 2017.

Undertaking 23 from Questioning on Affidavit of Charles Ryan held February 21 and 23, 2017. **[TAB 18]**

Ryan February 2017 Transcript, 360:19 – 361:11. **[TAB 17]**

52. The Servus Loans remain registered on the home property in Sturgeon County occupied by Ryan and his wife (the "Ryan Home Property") and held in Mrs. Ryan's name and had a current outstanding balance of \$826,496.84 as at April 5, 2017. In addition, the Ryan Home Property has registered against it by Sturgeon County notice of outstanding tax arrears and penalties.

Hemmaway Affidavit, paras 1, 2 and Exhibits "A", "B".

Affidavit of Charles Ryan sworn April 28, 2016 ("Ryan April 2016 Affidavit"), Exhibit "20".

Ryan February 2017 Transcript, 152:25 – 153:10. **[TAB 17]**

H. The Ryan Companies have no exigible assets bearing equity and do not file tax returns

53. Ryan has admitted that there is no equity in the Transferred CLE Lands, all but one of which have been now sold, and that the Ryan Companies have cross-guaranteed CLE's and Ryan's debts under the Servus Loans.

Ryan July 2016 Transcript, 54:12-18. [TAB 12]

54. Ryan also admitted that Mrs. Ryan stopped making mortgage payments toward the Servus Loans from December 3, 2016 to sometime after April 5, 2017. He has failed to answer an Undertaking providing evidence of payments since December 3, 2016 apart from the proceeds of the Brenmar Sale.

Ryan January 2016 Affidavit, para 4.

Undertaking 23 from Ryan February 2017 Questioning on Affidavit. [TAB 18]

Ryan February 2017 Transcript, 168:18 – 170:13. [TAB 17]

Ryan May 2017 Transcript, 361:12 – 363:3. [TAB 19]

55. Moreover, the lands held by CLE and its wholly owned subsidiary, Alberta Estates Inc., are situated in northeastern Alberta where, according to Ryan, the real estate and other markets are depressed. In his words, "there's no sales of any other property in the area."

Ryan February 2017 Transcript, 141:14 – 142:22. [TAB 19]

56. By Ryan's own evidence and that of Muller and Richard, neither NAE nor MRR held or were intended to hold any assets. In fact:

- a. NAE was operated by Ryan, Muller and Richard to perform development work for properties owned by CLE. It was set up for liability reasons including to keep construction activities separate from land ownership. Muller sold his shares in NAE to Ryan for nominal consideration "because there was no value in that company."

Ryan July 2016 Transcript, 58:6 -25. [TAB 12]

Richard 2016 Transcript, 56:15-27, 57:8-20, 58:1-15. [TAB 8]

Muller 2016 Transcript, 72:12-16. **[TAB 7]**

- b. MRR was also created by Ryan, Muller and Richard and operated as the management arm for properties that CLE owned and NAE developed. Similarly, Richard conceded that when he sold his shares in MRR, they had no value.

Richard 2016 Transcript at 59:15-27; 60:1-16; 61:1-13; 74:23-27; 75:1-8. **[TAB 8]**

Ryan July 2016 Transcript, 88:23-89:3. **[TAB 12]**

57. Ryan has further admitted that while CLE, NAE and MRR have been under his sole direction and ownership, none of the Ryan Companies has filed tax returns or had financial statements prepared since 2013.

Exhibit 17, Ryan February 2017 Questioning on Affidavit, UT 24. **[TAB 17]**

Undertaking 24, Ryan February 2017 Questioning on Affidavit (CLE 2013 Tax Return). **[TAB 20]**

Exhibit 4, Ryan February 2017 Questioning on Affidavit (Letter, enclosed undertaking answers). **[TAB 21]**

58. In the last tax return it filed in 2013, CLE reported only \$46,836 of taxable income.

Ryan May 2017 Transcript, 363:25 – 364:10. **[TAB 19]**

59. In CLE's 2013 financial statements the company reported the following assets as at December 31, 2013:

- a. \$15,205,561 in assets that includes:
 - i. \$4,000,000 due within one year under the Memorandum Charging Lands;
 - ii. \$2,000,000 due under the VTB Mortgage;
 - iii. \$5,708,158 in land holdings;
 - iv. \$1,380,794 in farm machinery and buildings; and
- b. Cash in the bank of \$23 as at December 31, 2013.

CLE Financial Statement dated December 31, 2013 produced in Ryan Undertakings. **[TAB 22]**

60. In its Statement of Claim Prestigious disputes liability for the \$6,000,000 in mortgages recorded as assets on CLE's books and in its Counterclaim CLE alleges it has not received those funds to date.

61. Ryan has conceded that CLE only owns two parcels of farm land at the moment. Even though Ryan deposed in August 2016 that their combined value as development land was \$1,005,000, their combined tax assessment value is \$28,000 and together they bear registered encumbrances of \$240,143.47 as at April 2017.

UT 26 in Exhibit 17 to Ryan May 2017 Questioning on Undertakings (Undertaking answers). [TAB 23]

Undertaking 35 from Ryan February 2017 Questioning on Affidavit. [TAB 24]

Ryan August 2016 Affidavit, para 9.

62. NAE was a borrower and is liable to Servus Credit Union for the Servus Loans, along with CLE, MRR and Ryan. In addition, Ryan admits that Muller claims an outstanding debt payable by NAE, which claim Ryan disputes.

Ryan August 2017 Affidavit, paras 13, 14, 15.

63. Ryan deposed that NAE reported an intercompany receivable from Cold Lake Industrial Park LP ("CLIP LP") of \$1,844,879 and CLE holds a mortgage registered for \$4,285,020 with an outstanding balance of \$2,785,106 on lands held for development by CLIP LP. However, there have been no payments made by CLIP LP since 2014 and, as noted above, by Ryan's own evidence the real estate and other markets in northern Alberta are depressed and the development work for which NAE has a claim against CLIP LP has not been done.

Ryan August 2016 Affidavit, paras 11.

Ryan February 2017 Transcript, 291:20 – 294:11. [TAB 17]

Ryan May 2017 Transcript, 141:14 – 142:22. [TAB 19]

I. Ryan has no exigible assets or disclosed income and does not file income tax returns

64. As noted above, the Ryans' personal residence is subject to outstanding tax arrears and penalties. In addition, it is now the only land holding registered as security against the outstanding balance on the Servus Loans.

Hemmaway Affidavit, paras 2, 3 and Exhibits "A" and "B".

Ryan January 2017 Affidavit, Exhibit "2".

65. Ryan admits he is not presently an employee of any business. Yet he has repeatedly refused to answer questions about his personal income or financial well-being, including whether he has a source of personal income at the moment. Nor has he put into evidence any record of real property or other assets held in his name since the transfer of lands to Mrs. Ryan in December 2015.

Ryan February 2017 Transcript, 243:5 – 26. [TAB 17]

Ryan May 2017 Transcript, 388:20 – 389:9. [TAB 19]

66. Neither Ryan nor Mrs. Ryan have filed personal income tax returns since 2011. Ryan reported net income of \$65,000 in his 2011 tax return and Mrs. Ryan reported \$49,000 net income at that time.

Undertaking 41 from Ryan February 2017 Questioning on Affidavit. [TAB 25]

Ryan May 2017 Transcript, 387:17 – 388:11-13. [TAB 19]

J. Extant litigation involving Ryan and the Ryan Companies

67. Ryan has been or is a Defendant in multiple litigation claims, including the following recent actions:

- a. Action No. 1501 09276 as Defendant to a foreclosure action brought by Plaintiff Liberty Mortgage Service Creation Asset Management (the "Liberty Mortgage Action"), from which Ryan, Richard and MRR were released by a Discontinuance of Action filed November 21, 2016;
- b. Action Nos. 1210 00950 and 1412 00118 as Defendant to an action for damages brought by the Plaintiffs Markus and Adelle Abt (the "Abt Action");
- c. Action No. 1503 10987 as Defendant to a foreclosure action brought by Plaintiff Tri City Capital Corp. and Tri City Mortgage Fund (the "First Tri City Foreclosure Action");

- d. Action No. 1503 11195 as Defendant to a foreclosure action brought by Plaintiff Tri City Capital Corp. (the “Second Tri City Foreclosure Action”);
- e. Action No. 1503 11196 as Defendant to a foreclosure action brought by Plaintiff Tri City Capital Corp. and Tri City Mortgage Fund (the “Third Tri City Foreclosure Action”); and
- f. Action No. 1303 13921 as Defendant to an action brought by the Plaintiff Viet Tran Professional Corporation and Viet Tran (the “Tran Action”).

Jackson December 2015 Affidavit at para . 4 and Exhibit “D”.

Exhibit 17 to Ryan May Questioning on Undertakings: Undertaking 27. **[TAB 23]**

68. CLE, NAE and MRR are also Defendants in the Abt Actions, in which a decision of the trial judge is pending following trial dates in June and October 2016 and January or February 2017. In addition, NAE is a Defendant in the Tran Action and MRR is a Defendant in the Liberty Mortgage Action and in the Second and Third Tri City Foreclosure Actions.

Jackson December 2015 Affidavit at para . 4 and Exhibits “D”, “E”, “F” and “G”.

Ryan May 2017 Transcript, 389:14 – 390:27. **[TAB 19]**

K. Registered debts of Ryan and the Ryan Companies

69. Ryan is a registered debtor for the following security registrations:

- a. A Security Agreement in favour of Servus Credit Union for all present and after acquired property registered on June 20, 2011 as Personal Property Registration 11062032103;
- b. A Security Agreement in favour of Travelers Financial Corporation for a 1981 Piper Navajo Chieftain registered on June 3, 2013, as Personal Property Registration 13060327878; and
- c. A Security Agreement in favour of Viet Tran for a 1981 Piper Navajo aircraft, serial number 31852008 on March 5, 2014 as Personal Property Registration 11062032103.

Jackson December 2015 Affidavit at para 5 and Exhibit “L”.

70. CLE is a registered debtor for the following security registrations:

- a. A Security Agreement in favour of Servus Credit Union for all present and after acquired property registered on April 22, 2009 as Personal Property Registration 09042212288;
- b. A Security Agreement in favour of Tri City Capital Corp. for all present and after acquired property registered on January 13, 2014 as Personal Property Registration 14011316439;
- c. A Security Agreement in favour of Caterpillar Financial Services Limited for a Caterpillar 262D Skid Steer registered on June 10, 2014 as Personal Property Registration 14061045234;
- d. A Security Agreement in favour of Gould Ranching Ltd. for a 2016 Wilson PSDCL – 402 vehicle, registered on March 16, 2016 as Personal Property Registration 16031609969; and
- e. A Security Agreement in favour of Jordan Kane Edward Ryan for a 1981 Piper Navajo Chieftain aircraft, serial number 318152008 registered on March 16, 2016 as Personal Property Registration 16031610094.

Jackson December 2015 Affidavit at para 5 and Exhibit "M".

71. Ryan conceded that no payments have been made toward CLE's debt to Tri City and that outstanding balances remain on the debts to Caterpillar, Gould Ranching and Jordan Kane Edward Ryan. Moreover, Ryan has repeatedly refused to provide a payout statement for the Tri City mortgage.

Exhibit 17 to May Questioning: Undertaking 38. **[TAB 23]**

Ryan May 2017 Transcript, 367:18-20; 380:9-27; 381:7-16; 382:27 – 383:6; 386:19 – 387:6. **[TAB 19]**

72. NAE is a registered debtor for the following security registrations:

- a. A Security Agreement in favour of Servus Credit Union Ltd. for all present and after acquired property registered on October 6, 2006, as Personal Property Registration 06100629689; and
- b. A Security Agreement in favour of Travelers Financial Corporation for a 1981 Piper Navajo Chieftain registered on June 3, 2013, as Personal Property Registration 13060327878.

Jackson December 2015 Affidavit at para 5 and Exhibit "N".

73. MRR is a registered debtor for the following security registrations:

- a. A Security Agreement in favour of Servus Credit Union Ltd. for all present and after acquired property registered on April 5, 2103, as Personal Property Registration 13040532639.

Jackson December 2015 Affidavit at para . 5 and Exhibit "O".

III. **ISSUES**

74. The issue before this Honourable Court is whether the Ryan Companies and/or Ryan should be ordered to post security for costs in the Consolidated Action.

IV. **LAW**

75. The test for awarding security for costs against the Ryan Corporations is whether "it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant".

Business Corporations Act, RSA 2000, c B-9, s. 254. [TAB 26]

76. Rule 4.22 of the *Alberta Rules of Court* provides a generalized power to order security for costs and applies to consideration of the Application against Ryan personally. Rule 4.22 allows the Court to consider:

- (a) The likelihood that the applicant will be able to enforce an order or judgment against assets in Alberta;
- (b) The respondent's ability to pay the costs award;
- (c) The merits of the action;
- (d) Whether an order for security for costs would unduly prejudice the respondent's ability to continue its action; and
- (e) Any other matter the Court considers appropriate.

Alberta Rules of Court, Alta Reg 124/2010, Rule 4.22 [Rules of Court] [TAB 27].

V. **ARGUMENT**

A. **The law regarding security for costs**

77. The purpose of a security for costs order is to provide a party security that it will have some means of collecting costs from another party if entitled to do so at the litigation's conclusion. The rule protects a party against an action by another – such as CLE, the other Ryan Companies and Ryan – who has “nothing to lose”.

Sinha v Sinha, 1998 ABQB 1041 at paras 4-5. [TAB 28]

The Honourable William A Stevenson and The Honourable Jean E Côté, *Alberta Civil Procedure Handbook* (Edmonton, Alberta: Juriliber), 2016 at 4-18. [TAB 29]

78. Where a party does not have sufficient assets in the jurisdiction or where the value of its assets would be insufficient to satisfy a judgment or costs award following litigation, security for costs will be appropriate. Ordering the payment of security is aimed at ensuring “that parties do not ‘gamble’ with litigation while they are exposed to relatively little risk.”

Fairways Project Ltd v Melander, 2011 ABQB 6 at paras 29-33. [TAB 30]

79. Orders for security for costs are discretionary.

Amex Electrical Ltd v 726934 Alberta Ltd, 2014 ABQB 66 (“Amex Electrical”). [TAB 31]

Provalcid Inc v Graff, 2014 ABQB 453 (“Provalcid”). [TAB 32]

80. In the *Amex Electrical* case, Wakeling J. (as he then was) clarified the law regarding security for costs orders sought against a corporation.

Amex Electrical, supra. [TAB 31]

81. Generally, where the respondent to a security for costs application is a corporation the governing rule is set out in s. 254 of the *Business Corporations Act*.

82. Security for costs is appropriate where the applicant can establish that it is more likely than not that the respondent corporation will be unable to pay costs if the applicant is successful. The evidentiary burden then shifts to the respondent corporation to show why the Court should not exercise its discretion to order security for costs against it.

Amex Electrical, supra at paras 6, 58. [TAB 31]

Provalcid, supra at paras 87, 89. [TAB 32]

83. There is no evidence before the Court that any of the Ryan Companies could pay a costs award if Prestigious is successful at trial. Nor has Ryan sworn any evidence of prejudice or impecuniosity sufficient to warrant a consideration of special circumstances.

84. In a security for costs application, the costs of the entire action are relevant to the determination of the respondent’s ability to pay costs.

Geophysical Service, supra at para 29. [TAB 33]

85. The Court in *Amex Electrical* provided a list of factors that may increase the likelihood of the Court granting a security for costs order including where:

- a. The respondent corporation has no assets in Alberta;
- b. The respondent corporation’s assets in Alberta are of a nature or value such that there is a substantial risk that the applicant may not be able to recover any cost award likely to be granted to it;

- c. The likelihood the respondent will receive judgment against the applicant is low;
- d. A security for costs order will not prevent the respondent from prosecuting its action;
- e. The applicant is not seeking costs for steps already taken; and,
- f. The applicability of a counterclaim.

Amex Electrical, supra at paras 74-75. [TAB 31]

Provalcid, supra at paras 90-91. [TAB 32]

86. These factors, or most of them, are clearly engaged with respect to the Ryan Companies on this application. For example:

- a. None of the Ryan Companies have produced evidence of having any assets;
- b. By Ryan's evidence and as noted in the Personal Property Registry searches referenced previously, the Ryan Companies and Ryan personally have guaranteed a loan from Servus Credit Union that originally stood at \$3,000,000.00 and are liable to Servus for all present and after acquired property;
- c. Muller and Richard have given evidence that MRR & NAE have no value;
- d. Ryan has tendered no evidence that he or the Ryan Companies have sufficient assets in their respective possession to pay a costs award in favour of Prestigious or to contradict the evidence of Muller and Richard;
- e. The likelihood of CLE obtaining a judgment against Prestigious in the circumstances is low; and
- f. At the time that Prestigious brought its security for costs application the majority of the costs sought were for steps not yet taken.

87. Where the Court has concluded on a balance of probabilities that a respondent will be unable to pay a costs award, the Court should be reluctant to exercise its discretion to deny such an order "unless other factors clearly indicate that it would be unfair to impose an obligation on the respondent to furnish security".

Amex Electrical, supra at para 73. [TAB 31]

88. Ryan has tendered no evidence of unfairness to the Ryan Companies should any one or more of them be directed to post security.

89. Many of the factors in *Amex Electrical* are also to be considered under Rule 4.22. Accordingly, the jurisprudence that has developed under Rule 4.22 remains relevant to this analysis, and also fully applies to Ryan in his personal capacity.

Provalcid, supra at para 93. [TAB 32]

B. The Respondents lack exigible, readily realizable assets in Alberta

90. Ryan, in a personal capacity and on behalf of CLE, has transferred exigible assets away from himself and CLE, while actively concealing that fact from the parties and the Court. This has left both Ryan and CLE in a position where they lack existing exigible assets in Alberta that could be used to pay an order of costs.

April 2016 Jackson Affidavit at paras 7-15.

91. Despite being an individually named Respondent on Prestigious' security for costs application, Ryan has not disclosed in his various affidavits and oral evidence any other land holdings or assets held in his name since he transferred the lands formerly held in his name to Mrs. Ryan in late December 2015. In short, he has not discharged the burden of proving he could satisfy a costs award.

92. Furthermore, if Ryan or CLE did have assets available to satisfy a costs award, they must show that the assets are "real, substantial and sufficiently liquid so as to allow the defendant ready access thereto in the event that costs are awarded". To be "exigible" an asset must be readily realizable or sufficiently liquid. Accounts receivable do not count.

Tracer Industries Inc v Shell Canada Ltd, 2004 ABQB 484 ("*Tracer Industries*") at paras 23, 26, 29. [TAB 34]

Commercial Construction Supply Ltd v Ghost Rider Farms Inc, 2016 ABQB 166 ("*Commercial Construction Supply*") at paras 28, 35. [TAB 35]

93. Ryan has not tendered any such evidence apart from the evidence in his January 18, 2016 Affidavit, which fails to mention that all of the lands referenced in that affidavit were sold to third parties or transferred to Mrs. Ryan a month earlier. Neither Ryan nor the Ryan Companies have given evidence of sufficient, or any, assets to pay a substantial, or any, costs award.

94. Moreover, Muller and Richard previously testified to the fact that their shares in NAE and MRR had no value. It is not unreasonable for this Court to draw the inference in the absence of sworn evidence from Ryan that if NAE's and MRR's shares have no value and both companies, together with Ryan personally and CLE, are liable for considerable liabilities to Servus Credit Union – as Ryan has testified – the likelihood of any of the Respondents being able to pay a costs award is very low.

Richard Questioning Transcript 74:23-27, 75:1-8. **[TAB 8]**

Muller Questioning Transcript 72:12-16. **[TAB 7]**

C. Prestigious will be unable to enforce judgment against Ryan and the Ryan Companies

95. This Honourable Court has held that where a plaintiff is a corporation the court should be mindful “of the potential for injustice to a defendant where the corporation is a mere shell without financial substance”.

Terra Energy v Kilborn Engineering, 1995 CarswellAlta 490 (QB) (“*Terra Energy*”) at para 60, aff'd 1995 CarswellAlta 491 (CA). **[TAB 36]**

96. Similarly, the Court has noted that an impecunious company can be a “one-way valve”, allowing money to flow out to shareholders if the suit is successful but preventing money from flowing in the opposite direction.

Amex Electrical at para 74. **[TAB 31]**

97. Moreover, the Court on an application for security for costs must consider whether there is a “real risk of an inability to pay substantial costs after protracted and expensive litigation.” This is clearly the case with the Ryan Companies.

Autoweld Systems Ltd v CRC-Evans Pipeline International, Inc, 2011 ABQB 265 (“*Autoweld*”) at para 21. [TAB 37]

98. A “rapid reduction” in the assets of a party caused merely by legal expenses is a “cause of concern”. Given the multiple pending litigation claims in which Ryan and the Ryan Companies are involved, the Court may reasonably infer serious cause for concern in this case.

Geophysical Service, supra at paras 98-100. [TAB 33]

99. To stave off a security for costs order, the assets claimed by the responding parties must be exigible. Accounts receivable – such as the CLIP LP and CLE liabilities to NAE to which Ryan deposited in the August 2016 Affidavit – are not sufficiently liquid or readily realizable. By Ryan’s evidence, they are unlikely to be realized in the foreseeable future, if at all. Similarly, there is no evidence that Ryan, as the sole shareholder of the Ryan Companies, is in any position to “backstop” those companies’ liabilities if so ordered by the Court.

Commercial Construction Supply, supra at paras 28 and 35. [TAB 35]

100. In fact, neither Ryan nor the Ryan Companies have tendered evidence showing the Respondents’ ability to pay a costs award. Rather, there is a preponderance of evidence to the contrary.

Affidavit of Charles Ryan sworn and filed April 28, 2016 (“Second Ryan Affidavit”) at paras 28-29.

D. The likelihood of CLE obtaining judgment against Prestigious is low

101. This Honourable Court has held that “[i]t is neither possible, nor desirable, for the Court at this stage to determine which party’s case is stronger”. Accordingly, “a reasonably

meritorious defence, when considered with other factors set out in Rule 4.22, is sufficient to weigh in favour of granting security for costs.”

Attila Dogan Construction & Installation Co v AMEC Americas Ltd, 2011 ABQB 175 (“*Attila Dogan*”) at para 17. [TAB 38]

102. The Ryan Companies and Ryan have not pleaded nor does the evidence suggest they will establish a reasonably meritorious defence to Prestigious’ claim.

103. The analysis requires a “balanced view of the entire action as it then appears”. Although Prestigious must show a “reasonably arguable case” it need not be “ironclad”. Prestigious has met this onus.

Autoweld Systems, *supra* at para 22. [TAB 37]

Sprung Enviroponics Ltd v Calgary (City), 1990 AR 131, 1990 CarswellAlta 23 (CA) at para 7. [TAB 39]

104. Similarly, Prestigious has demonstrated a meritorious defence to CLE’s Counterclaim.

E. Ryan and the Ryan Companies have not shown evidence of undue prejudice

105. A party who wishes to argue that posting security for costs will unduly prejudice its ability to continue its action must present evidence that it does not have access to the funds needed to furnish security and prosecute the action.

Autoweld Systems, *supra* at para 23. [TAB 37]

106. CLE has not tendered any evidence that they are unable to raise funds to continue its Counterclaim and the case law is clear: such evidence is required.

Commercial Construction Supply, *supra* at paras 47-49. [TAB 35]

107. Where a claim and counterclaim involve interrelated subject matter this may in certain circumstances be a relevant factor in refusing security. The law suggests that courts should not indirectly require a defendant to give security for costs as a condition of continuing to defend the action.

Attila Dogan, *supra* at para 20. [TAB 38]

108. That being said, the mere existence of a counterclaim is not sufficient to bar the relief sought. Again, there is no indication in the evidence before this Court that posting security for costs would prejudice CLE's ability to defend Prestigious' claim or prosecute its Counterclaim in the Consolidated Action.

Tracer Industries, supra at paras 32-35. [TAB 34]

109. Accordingly, undue prejudice warranting a dismissal of Prestigious' security for costs application has not been established.

F. The Pre Judgment Attachment Order is not a substitute for security for costs

110. On April 18, 2016 Prestigious demonstrated to the Court's satisfaction that the transfers of the Ryan Lands and the CLE Lands to Mrs. Ryan give rise to sufficient concern to warrant the granting of the Pre Judgment Attachment Order on an ex parte basis.

111. Attachment orders are an extraordinary remedy that involve the exercise of discretion and, as here, may involve consideration of whether transactions are out of the ordinary course of business, whether assets have disappeared or been sold to non-arms' length parties for less than market value and whether there is an abundance of exigible assets against which a plaintiff could recover if ultimately successful against a given defendant.

Qualex Landmark Investments v Soroya, 2009 ABQB 689 ("*Qualex*") at paras 8-10. [TAB 40]

112. In this case the grounds included the transfers of the Ryan Lands and the CLE Lands – being the vast majority if not all of the Respondents' exigible assets – to Mrs. Ryan for nominal cash and assumption of mortgages only, together with Ryan's failure to voluntarily disclose that such transfers had been effected when he swore an affidavit attesting to the value of assets held by the Respondents in response to Prestigious.

113. These facts are also grounds for requiring the Respondents to post security for costs, particularly given Ryan's own evidence that the CLE Lands and the Ryan Lands have no equity in any event. Moreover, all but one of the lands to which the Pre Judgment Attachment Order applied has been sold and proceeds applied to the Servus Loans.

114. To obtain pre judgment relief on April 18, 2016, Prestigious had to satisfy the Court that there were reasonable grounds to believe that Ryan and CLE were dealing with their exigible property in a manner that would hinder Prestigious' enforcement of a judgment if successful at trial and for a purpose other than to meet reasonable and ordinary business or living expenses. It was not necessary for Prestigious to demonstrate an improper motive on the part of CLE or Ryan to obtain the Pre Judgment Attachment Order although the existence of one may favour the granting of such relief.

Qualex, supra at paras 8-10, 16-17. [TAB 40]

115. In the same way that Prestigious met the threshold test to obtain the Pre Judgment Attachment Order, Prestigious has demonstrated its entitlement to an Order directing the Ryan Companies and/or Ryan to post security for costs.

116. Moreover, the Pre Judgment Attachment Order is not a substitute for the posting of security to cover an award of costs granted in favour of Prestigious. Prestigious has met its burden demonstrating the need for the Court to exercise its discretion to direct the Respondents to post security at this stage.

117. Absent the Order sought, CLE in particular and to a lesser degree NAE, MRR and Ryan are at liberty to gamble at Prestigious' expense while having nothing to lose and no means of paying costs to Prestigious at the conclusion of this litigation.

118. Further, it is submitted that the Misrepresentation by Ryan to the Court in the January 2016 Ryan Affidavit and Ryan's conduct in this litigation are of sufficient concern to warrant consideration by this Honourable Court under Rule 4.22(e), which empowers the Court to take into account any matter it considers appropriate when hearing an application for security for costs.

G. The Quantum of Security Sought

119. The determination of the quantum of security for costs is discretionary and must be performed on a case-by-case basis.

Beacon Hill Service (2000) Ltd v Esso Petroleum Canada, 2000 ABCA 326 at para 10. **[TAB 41]**

120. When Prestigious filed its application for security for costs on December 1, 2015 it included a draft Bill of Costs totaling \$217,175.00 for what it anticipated would be its taxable costs in the Prestigious Action and the CLE Action (insofar as this application was filed prior to the Consolidation Order being granted) on a solicitor-and-his/her-own-client basis, plus reasonable disbursements.

Security for Costs Application, Schedule "A".

121. At the time Prestigious filed its application for security it sought an order requiring that the Respondents post security only for steps anticipated after the filing of that application. As a result of the Respondents' conduct in filing a late affidavit, this application was not heard when originally scheduled in August 2016. Prestigious submits that it should not be prejudiced by an Order that rewards the Respondents for such conduct.

Chic-Hog-O's Social Roast House v Virvilis Properties Inc, 2016 ABQB 37 at para 17. **[TAB 42]**

122. On this basis Prestigious respectfully submits that a reasonable sum for security for costs in these proceedings is \$217,175.00 or, alternatively, such other sum as this Honourable Court deems appropriate.

123. Alberta courts have directed the posting of security for costs on a full indemnity basis where the applicant was entitled to that level of costs by statute – such as the *Business Corporations Act* with respect to the Ryan Companies – or where costs are likely to be awarded on an enhanced scale, such as where fraud, alleged here, could be made out.

Prairie Land Corp v Concert Properties Ltd, 2004 ABQB 726 at para 13. **[TAB 43]**

Canada Deposit Insurance v Canadian Commercial Bank, 1989 ABCA 150 at paras 18-20. **[TAB 44]**

124. If Prestigious ultimately succeeds in establishing its claims against the Respondents, including the allegations of fraudulent misrepresentation, and in defending CLE's Counterclaim, solicitor-client costs are appropriate in all of the circumstances.

125. Accordingly, it is just and reasonable that the Respondents be directed, jointly and severally, to post security for costs on a solicitor and his/her own client basis, or such other elevated basis as the Court deems appropriate in the circumstances.

126. Further, the conduct of Ryan and the Ryan Companies in the litigation to date warrant the posting of an elevated level of security, in accordance with the discretionary power granted this Honourable Court in Rule 4.22(e).

VI. **RELIEF SOUGHT**

127. Prestigious has met its burden of establishing that Ryan and the Ryan Companies will be unable to pay Prestigious' costs if it is successful after a trial. Specifically, the evidence supports a finding that Ryan and the Ryan Companies:

- a. lack sufficient exigible assets to satisfy a judgment or order for costs against them;
- b. are individuals/companies with no meaningful assets;
- c. has been met with a meritorious defence/offence by Prestigious; and
- d. has not provided evidence that the Order sought would prejudice its ability to pursue its claim or defend the Counterclaim.

128. Accordingly, Prestigious respectfully requests that this Honourable Court exercise its discretion to require Ryan and the Ryan Companies to post security for costs in the amount of \$217,175.00 or such other amount as Prestigious may advise at the hearing of its security for costs application, that such amount be posted by a date certain, and a direction that until such security is posted the Claim of CLE filed in the Cold Lake Estates Action and the Counterclaim filed by CLE in the Consolidated Action shall be struck with costs payable to Prestigious for all steps taken in each Action since their respective commencement dates.

129. Moreover, the quantum proposed is appropriate and conservative in the context of Ryan's and the Ryan Companies' conduct in the litigation to date.

130. Prestigious requests costs of this application as well on a solicitor and his/her own client basis or such other elevated measure as this Honourable Court deems just given the Respondents' conduct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF JUNE, 2017

FIELD LLP

Per: _____
SANDEEP K. DHIR, Q.C.
LINDSEY E. MILLER
SHARON A. ROBERTS
Solicitors for the Applicant, Prestigious Properties Inc.

LIST OF APPENDICES AND AUTHORITIES

1. Contract: Exhibit D-1 to Questioning of Charles Ryan held on July 11, 12 and 14, 2016
2. Statement of Claim filed April 11, 2016
3. Statement of Defence filed May 4, 2016
4. Counterclaim filed May 4, 2016
5. Application for Security for Costs filed December 1, 2015
6. Consolidation Order filed March 16, 2016
7. Excerpts from Questioning Transcript of Matthys Muller held March 2 and 3, 2016
8. Excerpts from Questioning Transcript of Roger Richard held March 1 and 2, 2016
9. Proof of Filing 2010/12/29 excerpted from CLE Minute Book (Exhibit 10 to Questioning on Affidavit of Charles Ryan held February 21 and 23, 2017)
10. Notice of Resignation of Matthys Muller, from Exhibit 10 to Ryan February 2017 Questioning on Affidavit
11. Notice of Resignation of Roger Richard, from Exhibit 10 to Ryan February 2017 Questioning on Affidavit
12. Excerpts from Questioning of Charles Ryan held July 11, 12 and 14, 2016
13. Exhibits for identification F, G, H, I, J, K, L and M marked at the Questioning of Charles Ryan held July 11, 12 and 14, 2016
14. Excerpts from Questioning of Thomas Beyer held January 24-26, 2017
15. Excerpts from Questioning on Affidavit of Charles Ryan held June 9, 2016
16. Ex Parte Pre Judgment Attachment Order
17. Excerpts from Questioning on Affidavit of Charles Ryan held February 21 and 23, 2017
18. Undertaking 23 from Ryan February 2017 Questioning on Affidavit
19. Excerpts from Questioning on Undertakings of Charles Ryan held May 15, 2017

20. Undertaking 24 from Ryan February 2017 Questioning on Affidavit
21. Exhibit 4 (Letter and Undertaking Responses) from Ryan February 2017 Questioning on Affidavit
22. Exhibit 10 (CLE Minute Book) from Ryan February 2017 Questioning on Affidavit
23. Exhibit 17 (Undertaking Responses) from Ryan May 2017 Questioning on Undertakings
24. Exhibit 35 from Ryan February 2017 Questioning on Affidavit
25. Undertaking 41 from Ryan February 2017 Questioning on Affidavit
26. *Business Corporations Act*, RSA 2000, c B-9, section 254
27. *Alberta Rules of Court*, Alta Reg 124/2010, Rule 4.22
28. *Sinha v Sinha*, 1998 ABQB 1041
29. The Honourable William A Stevenson and The Honourable Jean E Côté, *Alberta Civil Procedure Handbook* (Edmonton, Alberta: Juriliber), 2016
30. *Fairways Project Ltd v Melander*, 2011 ABQB 6
31. *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66
32. *Provalcid Inc v Graff*, 2014 ABQB 453
33. *Geophysical Service Incorporated. v Encana Corporation*, 2015 ABQB 196
34. *Tracer Industries Inc v Shell Canada Ltd*, 2004 ABQB 484
35. *Commercial Construction Supply Ltd v Ghost Riders Farm Inc*, 2016 ABQB 166
36. *Terra Energy v Kilborn Engineering*, 1995 CarswellAlta 490 (QB) at para 56, aff'd 1995 CarswellAlta 491 (CA)
37. *Autoweld Systems Ltd v CRC-Evans Pipeline International, Inc*, 2011 ABQB 265
38. *Attila Dogan Construction & Installation Co v AMEC Americas Ltd*, 2011 ABQB 175
39. *Sprung Enviroponics Ltd v Calgary (City)*, 1990 AR 131, 1990 CarswellAlta 23
40. *Qualex Landmark Investments v Soroya*, 2009 ABQB 689

41. *Beacon Hill Service (2000) Ltd v Esso Petroleum Canada*, 2000 ABCA 326
42. *Chic-Hog-O`s Social Roast House v Virvilis Properties Inc*, 2016 ABQB 37
43. *Prairie Land Corp v Concert Properties Ltd*, 2004 ABQB 726
44. *Canada Deposit Insurance v Canadian Commercial Bank*, 1989 ABCA 150