CITATION: TruGrp Inc. v. Karmina Holdings Inc., 2024 ONSC 2165
COURT FILE NO.: CV-23-81869 (Hamilton)
DATE: 2024 04 15

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: TRUGRP INC., *Plaintiff*

- and -

KARMINA HOLDINGS INC., DR. H.A. DEMIAN MEDICINE PROFESSIONAL CORPORATION, and DOMPOL ENTERPRISES INC., *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: G. Camelino, *for the plaintiff*

Z. Flemming-Giannotti, *for the defendants, Karmina Holdings Inc. and Dr. H.A. Demian Medicine Corporation*

HEARD: April 2, 2024 (by videoconference)

REASONS FOR DECISION
(Motion to Set Aside Vacating Order)

[1] TruGrp Inc. ("TruGrp") moves to set aside my order vacating its two claims for lien and certificate of action, which was made on an *ex parte* motion brought by Karmina Holdings Inc. ("Karmina"). TruGrp is concerned with language in the approved lien security, namely a letter of credit issued by the Bank of Montreal ("BMO"). TruGrp submits that the language is such that it could result in there being no security for its lien, which TruGrp argues is confirmed by an email received from the office of the Accountant of the Superior Court of Justice (the "Accountant"). Alternatively, TruGrp seeks directions from the court to address its concerns.

[2] The motion is opposed by Karmina, the registered owner of the liened premises in Hamilton. The letter of credit was obtained from BMO by Dr. H.A. Demian Medicine Corporation, which holds a second charge against the premises. Karmina's basic position is that TruGrp fundamentally misunderstands how irrevocable letters of credit work and that their use as lien security has been a common practice for decades. Karmina characterizes this motion as being without merit and a waste of judicial resources.

[3] This motion was originally before Nightingale J. in Hamilton. This is a Hamilton lien action, in which the *ex parte* vacating motion was brought in writing in Toronto with leave as

permitted by Section H.4 of the *Notice to Profession and Parties – Toronto Region*. Nightingale J. adjourned the motion to be heard by me, if possible, because it involves my order and given the importance of the disputed issue in construction lien practice and to the practicing bar.

[4] The core dispute on this motion, which did not fully crystallize until oral submissions, is whether the form of letter of credit commonly used as lien security and approved by the court complies with the scheme of the *Construction Act*, RSO 1990, c C.30 and the role of the Accountant as "custodian" as set out in O Reg 191/95 under the *Public Guardian and Trustee Act*, RSO 1990, c P.51.

[5] Specifically, the commonly used form of letter of credit contains a provision permitting the issuing bank to decline renewal of the letter of credit provided that the Accountant is given at least thirty days' notice and is provided with a bank draft for the amount of letter of credit, less any payments already made under it. TruGrp argues that the language of that provision gives rise to a contingency in the security that is at odds with the *Construction Act*. TruGrp further argues that it places duties and obligations on the Accountant that are at odds with the *Public Guardian and Trustee Act*. Karmina disagrees.

[6] Karmina has raised a series of five procedural challenges to this motion. Success on any of them would vitiate the need to address the substantive dispute. Although the challenges are well-articulated and have been persuasively argued, I have determined that each of them fails in the circumstances of this case. Also, given the potential impact of the decision on construction lien practice, my view is that the core dispute should be decided now that it has been raised and argued.

[7] With respect to that central disputed issue, though, I have determined that it cannot be fairly decided without first providing the Accountant and BMO an opportunity to make submissions. They are each affected by the decision, particularly the Accountant. Both must be served with all materials and these reasons. If either takes a position on the motion, then a further hearing before me should be scheduled as promptly as possible for them to make submissions before I render a decision on the merits of the core dispute.

ANALYSIS

[8] TruGrp moves under subrule 37.14(1)(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*"). It provides that a party or other person who is affected by an order obtained on motion without notice may move to set aside or vary the order. Pursuant to subrule 37.14(2), the court may set aside or vary the order on such terms as are just.

[9] Subrule 37.12(2) applies in this lien action by operation of s. 50(2) of the *Construction Act*, which provides that the rules of court apply in a lien action except to the extent that they are inconsistent with the act and the prescribed procedures for lien actions. No inconsistency was argued between subrule 37.12(2) of the *Rules* and the provisions and procedures under the *Construction Act*. I find none.

[10] TruGrp's concern on this motion arises from the expiry and renewal language in the letter of credit issued by BMO, which I approved as security for TruGrp's lien. It is the same language found in the typical form of letter of credit identified in an appendix to *Conduct of Lien, Trust and Adjudication Proceedings*, 2023 edition (Toronto: Thomson Reuters, 2023) (as well as prior editions of that text). BMO's letter of credit states as follows:[†]

> This letter of credit expires at our counters on July 06, 2024 subject to the following:
>
> This letter of credit shall be deemed to be automatically extended without amendment for successive one year periods from the present or any future expiration date, unless at least thirty (30) days prior to any such date we shall notify you in writing, by registered mail or courier, that we elect not to extend this letter of credit for any further period and at the same time forward to you together with such written notice a bank draft in the amount of Six Hundred Seven Thousand One Hundred Sixty-Six and 10/100's Canadian dollars (CAD 607,166.10) less any amount previously paid under this letter of credit, payable to the Accountant, Ontario Superior Court of Justice at Toronto, Ontario or upon our receipt of this original letter of credit accompanied by your written authorization to us to cancel same.

[11] There are three relevant aspects to the above provision: (i) BMO's letter of credit expires on July 6, 2024; (ii) the letter of credit automatically renews for successive one year periods unless BMO elects not to extend the letter of credit; and (iii) BMO may exercise its option not to extend the letter of credit by providing at least thirty days' written notice to the Accountant and providing the Accountant a bank draft for the balance of the security.

[12] TruGrp's position is that communications with the Accountant's office have confirmed that the Accountant will not accept a replacement bank draft sent by BMO without both a court order and compliance with subrule 72.03(2) of the *Rules*. That subrule addresses requirements to pay out money or security held by the Accountant. TruGrp relies specifically on an email from a trust analyst with the Accountant's office referring to subrule 72.03(2) and stating that "to have the Letter Of Credit replaced or released, an Order from the court will have to be obtained".

[13] TruGrp argues that there is a potential gap whereby the letter of credit is not renewed by BMO, but the Accountant will not accept the bank draft as contemplated by the letter of credit, resulting in there being no enforceable security held in court for TruGrp's lien. Since Karmina is currently seeking to sell the liened premises, TruGrp is concerned that it could be left without any security for its lien, contrary to the intent of the *Construction Act.*

Procedural context of motion

[14] As noted, my vacating order was made on a motion brought in writing by Karmina pursuant to s. 44(1) of the *Construction Act*, which provides as follows:

[†] All words are capitalized in the actual letter of credit, but have been reformatted to sentence case in this decision for ease of reading.

Vacating lien by payment into court
Without notice

44 (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $250,000 or 25 per cent of the amount described in clause (c), as security for costs.

[15] The provision contemplates an *ex parte* motion to vacate the registration of a claim for lien and certificate action upon either paying into court the required amount or posting "security" in the required amount. "Security" is not defined in the *Construction Act*. Nevertheless, for decades both lien bonds and letters of credit have been accepted by the court. Notably, both are expressly contemplated by the *Construction Act* as forms of lien security.

[16] Lien bonds are expressly contemplated by virtue of s. 2(20) of O Reg 303/18 under the *Construction Act,* which prescribes a particular form of bond to be posted as lien security under s. 44 (*i.e.,* Form 21). Although the prescribed bond form erroneously refers to the "Accountant of the Ontario Court", which is the former name of the Accountant, the bond is, in substance, an agreement between the principal obtaining the bond and the surety issuing the bond in favour of the Accountant. Specifically, the principal agrees to make payment of the amounts found owing for a lien and costs in a judgment, order or report of the court, subject to any appeal. The surety agrees that, in the event of a payment default by the principal, the surety will pay to the Accountant any deficiency in payment upon written demand of the Accountant without the right to question the merit of the demand and despite any objection by the principal.

[17] Unlike lien bonds, no form is prescribed for a letter of credit as lien security under s. 44. The only prescribed letter of credit in the *Construction Act* is Form 4, which is a letter of credit under s. 22(4) dealing with retaining holdback in a non-cash form. Nevertheless, letters of credit are contemplated as lien security by virtue of s. 44(5.1), which provides conditions for letters of credit used as lien security that contain references to an international commercial convention.

[18] The form of letter of credit most commonly used and approved by the court as lien security is found among the precedents included in *Conduct of Lien, Trust and Adjudication Proceedings*. As already noted, that precedent contains the same language challenged by TruGrp in BMO's letter of credit. I have previously endorsed the use of that form of letter of credit in *Sundance Development Corporation v. Islington Chauncey Residence Corp.*, 2021 ONSC 241.

[19] Once proposed lien security has been approved by the court, an order vacating the lien claimant's claim for lien and, if registered, the related certificate of action is granted. In Toronto

Region (where Karmina's vacating motion was brought with leave), the standard order provides that the registrations are vacated upon the posting of the approved security. That dovetails with s. 44(6) of the *Construction Act*, which provides that a vacating order causes the lien to cease to attach to the premises (or to the holdbacks and other amounts subject to a charge under the *Construction Act* for liens that do not attach to the premises) and instead become a charge upon the amount paid into court or security posted for the lien.

[20] In this case, Karmina moved *ex parte* for an order vacating TruGrp's two claims for lien and certificate of action supported by security in the form of a letter of credit issued by BMO. I rejected the initial form of letter of credit. In my view, it had two problematic provisions: an uncertain requirement for the Accountant to provide the original letter of credit if making any draw request and reference to an international commercial convention without including or appending the text of that convention as required by s. 44(5.1). Neither is material to TruGrp's challenge to the letter of credit on this motion. I point out the rejection because I specifically reviewed the letter of credit at the time.

[21] An amendment to the letter of credit was subsequently submitted removing the terms with which I had concerns. Following that amendment, I was satisfied that the letter of credit accorded with the typical form of letter of credit commonly approved by this court, was sufficient security, and was unconditional. I approved the letter of credit and granted the order on that basis.

[22] Subsequently, Karmina posted the letter of credit with the Accountant and registered an application to delete construction lien to vacate TruGrp's registrations from title to the premises. TruGrp was provided with the motion record, my signed order, and the receipt acknowledgement provided by the Accountant after posting the letter of credit.

[23] Both prior to and subsequent to the vacating motion being brought, TruGrp had challenged the sufficiency of the letter of credit as security under s. 44. After my vacating order was issued and entered, TruGrp's counsel ultimately contacted the Accountant directly. The email response in evidence was provided that the Accountant would require a court order to replace or release the letter of credit. TruGrp argues that the Accountant's response confirms that it will not accept a bank draft from BMO unless a court order is obtained. That led to this motion being brought.

[24] As it stands today, TruGrp's liens attach to BMO's letter of credit posted with the Accountant in accordance with s. 44(6) of the *Construction Act*.

Procedural challenges to motion

[25] Karmina has advanced five procedural challenges to the motion. The first four are set out in Karmina's responding factum and supplementary responding factum. Those were buttressed by an additional challenge raised in oral argument before me. The five challenges are as follows:

(a) the issues on the motion are *res judicata* and the motion is an abuse of process;

(b) TruGrp has put forward no evidence that would probably have changed the result had it been presented to me at first instance;

(c) TruGrp has failed to bring this motion "forthwith" as required in subrule 37.14(1) of the *Rules*, which is prejudicial to Karmina;

(d) granting the proposed relief of setting aside the vacating order and granting the extraordinary relief of reinstating the claims for lien and certificate of action against title to Karmina's property raises serious public policy concerns, since it would create turmoil in the construction bar; and

(e) the disputed issue on this motion meets the requirements for mootness and I should not hear the motion as a result.

[26] With respect to the first challenge, I do not agree that the issues on this motion are *res judicata* or an abuse of process. The case law cited by Karmina does not support finding that TruGrp's challenges are barred. My decision to vacate TruGrp's claims for lien and certificate of action was not a decision following argument by the parties. It was made on an *ex parte* motion brought in writing without any argument. The decision in *1191650 Ontario Limited v. 848835 Ontario Inc.*, 2022 ONSC 6574 (Div Ct), which Karmina cites, is readily distinguishable from this case. The Divisional Court dealt essentially with a collateral attack by the plaintiff lien claimant on an *ex parte* vacating order in the context of a motion by the defendant seeking to have the lien and related judgment declared unenforceable. The plaintiff had not brought a motion to set aside or vary the vacating order, nor had the plaintiff appealed the decision.

[27] In this case, TruGrp's motion is not a collateral attack on my order. TruGrp is moving specifically and directly to challenge my vacating order under subrule 37.14(1)(a) of the *Rules*. In my view, to find that the issues on the vacating motion, which was granted without any argument, are *res judicata* or that the motion is an abuse of process would be wrong in law and inconsistent with the right afforded under subrule 37.14(1)(a) for an affected party or person to move to vary or set aside an *ex parte* order.

[28] With respect to the second challenge, TruGrp has put forward some evidence and argument that may have impacted the result of the vacating motion had it been presented to me at the time. In particular, TruGrp has now tendered evidence on what it argues reflects the Accountant's position on the letter of credit. Karmina submits that I should give the email from the trust analyst in the Accountant's office no weight, since it lacks full context, is ambiguous, and constitutes double hearsay. It is thereby entirely unreliable. Karmina's arguments on why the email is unreliable and inadmissible hearsay are sound. If this motion were based solely on that email, then I would likely agree with Karmina that there is no new admissible or reliable evidence before me that would reasonably change the result.

[29] However, TruGrp has also advanced arguments on inconsistency between the language of the commonly accepted form of letter of credit and both the scheme of the *Construction Act* and the duties and obligations of the Accountant provided in O Reg 191/95 under the *Public Guardian and Trustee Act*. Those arguments were not before me when I decided the vacating motion. Karmina correctly points out that they were not the genesis of this motion. The position on the Accountant's role was only recently raised. In my view, though, that does not matter. The arguments have now been advanced, they do bear on whether I was correct to approve BMO's letter of credit, and they were not before me at the time.

[30] With respect to the third challenge, I am satisfied that this motion was brought in a sufficiently timely fashion in the circumstances of this case. Subrule 37.14(1) of the *Rules* requires that notice of a motion to set aside or vary an order be served "forthwith after the order comes to the person's attention". Karmina argues that the motion record from the vacating motion was provided to TruGrp on August 11, 2023, with my order and the approved security being provided on August 18, 2023. Those dates are supported by Karmina's responding record, which contradicts the assertion by TruGrp's affiant that the motion record was not provided until October 24, 2023. TruGrp provided notice of its intention to bring this motion in late September 2023, following which the motion was not formally brought until November 17, 2023. Karmina submits that there is no reason why this motion could not have been brought sooner.

[31] TruGrp did not move as expeditiously in bringing this motion as it might have done. However, I am mindful that TruGrp also requested that the vacating motion be brought on notice, but Karmina nevertheless proceeded with the motion to vacate on an *ex parte* basis. I note that Karmina did include an email from TruGrp's counsel with his position that the motion should be brought on notice, which was placed both in the text of the supporting affidavit and as an exhibit. However, I cannot now recall if I reviewed and considered it at the time. Importantly, though, TruGrp provided notice of its intention to bring this motion in September 2023, and there is evidence of communications with the Accountant in October 2023. The Accountant's subsequent written position relied on for this motion was provided on October 20, 2023. TruGrp's counsel then communicated with Karmina's counsel about the Accountant's position and, thereafter, sought to agree on dates for the motion before serving materials.

[32] Bringing a motion three months after an order is granted and served may not be "forthwith" in every case. In my view, though, considering the particular circumstances of this case, I am satisfied that TruGrp has brought the motion sufficiently forthwith.

[33] With respect to the fourth challenge, I find that the public policy concerns raised by Karmina are greatly outweighed by the risk that, if TruGrp's is successful in its arguments, the court may have been approving and may be continuing to approve a form of lien security that does not comply with the *Construction Act* and, further, that may impose improper duties and obligations on the Accountant contrary to its statutory role. Simply put, the risk of "turmoil" in the construction bar is not a reason to refrain from considering and deciding whether or not, by approving letters of credit with the impugned language, the court has been acting contrary to the legislation governing lien security and the Accountant.

[34] With respect to the fifth and final challenge, which was not raised until oral argument, I am not satisfied that the test for mootness has been met. In any event, I would find this to be an appropriate case to exercise my discretion to hear the motion.

[35] The doctrine of mootness arises where a decision of the court will have no practical effect on the current rights of the parties because there is no present and live controversy between them on the matter. There is a two-step analysis in assessing mootness. First, there must be a "tangible and concrete dispute" between the parties, since the court does not typically provide opinions in response to hypothetical problems. Second, if there is no live controversy between the parties,

then the court must still decide if it should exercise its discretion to hear the case: *Bowen v. City of Hamilton*, 2022 ONSC 5977 at paras. 13-16.

[36] I am not convinced by Karmina's arguments that there is no live controversy between the parties over the letter of credit. TruGrp's concern that the letter of credit may not be renewed by BMO is certainly hypothetical at present. There is no evidence before me supporting that BMO has expressed any intention that it may not renew the letter of credit or that there is any real probability that BMO will exercise its option not to renew it and send a bank draft to the Accountant. However, the jurisdiction of this court to approve the form of letter of credit and, in particular, whether it is a form of security that complies with s. 44 of the *Construction Act* and is properly approved by the court is, in my view, a tangible and concrete dispute.

[37] Even if I am wrong in that, I am satisfied that I should exercise my discretion to hear the motion. In deciding whether to exercise discretion to hear a moot case, there are three factors to be considered: (i) the ongoing presence of an adversarial context, (ii) the concern for judicial economy, and (iii) the court's traditional role as the adjudicative branch in our political system: *Bowen, supra* at para. 15. In my view, only the second factor favours Karmina. The first and third factors favour TruGrp.

[38] Regarding the first factor, there is an active dispute between TruGrp and Karmina over TruGrp's alleged supply of services and materials. TruGrp is pursuing a lien and contract claim for $485,732.88, which is disputed by Karmina and has been met with a substantial counterclaim in excess of $2.3 million. TruGrp has sought to avail itself of the additional protection of a lien that the *Construction Act* affords to those who provide services and materials to construction projects. Karmina argues that there is no active dispute over entitlement to security for a lien. That is true, but it is not the genuine dispute. Given TruGrp's decision to exercise its statutory lien rights, meaningful security for TruGrp's lien is an important piece of the parties' overall dispute and the adversarial context.

[39] Regarding the second factor, I do have concerns with the use of judicial resources to tackle a challenge to (i) a type of lien security that is expressly acknowledged in the *Construction Act*, and (ii) a form of letter of credit that has been in use for decades. The civil backlog following the COVID-19 pandemic and suspension of court operations in 2020 continues and is very real. There is no actual immediate impact to TruGrp from the motion being decided on the merits. Rather, TruGrp's concern is a future one, which may or may not crystallize.

[40] Regarding the third factor, in my view, the court's role as an adjudicative body includes ensuring that the court is always conducting itself in accordance with the legislated framework of the law. TruGrp's challenge goes directly to the court's adjudicative function of ensuring that the liens of lien claimants are appropriately secured in accordance with the spirit and intent of the *Construction Act*. Although there is no evidence of TruGrp's concerns being imminently realized, the form of letter of credit being challenged is widely used and will continue to be used. I note that, while this decision has remained under reserve, several motions seeking to vacate liens based on letters of credit have been brought in Toronto Region.

[41] To me, it is inconsistent with the court's adjudicative role to turn a blind eye to TruGrp's well-articulated challenge, albeit that it is brought in respect of a long-standing common practice in the construction bar. That there is an element of hypothetical risk to TruGrp and that no such challenge has seemingly ever been brought before is not enough to deny the motion being heard. I share Nightingale J.'s view: the parties' dispute over the sufficiency of the commonly used form of letter of credit is an important issue in both construction lien practice and to the practicing bar. Now that it has been raised with specific arguments on why the letter of credit does not comply with either the *Construction Act* or the *Public Guardian and Trustee Act,* it should be addressed.

[42] For these reasons, I am dismissing Karmina's various procedural challenges and permitting the motion to proceed to a determination on the merits.

Sufficiency of letter of credit

[43] The core dispute therefore remains to be decided, namely whether BMO's letter of credit is sufficient security under s. 44 of the *Construction Act* and whether this court approving it as lien security runs afoul of the Accountant's role as set out in the *Public Guardian and Trustee Act* and its regulation.

[44] Both parties agree that there is no case law addressing sufficiency of the form of letter of credit commonly used as lien security. Only two published cases appear to discuss letters of credit: the decision of Master Polika in *Naylor Group Incorporated v Enfinity Canada EPC Inc*., 2012 ONSC 4365, and my decision in *Sundance Development Corporation, supra*. Both decisions deal with letters of credit that contained references to international commercial conventions. Neither deal with a challenge to the expiry and renewal provisions, so neither case assists with this situation. There does not appear to be any case law addressing why courts have accepted the commonly used form of letter of credit as sufficient security or addressing the statutory arguments advanced by TruGrp. This may well be the first time that these issues have been raised and argued.

[45] TruGrp's position is, essentially, that BMO's letter of credit (and thereby the typical form of letter of credit commonly approved by the court) is an uncertain form of security and is thereby contrary to the scheme of the *Construction Act*. In addition, the requirement in the letter of credit for the Accountant to accept a bank draft is argued to create positive duties and obligations on the Accountant that are contrary to the scope of the Accountant's statutory role, which is limited to being a "custodian" of lien security.

[46] With respect to the *Construction Act,* TruGrp submits that s. 44 is intended to provide consistent and unconditional security for a lien that remains in place until a lien has been finally resolved. An issuing bank has the option not to renew a letter of credit, on terms, but if compliance with those terms is disputed, then a lien claimant may be left with uncertain or no security for its lien. TruGrp submits that, since nothing in the letter of credit requires notice to any party other than the Accountant, a lien claimant could also be entirely unaware of a potential deficiency with the security for its lien.

[47] That uncertainty is argued to be inconsistent with the purpose of s. 44, which TruGrp says is intended to put a lien claimant in the same secured position vis-à-vis lien security as it would

have been prior to the lien being vacated. TruGrp argues that if there is any hypothetical where a form of lien security may be extinguished, then such security should not be approved by the court. The form of security for a lien must be neutral to the lien claimant.

[48] With respect to the role of the Accountant, TruGrp argues that the letter of credit foists duties and obligations on the Accountant that are inconsistent with the Accountant's prescribed statutory role. Although at one time governed by the *Courts of Justice Act, 1984*, SO 1984, c 11, the role and duties of the Accountant are now governed by the *Public Guardian and Trustee Act* and, more particularly, by O Reg 191/95 under that legislation. TruGrp relies on the stated role of the Accountant as a "custodian" in s. 3(7) of O Reg 191/95, which provides as follows:

> (7) The Accountant is the custodian of mortgages, securities, other instruments and other personal property deposited with him or her, but has no other duties or obligations with respect to them.

[49] TruGrp also points to the now-repealed predecessor provision in s. 1(6) of O Reg 295/90 under the *Courts of Justice Act, 1984*. That provision is still cited by the Accountant in its receipt acknowledgment letters sent after lien security has been posted (or at least was cited in the receipt for the letter of credit at issue). It provided as follows:

> (6) The Accountant has no duty or obligation in respect of the instruments deposited […] except as custodian of the instruments, unless an order provides otherwise.

[50] TruGrp submits that the removal of "unless an order provides otherwise" is significant in interpreting the role of the Accountant as custodian of lien security. TruGrp argues that the current provision stipulates that the Accountant has no duties or obligations with respect to lien security that is held in court. It further submits that, properly interpreted, the Accountant's role as "custodian" of lien security, combined with the express provision that the Accountant "has no other duties or obligations with respect to them", supports that the obligations contemplated by the letter of credit are contrary to the Accountant's statutorily prescribed role.

[51] TruGrp submits that the letter of credit, if not renewed in accordance with its terms, would require the Accountant to interpret the letter of credit in deciding if BMO's notice was compliant, review the bank draft to confirm that it is also compliant, and then decide whether to accept or reject the bank draft, which may require the Accountant to engage directly with BMO, Karmina, and/or TruGrp. Those duties and obligations are argued to be at odds with the Accountant being nothing more than a "custodian" of the letter of credit. TruGrp suggests that removal of the "unless an order provides otherwise" language previously found in s. 1(6) of O Reg 295/90 also means that the court can no longer direct the Accountant to assume such duties or obligations.

[52] Karmina disagrees entirely with TruGrp's position. It maintains that my approval of BMO's letter of credit was not contrary to either the *Construction Act* or the *Public Guardian and Trustee Act*. Karmina relies on decades of the court approving the same form of letter of credit as lien security without any issues like the one argued by TruGrp ever arising. Karmina also submits that the word "custodian" should not be interpreted to be a purely passive role as argued by TruGrp. Rather, Karmina submits that I should interpret "custodian" consistent with its ordinary meaning and its use in other contexts, such as schools and office properties, none of which support that the

Accountant would have no responsibility or obligations with respect to the letter of credit beyond merely holding it.

[53] Albeit admittedly in a different context, Karmina cites the decision in *Ontario Society for the Prevention of Cruelty to Animals v. Straub*, 2009 CanLII 25138 (ON SC). The case discusses the meaning of "custodian" in the context of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990 c O.36. In the decision, at paras. 19-21, Jenkins J. discussed the need for a degree of care and control based on dictionary definitions of the word "custodian" and ultimately held that occasionally feeding and watering animals was not sufficient to rise to the level of a "custodian". Karmina submits that the Accountant's role as "custodian" is much the same: it is more than the "inanimate piggy bank" that TruGrp argues the Accountant to be.

[54] Karmina's main argument is straightforward and has been compellingly argued. Karmina does not dispute that the language of s. 3(7) of O Reg 191/95 limits the duties and obligations of the Accountant, but argues that it only excludes duties and obligations "other" than the duties and obligations inherent in being the "custodian" of lien security. Karmina submits that the Accountant is an officer of this court by operation of s. 5(3) of the *Public Guardian and Trustee Act*. This court has approved BMO's letter of credit. The approved letter of credit includes a specific direction that BMO may provide replacement security to the Accountant by way of bank draft. That being the case, the Accountant, who is the custodian of the letter of credit on the terms that have been approved by the court, has no basis to refuse to accept a bank draft from BMO provided that the required notice of at least thirty days has been given.

[55] I have considered the arguments advanced by both TruGrp and Karmina. I have the same concern with both of them: each requires me to interpret the Accountant's role as "custodian" of lien security. Specifically, both arguments require that I consider and decide the extent of any duties and obligations imposed on the Accountant by the terms of the letter of credit and whether any such duties or obligations are consistent with the Accountant's role as prescribed by O Reg 191/95 under the *Public Guardian and Trustee Act*.

[56] The problem I face is that this motion was not brought on notice to the Accountant. Moreover, it was not clear to me until well into the parties' submissions that the Accountant was likely a person affected by the relief sought. The parties' facta do not address the *Public Guardian and Trustee Act* or the role of the Accountant as "custodian". Written materials only addressed the communications between TruGrp's counsel and the Accountant. These now-central arguments on the role of the Accountant also do not appear to have been raised before Nightingale J. They appear to have been raised and argued for the first time in the parties' oral submissions before me.

[57] Since I am being asked to interpret the meaning of "custodian" in s. 3(7) of O Reg 191/95, I do not think that I can fairly do so without first affording the Accountant an opportunity to consider and make submissions on the scope of its role as "custodian" with respect to lien security. In that context, the Accountant may also wish to take a position on the arguments advanced by both TruGrp and Karmina about the interpretation of and weight to be given to the email from the trust analyst in the Accountant's office. Accordingly, the Accountant must be given notice of this motion and afforded an opportunity to provide a position before any decision on the merits is fairly made and rendered.

[58] I also find it appropriate to put BMO on notice of this motion, since the sufficiency of its letter of credit is at the centre of the parties' dispute. BMO may be affected by TruGrp's request in oral submissions that, as alternate relief to setting aside my order and restoring the claims for lien and certificate of action against title, I could vary my order and provide directions on the expiry language in the letter of credit and remittance of the bank draft by BMO.

[59] Karmina submitted that, if I found that the Accountant must be given notice, then I should dismiss this motion without prejudice to TruGrp moving again on notice to the Accountant. In my view, doing so is procedurally inefficient. Materials have already been served and arguments have already been made. A fresh motion will require redundant work to be done by both parties.

[60] For these reasons, I am adjourning the motion *sine die* pending the positions of the Accountant and BMO being obtained and a further hearing being scheduled, if required, for any submissions that they may wish to make in response to TruGrp's motion. Since BMO's letter of credit expires on July 6, 2024, subject to an automatic renewal in accordance with its terms, the parties should move expeditiously to serve the Accountant and BMO, as well as arrange any further hearing that may be required.

DISPOSITION

[61] For the foregoing reasons, I order as follows:

(a) The following materials shall be served on both the Accountant and BMO within fourteen (14) days of these reasons being released:

(i) by TruGrp: a copy of its motion record, moving factum, and reply factum, together with a copy of these reasons for decision; and

(ii) by Karmina: a copy of its responding motion record, responding factum, and supplementary responding factum.

(b) If either the Accountant or BMO intend to take a position on this motion, then a case conference shall be arranged with me through my Assistant Trial Coordinator (ATC) to provide directions on any further materials and to fix a further return date for submissions from the Accountant and/or BMO, as well as any supplementary submissions from the parties that may arise from the positions of the Accountant or BMO.

(c) If both the Accountant and BMO confirm that they take no position, then those confirmations shall be provided to my ATC and I will thereafter render a decision on the outstanding balance of the motion.

(d) This order is effective without further formality.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: April 15, 2024