



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Doka Canada Ltd./Ltee v. Astaldi Canada Inc.*, 2023 NLSC 28

Date: February 23, 2023

Docket: 201901G4489

BETWEEN:

DOKA CANADA LTD./LTEE

PLAINTIFF

AND:

ASTALDI CANADA INC.

DEFENDANT

AND:

MUSKRAT FALLS CORPORATION

THIRD PARTY

Before: Justice Sandra R. Chaytor

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: November 28, 2022

Date of Judgment: February 23, 2023

Summary:

The Plaintiff applied for a pre-judgment attachment order pursuant to section 27 of the *Judgment Enforcement Act* attaching all exigible property of Astaldi Canada Inc. up to the amount of \$7,244,975.88. The Plaintiff also sought an order prohibiting Astaldi Canada Inc. and Muskrat Falls Corporation from dealing with Astaldi's exigible property, up to that amount, in a manner that

would likely hinder the Plaintiff's enforcement of a judgment against Astaldi, until the termination of the pre-judgment attachment order.

Held: The pre-judgment attachment order and associated prohibition order were granted subject to the Plaintiff filing an undertaking pursuant to section 28(2)(a) and (b) of the *Act* within 30 days of this judgment.

The Plaintiff was awarded its costs to be taxed on Column 3 of the Scale of Costs under Rule 55 of the *Rules*.

Appearances:

Geoffrey W. Boyd	Appearing on behalf of the Plaintiff
R. Paul Burgess, K.C.	Appearing on behalf of the Defendant
Anna M. Wadden	Appearing on behalf of the Third Party

Authorities Cited:

CASES CONSIDERED: *Sanford v. Astaldi Canada Inc.*, 2021 NLSC 130; *The LeDrew Lumber Company Limited v. R & R Homes Ltd.*, 2019 NLSC 177; *Donovan Homes Ltd. v. Modern Paving Ltd.*, 2011 NLCA 51; 55668 *Newfoundland and Labrador Limited v. Sullivan*, 2021 NLSC 38; *BSB Electrical Services Ltd. v. Collins*, 2008 NLTD 201

STATUTES CONSIDERED: *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1.

RULES CONSIDERED *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

CHAYTOR, J.:

INTRODUCTION

[1] Doka Canada Ltd./Ltee. (“Doka”) brings this Application seeking a pre-judgment attachment order, pursuant to section 27 of the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1 (the “*Act*”). It seeks to attach all exigible property of Astaldi Canada Inc. (“Astaldi”) up to \$7,244,975.88. It further asks that Astaldi, Muskrat Falls Corporation (“MFC”) and Nalcor Energy¹ be prohibited, until termination of the pre-judgment attachment order, from dealing with Astaldi’s exigible property, up to that amount, in a manner that would likely hinder Doka in the enforcement of a judgment against Astaldi.

[2] Doka had also sought an order pursuant to Rule 32 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, as amended, (the “*Rules*”) compelling Astaldi to file its List of Documents. Astaldi filed its List of Documents prior to the hearing so that aspect of the Application was withdrawn.

BACKGROUND

[3] Astaldi was contracted by MFC to be the principal contractor for the Muskrat Falls Hydroelectricity Project in Muskrat Falls, Newfoundland and Labrador (“the Project”).

[4] Doka alleges that it entered into a contract with Astaldi for the supply of services and equipment to the Project by Doka. This included concrete dam

¹ At the hearing, counsel for Doka amended the relief sought by advising that Doka was not seeking an order against Nalcor Energy.

formwork systems for the construction of an intake and powerhouse, spillway and transition dams. It is alleged that this was work contemplated in the agreement between Astaldi and MFC and/or Nalcor Energy.

[5] Doka commenced this action against Astaldi on June 28, 2019 alleging breach of contract by Astaldi in not fully paying Doka for work performed and in failing to return or purchase goods in accordance with the contract. An Amended Statement of Claim was filed on January 31, 2020 and the pleading was further amended on March 6, 2020.

[6] Pleadings are closed. Astaldi filed its Statement of Defence and commenced a Third Party action against MFC on September 16, 2020. Astaldi denies any breach of contract or that Doka is entitled to the relief sought.

[7] By way of the Third Party Action, Astaldi claims contribution and indemnity from MFC if it is found liable to Doka. It claims that such liability would be a result of MFC having breached its contract with Astaldi including its failure to pay Astaldi for work performed and for the materials provided by Doka to Astaldi. In particular, Astaldi pleads that on November 8, 2018 it received notice from MFC that its contract had been terminated and that MFC claimed the right to take immediate possession of Astaldi's work site, work, equipment, and property to enable MFC to complete the work of the Project.

[8] A Statement of Defence to the Third Party Claim was filed by MFC on July 13, 2021. It denies that its contractual relationship with Astaldi has any bearing on Doka's claim and states that any monies owing to Doka is solely the responsibility of Astaldi.

[9] Doka filed its List of Documents on April 16, 2021 and Astaldi filed its on March 31, 2022. MFC has not filed its List of Documents and no discoveries have been conducted.

[10] Doka filed this Application on September 29, 2021. The Application was scheduled to be heard in March, 2022 but with the agreement of the parties, it was postponed pending the outcome of an appeal of *Sanford v. Astaldi Canada Inc.*, 2021 NLSC 130. *Sanford* involved an application for a pre-judgment attachment order against Astaldi by a number of Astaldi's former employees who were hired to deliver work and services at the Project. The order was granted.

[11] At the hearing of the Application, counsel advised that the claims subject to the *Sanford* decision were subsequently settled and therefore the appeal of that case did not proceed.

[12] Astaldi contests the Application. It challenges the sufficiency of the evidence filed in support of the Application and argues that the circumstances that existed at the time the order was granted in *Sanford* have changed.

[13] MFC took no position on the Application except to state that it would, of course, abide by any order of the Court. Counsel for MFC advised the Court that McInnis Cooper, the law firm representing MFC, is holding funds in trust for Astaldi which are equal to or greater than the amount of the pre-judgment attachment order sought by Doka.

[14] This is my decision on the Application.

ISSUE

[15] The issue to be determined is whether Doka has established that it is entitled to a pre-judgment attachment order against the exigible property of Astaldi.

DISPOSITION

[16] For the reasons that follow, the pre-judgment attachment order, and the associated prohibition order, are granted subject to Doka providing the requisite undertaking pursuant to section 28(2)(a) and (b) of the *Act*.

EVIDENCE ON THE APPLICATION

Gunnar Falke

[17] In support of the Application, Doka filed an affidavit of Gunnar Falke, the Managing Director of Doka. The affidavit is dated September 24, 2021, coinciding with the filing date of the Application.

[18] Mr. Falke attested to the facts asserted in the Application, including those regarding the contractual relationship between Doka and Astaldi. This includes the alleged breach of contract by Astaldi in not having provided full payment to Doka for work performed and in failing to return or purchase goods in accordance with the contract between the parties.

[19] In paragraphs 4 through 13 of his affidavit, Mr. Falke deposed as follows:

4. It is my understanding that Astaldi Canada Inc. (“ACI”) is no longer conducting business in the Province of Newfoundland and Labrador. I have been advised and do verily believe that ACI closed its offices situated at 69 Elizabeth Avenue, in the City of St. John’s, in the Province of Newfoundland and Labrador. The current registered address for ACI is a post office box situated at: P.O. Box 177, Station C, Happy Valley - Goose Bay, NL, A0P 1C0. A search of the Registry of Companies and Deeds Online Database (“CADO”) confirming ACI’s registered address is attached hereto at Exhibit “A”.

5. To the best of my knowledge information and belief, ACI does not have any employees in the Province of Newfoundland and Labrador. I have been advised

and do verily believe that ACI has no registered interests in real property in the Province of Newfoundland and Labrador. A copy of the CADO search conducted by Doka's legal counsel is attached hereto as Exhibit "B".

6. I have been advised and do verily believe that the association for "Professional Engineers & Geoscientists Newfoundland and Labrador" ("PEGNL") is responsible for the regulation of geoscientists and engineers in the Province of Newfoundland and Labrador. Legal counsel for Doka conducted a search of PEGNL's online registry and confirmed that ACI's status is listed as "Not Entitled to Practice." ACI's professional liability insurance expired on October 30, 2018. A copy of the PEGNL search is attached hereto as Exhibit "C".

7. I have been advised by Doka's legal Counsel that certain property including money and equipment owned by ACI is being held in trust by Muskrat Falls Corp. ("MFC") and/or Nalcor Energy ("Nalcor").

8. Attached hereto at Schedule "D" is a credit report generated by D&B Credit (the "Credit Report"). The Credit Report shows ten (10) judgments, seventeen (17) liens, and fifty-six (56) lawsuits filed against ACI, totaling \$45,215,515.00, \$35,440,517.00 and \$7,433,467.00 respectively.

9. It is my understanding that ACI is a subsidiary company of Astaldi S.p.A. as stated at paragraph 22 of the Application. I am aware that Astaldi S.p.A. recently underwent a process of corporate reorganization which resulted in Astaldi S.p.A., in part, coming under the control of WeBuild S.p.A. ("WeBuild"). It is my understanding that WeBuild intends to dissolve Astaldi S.p.A. subject to certain conditions imposed by the law courts in the Country of Italy.

10. I am aware that two subsidiary companies of Astaldi S.p.A. – Astaldi Canada Enterprises Inc. and Astaldi Canada Design & Construction Inc. – have continued to operate in Canada outside of the Province of Newfoundland and Labrador. Astaldi S.p.A. through its subsidiaries have pursued contracts in other Canadian Provinces including the Light Rail Transit system in the City of Edmonton, in the Province of Alberta; the Greenline Light Rail Transit system in the City of Calgary, in the Province of Alberta; and the Broadway subway system in the City of Vancouver, in the Province of British Columbia.

11. I understand that arbitration proceedings between ACI, MFC and Nalcor have been ongoing for nearly three (3) years (the "Arbitration"). I have been advised and do verily believe that ACI has claimed approximately \$200,000,000.00 from MFC and/or Nalcor as a result of the termination of ACI's contract with MFC; which contract related to the provision of work and services by ACI at the Muskrat Falls Hydroelectricity Project at the Churchill River in the Province of Newfoundland and Labrador. I am informed and do verily believe that the Arbitration has concluded and that a decision is expected on October 29, 2021. I

understand that MFC and/or Nalcor may be compelled to make a payment to ACI as a result of the Arbitration.

12. It appears that Astaldi S.p.A. has maintained ACI solely for the purpose of engaging in the Arbitration and has otherwise dealt with its property in a manner that is likely to seriously hinder or preclude the enforcement of a judgment against ACI by Doka.

13. In the event that ACI receives funds from MFC and/or Nalcor as a result of the Arbitration, and because ACI has ceased all business in the Province of Newfoundland and Labrador, it is my belief that ACI will deal with its property in a manner that will seriously hinder Doka's ability to enforce a judgement against ACI.

[20] Mr. Falke was cross-examined on his affidavit. He acknowledged that he did not have direct knowledge of certain matters attested to in his affidavit and was relying, in part, on information that had been provided to him. He did not have any direct knowledge of whether Astaldi was conducting business or had employees in the province. This is information that was true to the best of his knowledge and belief based on what he had been advised, including the results of the PEGNL search.

[21] With respect to the information contained in paragraph 9 of his affidavit, while Mr. Falke acknowledged that he had no direct knowledge of what WeBuild intends to do, his belief is based on public information released by WeBuild on its website.

[22] With respect to the contents of paragraph 8 of his affidavit and the credit report attached as a schedule to his affidavit, Mr. Falke acknowledged this report was generated by a staff member of Doka, not him personally. He further acknowledged that it was accurate as of the date of the search, being August 18, 2021.

[23] It was put to Mr. Falke on cross-examination that the arbitration referenced in paragraph 11 of his affidavit had concluded in 2022 and a number of matters had since been settled and discontinued. Therefore, it was suggested to him that his apprehension of what would happen to the arbitration funds as articulated in paragraph 13 of his affidavit had not transpired. Mr. Falke acknowledged that he is not aware of any money being funnelled inappropriately by Astaldi out of the

jurisdiction. However, he maintained that nothing had changed in terms of Doka's underlying concern and his belief that Astaldi is, or likely to, deal with its property in a manner that would seriously hinder Doka's ability to enforce a judgment. This is grounded on his understanding of Astaldi's circumstances, as articulated in the affidavit, and that Doka believes its claim against Astaldi is the largest.

[24] Counsel for Astaldi suggested to Mr. Falke that Doka had not advanced the litigation since taking this Application. Mr. Falke responded that Doka had tried to advance the matter but Astaldi was unresponsive. He acknowledged however that no steps in the litigation process, such as discoveries, had taken place.

Affidavit of Paul Burgess

[25] In responding to the Application, Astaldi filed an affidavit of its legal counsel, Paul Burgess. The affidavit was concise and showed the current situation in terms of judgments and actions against Astaldi. It addressed the content of three exhibits attached to the affidavit as follows:

- Exhibit 1 is a copy of a search of the Judgment Enforcement Registry in the name of Astaldi dated February 11, 2022. It shows judgments against Astaldi totaling over \$12,700,000. This search reflects the judgments which were registered against Astaldi at the time of the *Sanford* decision.
- Exhibit 2: a copy of a search of the Judgment Enforcement Registry in the name of Astaldi as of November 9, 2022. It shows no judgments outstanding against Astaldi.
- Exhibit 3: is a copy of a litigation search of the Registry of the Supreme Court of Newfoundland and Labrador as of October 18, 2022. There are numerous actions against Astaldi noted in the search. Mr. Burgess attests in his affidavit that most of the actions noted in Exhibit 3 have been settled and are awaiting the filing of Notices of Discontinuance. To his knowledge, the only actions that remain outstanding against Astaldi are this action and one other.

ANALYSIS

[26] The basis of the relief sought by Doka is sections 27 and 28 of the *Act*. I must decide whether to issue an order pursuant to section 27. Section 28 addresses the potential scope of the order, if granted.

[27] Section 27, reads in part:

27. (1) A claimant may apply to the court for an attachment order where

(a) the claimant has commenced or is about to commence proceedings in the province to establish the claimant's claim; or

...

(2) On hearing an application made under subsection (1) the court may make an attachment order if it is satisfied that

(a) there is a serious issue to be tried; and

(b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,

(i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

(ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[28] An Application of this nature is an extraordinary remedy. In *The Ledrew Lumber Company Limited v. R & R Homes Ltd.*, 2019 NLSC 177, McGrath J. (as she then was) called it a drastic measure (at para. 50). This is because it intrudes upon a defendant's property rights prior to a plaintiff successfully proving its claim against the defendant. Therefore, it is important that the criteria under section 27 of the *Act* be strictly construed.

[29] Pursuant to section 27(1)(a) of the *Act*, Doka may apply to the Court for an attachment order where it has commenced proceedings in the province to establish its claim. This condition has been met.

[30] Section 27(2)(a) of the *Act* requires the existence of a serious issue to be tried. Astaldi acknowledges there are serious issues to be tried. I conclude, based on a review of the pleadings, that this requirement has been met.

[31] The contentious issue between the parties on this Application is whether section 27(2)(b) has been satisfied.

[32] In *Donovan Homes Ltd. v. Modern Paving Ltd.*, 2011 NLCA 51(N.L.C.A.), at paragraph 10, the Newfoundland and Labrador Court of Appeal noted the requirements a claimant must establish in order for a court to grant a pre-judgment attachment order against a corporate defendant. The court must consider whether there are reasonable grounds for believing the defendant is dealing with, or likely to deal with, its exigible property (i) otherwise than for the purpose of meeting its reasonable and ordinary business expenses; and (ii) in a manner that would be likely to seriously hinder the claimant in enforcement of a judgment against the defendant.

[33] To meet the test, Doka does not have to prove that Astaldi is indeed so acting but rather that there are reasonable grounds for so believing. The test therefore requires the Court to assess the reasonableness of the grounds for belief.

[34] I now turn to that assessment.

- (i) **Are there reasonable grounds to believe Astaldi is dealing, or is likely to deal, with its exigible property otherwise than for the purpose of meeting its reasonable and ordinary business expenses?**

[35] I am satisfied that Doka has met its onus of establishing on a balance of probabilities that there are reasonable grounds to believe Astaldi is dealing with the defendant's exigible property, or is likely to deal with that property otherwise than for the purpose of meeting its reasonable and ordinary business expenses.

[36] In *Sanford*, the Court found that Astaldi was not conducting business at Muskrat Falls. The Court concluded Astaldi's ability to do so had been precluded by the termination of its contract. The Court further found that Astaldi had not dealt, and could not deal, with any of its property in this jurisdiction since November 2018.

[37] At paragraph 24, of *Sanford*, Thompson J. stated that the complete loss of the ability to control and deal in the Defendant's exigible property must have been intended on its face as meeting the reasonable grounds for belief under s. 27(b)(i) where the Defendant was not dealing with its exigible property, nor meeting past expenses.

[38] Thompson J. continued at paragraphs 27 and 28 as follows:

27 ... [Astaldi] admits to having submitted to consent judgments, having secured deferral of enforcement due to its current inability to pay. Practically, the Plaintiffs have to be said to have demonstrated on this record clearly that, while due to outside factors possibly not in the Defendants' control, the Defendant has not met its reasonable and ordinary business expenses and has not done so for the past three years and, had these Plaintiffs obtained judgments, they would not have been successful in enforcement. These circumstances of themselves present reasonable grounds to believe the Defendant is not now and likely will not be able to do so in the immediate future.

28 Astaldi has not met its past obligations, it cannot meet Consent Court Orders, deferring payment awaiting outcome from arbitration by agreement of the holders of judgments against it. In my view, the present prospect of an unknown arbitration outcome cannot diminish the reasonableness of those grounds for belief under s. 27(2)(b) based upon the record to date.

[39] In *55668 Newfoundland and Labrador Limited v. Sullivan*, 2021 NLSC 38, Knickle J. (as she then was) found that it is not regular business to cease operating. Further, closing the business and selling the assets to pay off creditors could not be described as dealing with exigible property in a manner that is "reasonable and ordinary" as per section 27(2)(b)(i) of the *Act* (paragraphs 30, 32 and 34).

[40] Astaldi submits that *Sanford* is distinguishable from this case in two aspects. First, in *Sanford*, Astaldi acknowledged amounts owing to its former employees including the plaintiff. In this case, however, Astaldi does not admit any amount owing to Doka.

[41] Acknowledgement of the claim asserted is not a prerequisite to a pre-judgment attachment order. In fact, s. 27 (1) allows an application to be brought even when an action has yet to be commenced.

[42] More significantly, Astaldi asserts that the circumstances have changed since the decision in *Sanford* and the filing of this Application. The outcome of the arbitration that was pending at the time is now known. Funds from the arbitration award are being held in trust by counsel for MFC. As attested to by Mr. Burgess, unlike at the time the order was granted in *Sanford*, there are no longer any judgments outstanding against Astaldi. It is submitted by Astaldi that this demonstrates it is dealing with its property so as to meet its reasonable and ordinary business expenses.

[43] The evidence of Mr. Falke is that Astaldi has no real property in this province. Further, while it had a physical office located in the province, its address in the jurisdiction is now a postal box and although it is in the business of large-scale construction, it allowed its status with PEGNL to be listed as "Not Entitled to Practice," and its professional liability insurance expired as of October 30, 2018.

[44] These attestations by Mr. Falke are supported by public record searches attached as schedules to his affidavit. Doka did not however file updated affidavit evidence to the time of the hearing and the searches were not current to the date of

the hearing. It is expected that the evidence supporting an application of this nature would be current.

[45] On the other hand, Astaldi did not file affidavit evidence to rebut those assertions by Mr. Falke or to show that they were no longer true. Through the affidavit of Mr. Burgess, Astaldi provided updated Judgment Enforcement Registry and litigation searches to show that Astaldi no longer has any judgments against it. If Astaldi's other circumstances, as attested to by Mr. Falke, had changed since the filing of Mr. Falke's affidavit or the *Sanford* decision, it would be reasonable to infer that Astaldi would have likewise filed evidence to rebut those assertions.

[46] Although Doka bears the burden of proof, I conclude that if other aspects of Mr. Falke's affidavit regarding Astaldi's circumstances were assailable as having changed since the filing of the affidavit, evidence would have been proffered by Astaldi to do just that. A defendant faced with a pre-judgment attachment order would be expected to vigorously respond to rebut any evidence adduced by the applicant in support of the application.

[47] In *Donovan Homes*, the Court of Appeal granted the pre-judgment attachment order. In that case, the parties had entered into a contract to develop lands jointly. The plaintiff led affidavit evidence that the defendant was selling building lots below market value in a series of non-arms length transactions; had a practice of flowing cash out to its shareholders; and was substantially without assets other than the land that was the subject of the litigation. At paragraph 13, Rowe J.A. (as he then was), noted that the defendant offered no evidence to contradict this evidence.

[48] In *LeDrew*, the Court, in not granting the pre-judgment attachment order, relied upon the strength of the affidavit evidence of the defendant in responding to the application.

[49] Similarly, in *BSB Electrical Services Ltd. v. Collins*, 2008 NLTD 201, in not granting the order, the Court noted, at paragraph 23, that the affidavit by the

defendant was sufficient to rebut the allegations made by the claimant in the application.

[50] Furthermore, Mr. Falke's evidence regarding Astaldi's status in the province and its property is consistent with Astaldi's statements in the Third Party pleading. In its pleading, Astaldi states that on November 8, 2018, it received notice from MFC that its contract had been terminated and that MFC claimed the right to take immediate possession of Astaldi's work site, work, equipment and property to enable MFC to complete the work of the Project. This is reiterated by Astaldi in its written submission on this Application where it states that MFC's actions hindered Astaldi's ability to deal with its property.

[51] I am satisfied that the evidence establishes that Astaldi has no real property in this province and is no longer operating its business in this province.

[52] I accept that since *Sanford* was decided, Astaldi has now met many of its outstanding obligations and satisfied judgments against it. I cannot conclude however, that utilizing funds from an arbitration award to satisfy a multitude of outstanding judgments and claims by creditors (many of which were subject to pre-judgment attachment orders or deferred consent orders) is evidence of a business dealing with its property for the purpose of meeting reasonable and ordinary business expenses. This is particularly so in the circumstances of this case where the business is no longer operating in the province and has no other real property in the jurisdiction.

[53] I am satisfied that section 27(2)(b)(i) of the *Act* has been met. There are reasonable grounds to believe Astaldi is dealing with its exigible property, or is likely to deal with that property, otherwise than for the purpose of meeting its reasonable and ordinary business expenses.

- (ii) **Are there reasonable grounds to believe Astaldi is dealing, or is likely to deal, with its exigible property in a manner that would be likely to seriously hinder Doka in the enforcement of a judgment against Astaldi?**

[54] I am satisfied that Doka has established the second prong of section 27(2)(b). There are reasonable grounds for believing that Astaldi is dealing, or is likely to deal, with its exigible property in a manner that will seriously hinder Doka's ability to enforce a judgment should it be successful at trial.

[55] Astaldi contends that any concerns that Doka had at the time of bringing this Application that Astaldi would deal with its property so as to hinder Doka's ability to enforce a judgment, have not proven to be legitimate. Rather, since then, Astaldi has used the arbitration funds to settle most of the claims and judgments that were pending against it at the time.

[56] Astaldi submits that, unlike the circumstances in other cases such as those of *Donovan Homes Ltd.*, there is no evidence that Astaldi has attempted to remove, transfer, sell or dispose of its assets for any nefarious purpose.

[57] Questionable conduct, as seen in other cases, such as a corporate defendant entering into non-arm's length transactions or funnelling funds to shareholders, would be significant evidence towards meeting the reasonable grounds required of section 27(2)(b)(ii) of the *Act*. However, the test does not require proof of such conduct.

[58] It is also not required that the manner of dealing with the assets be a deliberate course of action by the defendant. For example, it may suffice that the defendant's dealing with the property could be the result of actions alleged by the defendant to have been taken by another party. Loss of control over the ability to determine what happens to Astaldi's assets was a key factor in the granting of the pre-judgment attachment order in *Sanford*.

[59] In *Sullivan*, the Court found that the defendant ceasing business operations and liquidating its available assets to satisfy creditors was sufficient to meet the second prong of the test. At paragraph 36, Knickle, J. wrote:

36 In deciding to close the business operations of 61791 and liquidate the available assets or inventory to satisfy creditors, there is no dispute that this will seriously hinder the Plaintiff's ability to enforce judgment should it be successful in its claim against 61791. There will be nothing left of the business from which to enforce a judgment if unsecured creditors are paid before judgment is obtained. It will be a hollow victory for the Plaintiff should he be successful in his claim against 61791 if there is nothing left of 61791 to fulfill the judgment. Indeed, some of the property Mr. Sullivan identified as being owned by 61791, such as the washer and dryer, appear to be part of the very items at issue in this litigation.

[60] Mr. Falke testified that other claims being settled by Astaldi does not allay Doka's underlying concern and belief that Astaldi is dealing, or likely to deal, with its property in a manner that would seriously hinder Doka's ability to realize on a judgment at the end of the day. This belief is founded on Astaldi no longer conducting business in the province and having no real property in the jurisdiction. It is also grounded in Doka's understanding that its claim is the largest against Astaldi and has remained unresolved.

[61] The magnitude of Doka's claim in comparison to other claims that have been resolved is apparent from the evidence of Mr. Burgess. The total combined value of the judgments satisfied by Astaldi from the date of the *Sanford* decision to the date of the hearing was approximately \$13 million. The outstanding claim of Doka at over \$7 million is over half of the amount of all of those judgments

[62] In my view, the fact that Astaldi has settled other claims and judgments against it does not diminish the reasonableness of the grounds for belief that Astaldi is dealing, or is likely to deal, with its property in a manner to seriously hinder the enforcement of its judgment. The Court is not aware of the circumstances by which those settlements were reached or the terms and conditions in which money continues to be held in trust for Astaldi by the solicitors for MFC.

[63] What is known is that many of the resolved claims were subject to consent judgments entered into by Astaldi prior to the outcome of the arbitration award. Many others, such as the multitude of claims by Astaldi's former employees, had the benefit of the pre-judgment attachment order given in the *Sanford* decision.

[64] More significantly, it is known that Astaldi no longer operates in this province, has no real property in this jurisdiction, and has been using arbitration funds held in trust by legal counsel for MFC to satisfy outstanding judgments and claims by other creditors. I am satisfied that this constitutes reasonable grounds for belief that Astaldi is dealing, or is likely to deal, with its exigible property in a manner that would be likely to seriously hinder Doka in the enforcement of a judgment.

[65] There are reasonable grounds for belief that without a pre-judgment attachment order, there may not be funds available in this jurisdiction to satisfy a judgment if Doka is ultimately successful at trial.

SUMMARY AND DISPOSITION

[66] A pre-judgment attachment order pursuant to sections 27 and 28 of the *Act* is granted attaching all exigible property of Astaldi up to the amount of \$7,244,975.88.

[67] Further, Astaldi and MFC are prohibited from dealing with Astaldi's exigible property up to the amount of \$7,244,975.88 in a manner that would likely hinder Doka's enforcement of a judgment against Astaldi until the termination of the pre-judgment attachment order.

[68] Doka shall file an undertaking pursuant to section 28(2)(a) and (b) of the *Act* within 30 days of this judgment. This is a condition precedent to the issuance of the pre-judgment attachment order.

[69] Doka is entitled to its costs of this Application to be taxed on Column 3 of the Scale of Costs under Rule 55 of the *Rules*.

SANDRA R. CHAYTOR
Justice