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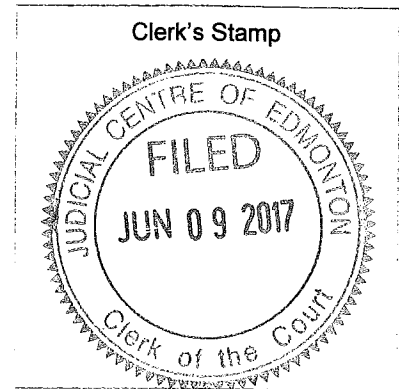
EDMONTON

PLAINTIFFS

PRESTIGIOUS PROPERTIES INC.,

DEFENDANT

COLD LAKE ESTATES INC., NORTHERN ALBERTA ESTATES INC., THE MULLER RYAN RICHARD DEVELOPMENTGROUP INC. also known as the MRR DEVELOPMENT GROUP INC., M DOUBLE M ENGINEERING SERVICES INC., CHARLES RYAN, MATTYS MULLER, ROGER RICHARD and TRI-CITY CAPITAL CORP.



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**BRIEF OF THE DEFENDANTS**

**COLD LAKE ESTATES INC., NORTHERN ALBERTA ESTATES INC., THE MULLER RYAN RICHARD DEVELOPMENTGROUP INC. also known as the MRR DEVELOPMENT GROUP INC. and CHARLES RYAN**

**IN RESPONSE TO PLAINTIFF'S APPLICATION FOR SECURITY FOR COSTS**

**CASE MANAGEMENT HEARING  
20 JUNE 2017  
2:00 p.m.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 78,736/7

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## **PART I INTRODUCTION**

1. This brief is the response of the Defendants COLD LAKE ESTATES INC., NORTHERN ALBERTA ESTATES INC., THE MULLER RYAN RICHARD DEVELOPMENTGROUP INC. and CHARLES RYAN ("these Defendants") to the Plaintiff's brief filed June 2, 2017 with respect to security for costs.

## **PART II RESPONSE TO PLAINTIFF'S ARGUMENTS**

### **A. FACTUAL OBJECTIONS**

2. These Defendants responds to the discussion in the Plaintiff's brief in the following sections of that Brief

- a. **"C. Facts Supporting Prestigious' Claim" pages 6-11**

The strength of these Defendants' defence to Prestigious' claim and these Defendants' counterclaim was dealt with in pages 3-14 of these defendants brief for vacating the Without Notice Prejudgment Attachment Order filed June 5, 2017, and are incorporated here by reference.

The fact that Master Schlosser, in dismissing these Defendants' application for summary dismissal, stated that "this result is the nearest of misses" speaks to the strength of these Defendants' position particularly as Master Schlosser had the benefit of a special chambers application on this point and the ability to review the briefs filed by the parties while he took the matter under consideration before rendering his reserved decision some 2½ months after the application was heard.

- b. **"E. The attempt to mislead the Court " pages 12-14**

These Defendants response to these allegations was dealt with in paras 35-36 of these Defendants' brief for vacating the Without Notice Prejudgment Attachment Order filed June 5, 2017 and are incorporated here by reference

It is submitted there was no attempt to mislead the court as alleged, and that the January 2016 Ryan affidavit, read in its entirety, is not intended to mislead the court, as alleged.

**c. "F. The August 2016 affidavit an adjournment of this application " paras 3, 41-45**

These Defendants' response to these allegations was dealt with in para 24-25 of these Defendants' brief responding to the Plaintiff's Application for Thrown Away Costs filed June 9, 2017 and are incorporated here by reference

**B. ARGUMENT**

3. The Plaintiff's brief details the case law on security for costs and these Defendants take no issue with it.
4. The most relevant principles gleaned from that case law are the following, as set out in the *Amex Electrical* case by Justice Wakeling:

**a. Factors in Favour of Granting an Application for Security for Costs**

**i. The likelihood the respondent will receive a judgment against the applicant is low**

It is submitted that this factor mitigates against the granting of an application for security for costs.

Given Master Schlosser's statement, in dismissing these Defendants summary dismissal application, that this result was "the nearest of misses", the strength of these Defendants' defence (and likewise the Counterclaim) cannot be stated as being low.

**ii. A security for costs order will not prevent the respondent from prosecuting its action**

It is submitted that this factor also mitigates against the granting of an application for security for costs.

These Defendants' resources have been exhausted as a result of the Plaintiff's failure to honour its commitments under the purchase contract at issue.

These Defendants had expected the Plaintiff to pay the additional \$6 million outstanding under the purchase contract for the lands at issue in this action. The Plaintiff's failure to pay, and the ongoing costs of the litigation now in its third year, has caused a serious drain on their resources to the point they are now without sufficient resources at this time to be able to provide any security if ordered and meet the ongoing expenses of the action.

Another drain on their resources was Canada Revenue Agency's assessment of approximately \$2 million in taxes on the sale to the Plaintiff of the lands at issue in this action, based on an \$8 million transaction.

It would be inequitable and unjust to have a situation where the Plaintiff causes financial strain on these defendants, and then uses that situation to try to create a situation whereby they would not be able to pay security for costs and therefore risk losing their lawsuit, a lawsuit initiated by the Plaintiff. This is particularly so when the Plaintiff's principal expressly threatened to bankrupt these defendants by burying them in litigation.

**Affidavit of Charles Ryan sworn June 9, 2017, para 14**

**iii. The applicant is not seeking security for steps already taken**

It is submitted that this factor also mitigates against the granting of an application for security for costs. The plaintiff is seeking costs for all steps. In awarding security for costs against the Plaintiff, Master Schlosser restricted the award only to steps taken after the date of his decision. It would be unjust to award costs on a different basis here

**iv. The applicant has applied for security for costs order at the earliest opportunity**

It is submitted that this factor also mitigates against the granting of an application for security for costs. This action is now over 2½ years old and is at an advanced stage, with most of the the questioning completed. As noted in para 74 g the Amex case, citing *In re Clough*, "as a general rule, the court will not order

security for costs... when the application is delayed until the expenses of the appeal have been incurred.”

**b. Factors in Favour of Dismissing an Application for Security for Costs**

**i. The applicant failed to apply for security for costs at the earliest opportunity**

The *Amex* case, at para 75 a, cites *Roy v. Edmonton Real Estate Board Cooperative Listing Bureau Limited* for the proposition that “the authorities are clear that a motion for security for costs ought to be made in the early stages of a lawsuit”.

This lawsuit is now over 2 ½ years, and has undergone extensive questionings already.

**ii. The applicant seeks security for costs from steps already taken**

The *Amex* case, at para 75 b, cites *Wall v Wells* for the proposition that “while it is in the discretion of the court to grant ...[security for costs] even when there has been some delay it will never be granted in respect of past costs where there has been substantial accumulations thereof.” This case is now over 2 ½ years old and at an advanced stage.

**iii. The likelihood the respondent will receive judgment against the applicant is high**

Given Master Schlosser’s statement, in dismissing these Defendants summary dismissal application, that this result was “the nearest of misses”, it is a reasonable argument that these Defendants are quite likely to prevail at trial.

**iv. A security for costs order will prevent the respondent from prosecuting its action**

The Plaintiff’s actions have impoverished these Defendants to the extent that they no longer have sufficient resources to enable them to provide any security that may be ordered or to meet the expenses associated with prosecuting the action.

It would be unjust in the extreme to allow the Plaintiff to bury these defendants in litigation to the extent that its actions in

failing to pay for monies owed under the Purchase Contract agreement impoverished these defendants to the extent that their case is lost because they cannot pay security for costs.

The *Amex* case, at para 75 c, states that "unless the respondent's claim is obviously devoid of merit, this factor may be conclusive." It is respectfully submitted that these Defendants case is far from "devoid of merit", especially given Master Schlosser's comment that his dismissal of the summary dismissal application was "the nearest of misses."

**Affidavit of Charles Ryan sworn June 9, 2017, para 14**

- v. **If the applicant has counterclaimed and the issues raised by the counterclaim and the claim are the same or the counterclaim "adds significantly to the action, with the potential to prolong discoveries and trial, this may be a relevant factor in refusing security or in determining the amount"**

The *Amex* case cites, at para 75 (g), *Neck v Taylor*, the proposition that "it would be unfair to burden the respondent with a security for costs order if the applicant's counterclaim presented the same issues. The claim and the counterclaim in these in the *Prestigious* case are basically two sides of the same coin. The *Prestigious* claim is trying to get out of the purchase agreement, and the counterclaim is trying to enforce it.

*Amex Electrical Ltd v. 726934 Alberta Ltd.*, 2014 ABQB 66

**Brief of the Applicant, Prestigious Properties Inc. in Support of an Application for Security for Costs, filed June 2, 2017 at tab 31**

**C. QUANTUM**

5. In awarding security for costs against the Plaintiff, Master Schlosser did so on the basis of a single Column 5, refusing to speculate whether the allegations of fraud against the Defendants would not be proven at trial, therefore entitling them to costs on an elevated scale. In the event that costs are considered by this court, reciprocity would indicate that costs should be awarded on the same scale.

6. It is submitted that there are no circumstances here which justify an award of security for costs on a solicitor and his/her own client basis, or any other elevated basis, as sought by the plaintiff. There is no provision in the purchase contract to allow for solicitor client costs, and it is pure speculation at this point to suggest that the plaintiff will be successful in establishing its claims of fraud or fraudulent misrepresentation which could entitle them to elevated costs.

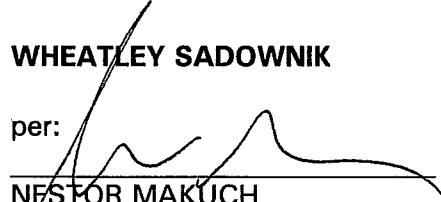
**PART IV SUMMARY OF RELIEF SOUGHT**

7. The Respondents/Defendants respectfully request:
- a) The Plaintiff's application be denied
  - b) Alternatively, any security for costs awarded be on the same basis and scale on a staged basis as those awarded by Master Schlosser against the Plaintiff
  - c) Costs

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at the City of Edmonton, in the Province of Alberta this 9<sup>th</sup> day of June, A.D. 2017.

**WHEATLEY SADOWNIK**

per:

  
NESTOR MAKUCH

Solicitors for the Respondents/Defendants  
COLD LAKE ESTATES INC., NORTHERN  
ALBERTA ESTATES INC., THE MULLER  
RYAN RICHARD DEVELOPMENT  
GROUP INC., and CHARLES RYAN