KORNFELD LLP

1100 ONE BENTALL CENTRE
505 BURRARD STREET, BOX 11
VANCOUVER, B.C., CANADA V7X 1M5
T: 604.331.8300 F: 604.683.0570
WWW.KORNFELDLLP.COM

Shafik Bhalloo
sbhalloo@kornfeldllp.com d: 604.331.8308

REMOVING, ADDING OR SUBSTITUTING A PARTY AFTER JUDGMENT OR A FINAL ORDER PURSUANT TO RULE 15(5) OF THE RULES OF COURT: CAN IT BE DONE AND WHEN?

*By Shafik Bhalloo**

Introduction

Rule 15(5) of the Rules of Court governs the adding, removing or substituting of a party at any stage of a proceeding in British Columbia. While there is much common law generated in court decisions interpreting and applying the said Rule in the context of applications to add, remove or substitute a party in a legal proceeding before a judgment or a final order[1], there is very little case law on the subject of removing, adding or substituting a party after a final order or judgment. The primary purpose of this article is to review the handful of instructive British Columbia cases, mainly spanning the last half century, where Rule 15(5) (or its equivalent) has been relied upon after judgment to add, remove or substitute a party. The writer's objective is to provide the reader some guidance on the subject matter by setting out the relevant governing principles.

Rule 15(5) of the Rules of Court

Rule 15(5) of the Rules of Court provides:

> *Removing, adding or substituting party*
>
> *(5) (a) At any stage of a proceeding, the court on application by any person may*
>
> *(i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,*
>
> *(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and*
>
> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected (A) with any relief claimed in the proceeding, or (B) with the subject matter of the proceeding, which in the opinion of the court it would be just and convenient to determine as between the person and that party.
>
> *(b) No person shall be added or substituted as a plaintiff or petitioner without the person's consent. [am. B.C. Reg. 95/96, s. 4.]*

The preamble in subsection (a) states "(a)t any stage of a proceeding . . . ." However, does "any stage of a proceeding" include after a final order or a judgment? While Rule 1(8) of the Rules of Court defines a "proceeding" to mean "an

action, suit, cause matter appeal or originating application"[2], it does not define the word "stage" or more importantly the phrase " any stage in a proceeding". The British Columbia *Interpretation Act*[3] similarly, is unhelpful.
The ordinary dictionary meaning of the word "stage" in the Merriam-Webster Online dictionary is: "a period or step in a process, activity, or development . . . ." Is a judgment a "step" in a proceeding? One may view a judgement as a final step in the proceeding or, alternatively, the end of a proceeding and thus not a "stage in a proceeding". The handful of cases in British Columbia that directly dealt with this question supports the latter view.

Court decisions interpreting Rule 15(5)

(i) Northern Electric Company Limited v. Turko

In *Northern Electric Company Limited v. Turko*[4] the plaintiff entered judgment by default against the defendant. A third party paid the judgment and received from the judgment creditor an assignment of the judgment and subsequently applied pursuant to O. 17, R. 4, of the Supreme Court Rules (now Rule 15(5)) for an order that the proceedings in the action be amended by striking out the name of the plaintiff and substituting therefore the third party. Collins J., in dismissing the application, stated that the said Rule did not permit an assignee of a judgment debt to be substituted as the judgment creditor in a judgment already drawn up and entered.
Judge Collins further commented at page1:

> *In Victoria (B.C.) Land Inv't. Trust Ltd. v. White (No. 2) [1920] 1 WWR 594, 28 BCR 31, not referred to by counsel, Macdonald, J. in chambers decided that the assignee of a judgment might apply to be added as a party if so advised in a case where an order was being made that the judgment be opened up and further proceedings taken in that action. But this is no authority for the application made by counsel on behalf of Southland Construction Ltd.*

(ii) Canadian Imperial Bank of Commerce v. Garneau

In *Canadian Imperial Bank of Commerce v. Garneau*,[5] some time after the issuance of order nisi of foreclosure, the petitioner bank brought an application to join or add tenants of the mortgaged residential premises as parties to a foreclosure proceeding; the tenants having become tenants after the order nisi for foreclosure had been issued. The main reason for the bank's application was its concern that without adding the tenants as parties, in light of section 50(4) of the *Residential Tenancy Act* (now section 94) which provided that no order of a court in foreclosure proceedings is enforceable against a tenant of the residential premises unless the tenant was made a party to the proceeding, it would effectively prevent the bank from enforcing the judgment of the court in the proceeding against the tenants.

In a very thorough analysis of section 50(4) of the *Act*, Southin J. concluded that the word 'tenant" in the Act only applies to tenants at the time of judgment and ruled that that the tenants who became tenants after the pronouncement of order nisi need not be a party to the proceedings for the bank upon order absolute to recover possession and thus dismissed the bank's application. In arriving at this decision, Southin J., *inter alia*, recognized that the order nisi for foreclosure was the judgment of court or a final order and relying upon the English Court of Appeal decision in the *Attorney General v. Corporation of Birmingham*[6] which was decided under a rule substantively comparable to Rule 15(5), concluded that parties could not be added after a final order. In particular, Southin J. stated at pages 8-10:

> *2. Generally, parties cannot be added after judgment. See Attorney General v. Corporation of Birmingham (1880) 15 Ch.D. 423 (C.A.) in which Jessel M.R., James and Brett L.JJ. concurring, said at p. 425:*
>
> *A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose. That case was decided under Order XVI, Rule 13 of the original post Judicature Act English Rules:*
>
> *13. ...*
> *(a) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out; and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.*
> *...*
> *Bacon V.C. had, held that the words "at any stage of the proceedings" permitted the addition of parties after decree but the Court of Appeal disagreed with him.*
> *Our present Rule 15(5) contains the words "at any stage of a proceeding". I do not think the difference in wording between the original English Rule and the present British Columbia Rule creates a difference in meaning or effect.*

(iii) Cassidy v. Lee

Subsequent to the decision in the *Canadian Imperial Bank of Commerce v. Garneau*, the British Columbia County Court in *Cassidy v. Lee*[7] relied on the same English authority, *Attorney General v. Corporation of Birmingham*, to arrive at a consistent result. In *Cassidy v. Lee*, the plaintiff obtained a judgment in default of an appearance against an individual defendant as well as a restaurant on the basis that it was a proprietorship. However, no such entity as the restaurant existed. The restaurant was in fact incorporated. The plaintiff then applied to amend the style of cause in the statement of claim, writ and default judgment to substitute the correct corporate name. Skip CCJ., in rejecting the application as inappropriate, stated at page 5:

> *Rule 15 which provides for adding or substituting parties has no application after judgment has been entered: Attorney- General v. Corporation of Birmingham ....*

However, Skipp CCJ, on the court's own motion, ordered that the default judgment against the restaurant be set aside as being taken irregularly on defective pleadings against a non-legal entity, and further ordered that the plaintiff was at liberty to amend its pleadings to allege what the restaurant was and substitute the corporate entity pursuant to Rule 15. The practicality of the court's approach in *Cassidy v. Lee*, in light of the prohibition of adding or substituting parties after judgment or a final order, is self-evident.

(iv) Royal Bank of Canada v. Olson

Northern Electric Company Limited v. Turko, the Canadian Imperial Bank of Commerce v. Garneau, and *Cassidy v. Lee* were all referred to in the *Royal Bank of Canada v. Olson*[8]. In *Olson* an application was brought under Rule 15 (5) (although at the hearing of the motion counsel for the applicant relied upon Rules 15(3) and (4)) to have the assignee of the judgment of the Royal Bank against the defendant substituted as the plaintiff. The decision in *Olson* is instructive on the subject of substituting a party after judgment as Errico, L.J.S.C. referred to Rule 15(5) in rejecting the application. In particular, Judge Errico stated at p.1:

> *There are a number of decisions of this court holding that the provisions of the Rules of Court for adding and substituting parties do not apply after Judgment. These include Canadian Imperial Bank of Commerce v. Garneau, et al., … and Cassidy v. Lee, et al., ….These were both decisions on applications made under Rule 15(5).*

Judge Errico commented further at pages 2-3:

> *The difficulty is that the proceeding here has now been concluded by the entry of the formal Judgment as was the case in Northern Electric Company Limited v. Turko. In these circumstances then, I am unable to distinguish the decision of Collins, J. in Northern Electric Company Limited v. Turko.*
> *The situation may differ where the judgment is in the process of being reopened, or further steps are to be taken in the proceedings, (See Victoria (B.C.) Land Inv't. Trust Ltd. v. White (No. 2) [1920] 1 W.W.R. 594), but that is not the situation here. The application must therefore be dismissed with costs.*

It would appear that if the proceedings in the matter had not been concluded by the entry of the judgment or if the judgment was in the process of being opened, that would have left the proverbial door open for the court to consider substitution of the party. To this end, *Olson* is instructive on when, after judgment, the court will consider substituting parties in the proceeding.

(v) Huff v. Price

In *Huff v. Price*[9], the plaintiff sought leave to add defendants to an action after the trial and appeal were concluded. The plaintiffs, investors with the defendant stock brokerage firm, had not consented to the transfer of their brokerage contract from the firm to the subsequent partnership when the owners of the stock brokerage firm changed their mode of operation from a firm to a partnership. Under the new partnership, there were nine corporate partners who were controlled by one of the nine persons who used to be a shareholder in the stock brokerage firm. The plaintiffs, in their action, sought damages from three of the shareholders of the firm and the firm but not from the partnership or the nine corporate partners and as such, filed an application to include the unnamed parties on the basis of extensive material in which the plaintiffs attempted to show that the partnership, the individual partners, and the shareholders, were all being treated as defendants in the litigation and that the addition of the unnamed defendants was simply a substitution of the true defendants for the defendants named by the Court. Lambert J.A., in dismissing the plaintiff's application, concluded that the addition of the new defendants was not a correction of a slip or the rectifying of a misnomer and further stated at page 3:

> *I am not satisfied that the partnership and the individual partners were, as a matter of fact, being fully represented at the trial or on the appeal and that they understood they were being fully represented on the trial*

> *and on the appeal and that they communicated to the plaintiffs that they were being fully represented on the trial and on the appeal.*
>
> *I am not satisfied also that there is no possibility of a defence that could be put forward on behalf of the partnership or the individual partners or any of them. It may well be that there is no defence open to any of them that was not open to the limited company, but I am not satisfied that that must necessarily be so. Even if the liability that was argued in relation to the limited company is entirely co-extensive with the liability of the partnership and the individual partners I am not satisfied that there was no argument that could have been put forward that was not put forward. I do not have to speculate about the nature of any such argument but it is not certain in my mind that, had the individual partners understood and recognized that they might be subject to liability, they might not have put forward other facts or other arguments or other ways of emphasizing the facts which might have been particularly appropriate to their circumstances. If the partnership and the individual partners were to be added now I am left in doubt about their rights of appeal to the Supreme Court of Canada. That is a matter which they could not even have had an opportunity to think about if they were now made defendants in the action in the true sense of being on the style of cause.*

Huff v. Price appears to stand for the principle that where the court is not satisfied that the entity sought to be added as a party after judgment was fully represented in the legal proceeding or not fully convinced that there was no possibility that the entity could have put forward a defence or position on its behalf different than the one that was litigated, the court will not add the entity after judgement or a final order.

(vi) Ingot Capital Corp. v. Paruk

In *Ingot Capital Corp. v. Paruk*[10], the applicant, Ingot Group Holdings ("IG"), the parent company of Ingot Capital Corp. ("IC") and Ingot Management Ltd. ("IM"), applied pursuant to Rule 15(5) to substitute itself in place of the plaintiff IC in one action and the defendants IC and IM in another. In the first action, IC, the plaintiff, had taken a judgement in default of appearance against the defendant Paruk who subsequently was unsuccessful in his application to set aside the default judgement. At the time of IM's application to substitute itself in place of IC, the parties had not resolved the order of the court setting aside Paruk's application to set aside the default judgment and therefore no order arising out of the court's ruling in the later application was entered.

In the second action, Paruk was the plaintiff and had taken a judgment against the defendants IC and IM as a result of the Defendants' failure to file their statement of defence. In this action, the defendants brought an application to set aside the default judgment. In the meanwhile, IC and IM underwent corporate reorganization and IG, the successor company, who then brought an application to substitute itself in place of the dissolved companies, IC in first action and IC and IM in the second, assumed the assets and liabilities of both. Counsel for Paruk, in reliance on *Northern Electric Co. v. Turko*, supra, and *Royal Bank of Canada v. Olson, supra*, argued that there could be no substitution of the parties as final judgment had been entered in the first action. Blair J. in allowing the application of IG, specifically referred to the *obiter dicta* of Errico J. in *Royal Bank of Canada v. Olson* and stated at page 3:

> *Errico J. held that the provisions for adding and substituting parties do not apply after judgment. He followed the Northern Electric decision and concluded that with the entry of formal judgment, the rules precluded him from making the substitution requested.*

> *However, Mr. Justice Errico noted the situation may differ where the judgment is in the process of being reopened, or further steps are to be taken in the proceedings.*
>
> *The question is whether final judgment has been entered in Action #913888 by Ingot Capital against Mr. Paruk.*

Judge Blair further noted at page 3:

> *In Peck v. Sun Life Assurance Company of Canada (1904), 21 B.C.R. 215, (B.C.C.A.) Irving, J.A. at page 219 noted that so long as there remained "anything to be done to work out the judgment pronounced in the action, the action is pending."*
> *In Federal Business Development Bank v. Mission Creek Farm Inc. et al (1988), 25 B.C.L.R. (2d) 188 the Court of Appeal considered a situation in which the Chamber's judge had made an order approving the sale of property. No order was entered and the Chamber's judge on motion set aside his previous order and made a new order.*
> . . .
> *I conclude that as the May 5, 1992, order of Meredith J. is still unentered, the judgment by Ingot Capital against Mr. Paruk has not been finalized and the matter remains pendente lite.*
> *It is therefore open to this court to consider the application brought by Ingot Group to have itself substituted for the plaintiff in [the first action]…. I invoke the consent of counsel for Mr. Paruk that Ingot Group should be substituted for the Defendants Ingot Capital and Ingot Management in [the second] action … if I find that Ingot Group is to be substituted as the Plaintiff in [the first] action….*
> . . .
> *I order that Ingot Group Holdings Ltd. be substituted for the plaintiff Ingot Capital Corp in [the first] action … and for the defendants Ingot Capital Corp. and Ingot Management Ltd. in [second] action….*

Accordingly, where a judgment has been given but not entered, the court is not precluded from making a substitution of a party under Rule 15 as the matter is considered pending or *pendente lite.*

(vii) Farina v. O'neil

In *Farina v. O'neil*[11] the defendant applied to add three new parties to an action that was instituted a few years prior in which a judgment went in favour of the plaintiff and the defendant unsuccessfully appealed and was further denied leave to appeal to the Supreme Court of Canada. The defendant's application to add the new parties to the action was brought subsequent to an order for the sale of certain property to satisfy the judgment in favour of the plaintiff. Lamperson J. in dismissing the application, adopted the analysis of Skipp L.J.S.C of Rule 15(5) in *Cassidy v. Lee* and concluded at page 2:

> *I know of no case in which parties were added long after a trial Skipp L.J.S.C. (as he then was) in Cassidy v. Lee … said at page 3:*
>
> *"Rule 15 which provides for adding or substituting parties has no application after judgment has been entered: Attorney-General v. Corporation of Birmingham (1880) 15 Ch.D. 423 (C.A.)….*

(viii) *Sign-O-lite Signs Ltd. v. Carruthers*

In *Sign-O-Lite Signs Ltd. v. Robert Carruthers*[12], the applicant was pursuing a judgment that was approximately 16 years old and applied, pursuant to Rule 15(5) of the Rules of Court, to amend the style of cause to reflect the name change from

"Sign-O-Lite Signs Ltd." to "32262 B.C. Ltd., formerly known as Sign-O-Lite Signs Ltd." The numbered company apparently was a successor to the earlier-named plaintiff. Blair J., in allowing the amendment, stated at paragraph 37:

> *I conclude that the Alberta-incorporated Sign-O-Lite Signs Ltd. which started the action against Mr. Carruthers and W.C.S. in 1983 when still an Alberta corporation, carried the asset being the cause of action against Mr. Carruthers and W.C.S. into B.C. when as Sign-O-Lite Signs (1973) Ltd. it obtained the certificate of continuation in October, 1986. I further conclude that upon the amalgamation of Sign-O-Lite Signs (1973) Ltd. and 32262 B.C. Ltd. in December, 1987, the asset which by then had become the 1986 judgment against Mr. Carruthers and W.C.S. became the property of the amalgamated company, 32262 B.C. Ltd.*

Since the original plaintiff never dissolved or ceased to exist because the essence of the latter remained in the proposed plaintiff, 32262 B.C. Ltd., through continuance and amalgamation, it is arguable that the application of the proposed plaintiff was not truly an application to substitute one party in place of another after the entry of a final order but instead an application to simply reflect the name change.

(ix) Agricore Ltd. v. Shipton

Agricore Ltd. v. Shipton[13] *is a contrasting decision to Sign-O-Lite Signs, supra, although the* applicant, United Grain Growers ("UGG"), relied on Rule 15(4) and not Rule 15(5) of the Rules of Court. In this case, the plaintiff and UGG were related in that the latter owned all shares in the plaintiff. The plaintiff underwent a corporate arrangement pursuant to which all property and rights of the plaintiff vested with UGG and the plaintiff was dissolved. Prior to the corporate arrangement, however, the plaintiff had obtained judgment in default against the defendant. After the corporate arrangement, UGG applied for an order to substitute itself for the plaintiff in order to enforce the judgment against the defendant. UGG relied on *Sign-O-Lite Signs* and argued that the facts in that case were similar and sought a similar outcome. However Master Baker, in the Supreme Court Chambers, rejected the application on the basis that the plaintiff, unlike in *Sign-O-Lite*, had dissolved. Master Baker stated at paragraphs 8 and 9:

> *There is no question that the facts in Sign-O-Lite are similar, and the argument of Mr. Dellow persuasive, but I consider this case distinguishable from Sign-O-Lite. In that case the original judgment holder (i.e. the Alberta company) continued, in some form, to exist and to assert its rights to the judgment. It had not been dissolved on amalgamation. In the case before me, Agricore, while apparently a form of subsidiary of UGG (by virtue of UGG's ownership of all of Agricore's shares), was obviously, at law, a separate legal entity from UGG. To ignore that fact is to pierce the corporate veil and ignore the uniqueness of legally incorporated entities. Secondly, as explained in the written argument submitted, apparently upon the Manitoba court accepting the corporate rearrangement, "Agricore was subsequently dissolved." (Facts, para. 3)*
>
> *This does not mean that I ignore the second aspect of the conclusion of Blair J., i.e. that the judgment ". . . became the asset of . . ." UGG. That, however, is the legal effect of any assignment of a judgment which, as Olson established, in itself does not justify substitution.*

(x) Dr. James C.O. O'Brien Inc. v. Bordeleau

In *Dr. James C.O. O'Brien Inc. v. Bordeleau*[14], the defendant, a former employee of the plaintiff, was convicted of theft from the plaintiff and the court, at the time of sentencing, made a restitution order in favour of the plaintiff. The order was

then registered as a judgment in the Supreme Court Registry and the Registry issued a certificate confirming the order. The plaintiff then sold the shares in the company but retained the right to collect on the restitution order and ultimately assigned its rights in and to the judgment to a numbered company of which Dr. O'Brien was the sole principal. The plaintiff relied on *Sign-O-Lite Signs Ltd., supra*, to analogize to the instant case but without any success as Master Baker (who also presided over the *Sign-O-Lite* case) was able to distinguish the two cases on a very important point, the lack of any evidence in the instant case of continuity between the plaintiff and the assignee, the numbered company. In particular, Master Baker stated at paragraph 6:

> *There is nothing in the evidence before me confirming or suggesting that "the essence" of O'Brien Inc. remains in the numbered company. That, it seems, distinguishes the case before me from Sign-O-Lite. To go further and presume the two corporate entities to be essentially the same is, I think, to rend the corporate veil.*

Master Baker, in dismissing the application, referred to the comment of Judge Errico made in *obiter* in *Royal Bank of Canada v. Olson, supra*, at paras. 9 and 11:

> *In support of his comment, which I interpret as obiter dicta, Judge Errico cited Victoria Land Company, Limited, v. White (1920), 1 W.W.R. 594, a decision of Murphy, J., of our Supreme Court. That case concerned an application by a defendant, post-judgment, to enter an appearance. Murphy, J., in the result, found that despite an apparent limitation of filing an appearance ". . . at any time before judgment" a defendant should be permitted to enter a conditional appearance so that, even post-judgment, he or she could dispute jurisdiction. With respect, I do not see how the ratio of The Victoria Land Company supports the proposition that a party may be substituted post-judgment because "further steps are to be taken". Permitting a defendant to file an appearance is not the same as changing or substituting parties.*
> . . .
> *I therefore conclude that once judgment is entered, unless that judgment is formally re-opened, parties may not be substituted pursuant to Rule 15. I therefore dismiss the plaintiff's application….*

(xi) Ross et al. v. B.C. Human Rights tribunal et al.

In *Ross et al. v. B.C. Human Rights tribunal et al.15*, the petitioners filed a complaint with the BC Human Rights Commission (the "Commission") against CB Richard Ellis Ltd. operating as CB Richard Ellis Property Management Services ("CBRE"), David Craig Apartments Ltd., operating as David Craig Apartments, and Paul and Connie Dube, the caretakers of David Craig Apartments, for discrimination regarding the terms and conditions of their tenancy on the basis of sexual orientation and family status, contrary to the Human Rights Code (the "Complaint"). The petitioners failed to add as a party to the Complaint the property management company, Martello Property Services Inc. ("Martello"), who at all material times leading up to the Complaint was licensed by CBRE to use the business name CB Richard Property Management and 50% of whose shares were then owned by CBRE.

Before the hearing of the Complaint, CBRE communicated with Martello with a view to involving Martello in the Complaint and removing itself. Subsequently Martello informed the Commission of the relationship between CBRE and Martello as well as the fact that at all material times it managed the building referred to in the Complaint. However, at no point was Martello added or CBRE removed as a party to the Complaint. The Complaint ultimately went to a hearing and was dismissed. The petitioners subsequently filed a petition seeking a judicial review of the Tribunal's decision and served CBRE with the application. CBRE filed an application pursuant to Rule 15(5) to have it removed as a party to the judicial review proceeding and Martello added, because the dispute involved Martello and not CBRE and that naming CBRE in the

Complaint was a mistake. Martello, in reliance on the authorities of *Farina v. O'Neil* and *Canadian Bank of Commerce v. Garneau, supra*, argued that Rule 15(5) of the Rules of Court did not allow for a substitution or removal of parties after judgment of a court and that the decision of the Tribunal was analogous to a final decision of the court and accordingly CBRE's application should be dismissed. Powers J., in finding jurisdiction in the court to add or remove a party in a judicial review proceeding because it has no effect on whether or not they were a party or continue to be a party in a proceeding before the tribunal, stated at paragraphs 17 and 21 that:

> *With regard to jurisdiction, I have not been referred to any authority that supports the argument that a court can add or remove parties from a proceeding before the Human Rights Tribunal. I am satisfied that the court can add or remove parties to a judicial review proceeding. Adding or removing a party from a judicial review proceeding has no effect on whether or not they were a party or continue to be a party in a proceeding before a Tribunal.*
>
> . . .
>
> *…[I]t is important to keep in mind that this is not a situation where the adding or removal of a party from a judicial review proceeding will effect who was or might continue to be a party if the proceeding were before a Tribunal, in that sense it is different than might occur if there was an application to add or remove a party after judgment and during an appeal.*

Judge Powers subsequently dismissed CBRE's application stating at paragraphs 31 to 34:

> *CBRE Ltd. is in essence in this application asking the court to make a summary decision that they have no liability for any human rights complaints or breaches and certainly no liability to the petitioners.*
> *The petitioners could certainly agree if they wished. They presented no evidence to the contrary. There is a great deal of weight to CBRE Ltd.'s argument that it seems unreasonable to require their continued involvement at this stage.*
>
> *However, their involvement may be necessary if there is some argument about what remedy the court should provide if the Tribunal's decision is set aside. In other words, whether the matter should be remitted to the Tribunal for reconsideration or whether the court should proceed with the hearing.*
>
> *Therefore I have decided to order that CBRE Ltd. remain a party but direct that it is not necessary for them to attend at the judicial review proceedings except to address the issue of remedy in the event that the Tribunal's decision is set aside.*

While Powers J. analysis had the effect of paying deference to the prevailing common law principle that parties could not be added after judgment and extended that principle to proceedings before an administrative tribunal such as the Human Rights Tribunal, his Lordship left the proverbial door open for the petitioners to retable the issue of adding or substituting Martello in the event that the petitioners were successful on their judicial review proceeding, otherwise the issue of adding or substituting Martello would be a moot issue. At paragraph 24, Judge Powers stated:

> If the petitioners are successful on their judicial review proceeding, then one of the remedies that is available to the court is to refer the matter back to the Tribunal for reconsideration. If that were to occur then I am assuming that the Tribunal would have the authority to hear any applications and make any decisions with regard to who the appropriate parties might be, including the addition or deletion or substitution of parties and I would expect that they would hear all of the arguments about limitations and prejudice and make their own determinations about

exactly what the background facts are that would allow them then to exercise their discretion as to whether to add or substitute or remove parties.

Conclusion

Having reviewed the relevant British Columbia cases interpreting Rule 15(5) of the Rules of Court in context of applications to add, remove or substitute a party after a judgment or a final order, the following principles can be derived:

1. Rule 15, which provides for adding or substituting parties "at any stage of a proceeding", has no application after judgment has been entered: *Cassidy v. Lee, supra; Farina v. O'Neil, Supra; Canadian Imperial Bank of Commerce v. Garneau, supra.*
2. Where a judgment has been given but not entered, the matter remains 'pendente lite' and Rule 15 may be employed to add or substitute parties: *Ingot Capital Corp v.Paruk, supra; Royal Bank v. Olson, supra.*
3. Rule 15 does not permit an assignee of a judgment debt to be substituted as the judgment creditor where a judgment has been drawn up and entered, unless an order was being made that the judgment be opened and further proceedings taken in the *action: Northern Electric Company Limited v. Turko, supra.*
4. In a foreclosure proceeding, order nisi of foreclosure is a final order and therefore parties cannot be added after order nisi of foreclosure: *Canadian Imperial Bank of Commerce v. Garneau, supra.*
5. Once judgment had been entered, the proceeding is concluded such that an assignee of the judgment could not then substitute itself in place of the plaintiff/assignor and amend the pleadings and style of cause: *Royal Bank of Canada v. Olson, supra.* 6. Where the court is not satisfied that the entity sought to be added as a party after judgment was fully represented in the legal proceeding or not fully convinced that there was no possibility that the entity could have put forward a defence or taken a position on its behalf different than the one that was litigated, the court will not add the entity after judgement or a final order: *Huff v. Price, supra.*
7. Where the plaintiff, a corporate judgment creditor, through continuance and amalgamation, forms part of the proposed plaintiff and where the essence of the former remains in the latter and the defendant has not been misled or substantially injured by the misnomer, the court will, allow an amendment to correct the plaintiff's

name: Sign-O-Lite v. Carruthers, supra; Dr. James C.O. O'Brien v. Bordeleau.

8. Where the plaintiff, a corporate judgment creditor, undergoes a corporate arrangement pursuant to which all property and rights of the plaintiff vest in a related third party and the plaintiff then dissolves, the court will not thereafter allow the third party to substitute itself for the plaintiff to enforce the judgment against the defendant

as the original judgment holder, upon dissolution, ceases to exist: not exist: *Agricore v. Shipton, supra.*

9. Where a final order of an administrative tribunal is challenged on a judicial review, the a court can add, substitute or remove parties from the judicial review proceeding itself because it has no effect on whether or not they were a party or continue to be a party in a proceeding before a tribunal: *Ross et al v. B.C. Human Rights Tribunal, supra.*

Whether Rule 15(5) requires some refinement to incorporate the common law principles arising from the court decisions so that there is more clarity for litigants and their counsel when determining whether or not their case may appropriately rely upon Rule 15(5) to remove, add, or substitute parties after judgement or a final order is questionable. As it is presently constructed, while not absolutely clear, Rule 15(5) has been interpreted by courts generally as inapplicable to remove, add,

or substitute parties after an entered judgment or a final order, unless where exceptional circumstances exist such as when an order is being made that the judgment be opened and further proceedings are taken in the action. Any attempt to further refine the rule by, for example, inserting the words *"before the entry of a judgment or a final order"* in the preamble to the Rule after the words *"(a)t any stage of a proceeding"* or other such changes with a view to incorporating the common law principles set out above may have an unnecessary and limiting effect on courts ability to apply the rule in the few exceptional or unusual cases where the application of the rule after the entry of judgment or a final order is appropriate and justifiable.

End Notes

*Shafik Bhalloo, B.A. (Hons), LL.B (UBC) LL.M (York U, Osgoode Hall), was called to the British Columbia Bar in 1990 and is a partner in Kornfeld Mackoff Silber, a Vancouver law firm that practices in the area of commercial, corporate, real estate, employment and labor law. The author wishes to thank Herb Silber for his helpful comments and Joshua Sadovnick for his research assistance.

1 See CJ Bouck J., JR Dillon & G. Turriff, *British Columbia Annual Practice 2006* (Aurora: Canada Law Book Inc.) and Hon. Justice M. McLachlin & J.P. Taylor, *British Columbia Practice* (2nd edition) (Markham: LexisNexis Canada Inc.)
2 "DEFINITIONS
1 (8) In these rules, unless the context otherwise requires:
"proceeding" means an action, suit, cause, matter, appeal or originating application"
3 R.S.B.C. 1996, c. 238
4 [1959] B.C.J. No. 27
5 (1986), 1 B.C.L.R. (2d) 53 (S.C.)
6 (1880) 15 Ch.D. 423 (C.A.)
7 [1987] B.C.J. No. 789 (Co. Ct.)
8 [1990] B.C.J. No. 359 (S.C.)
9 [1992] B.C.J. No. 258 (B.C.C.A.)
10 [1992] B.C.J. No. 2500 (S.C.)
11 [1993] B.C.J. No. 231 (S.C.)
12 [2000] B.C.J. 90 (S.C.)
13 [2004] B.C.J. No. 651 (S.C.)
14 [2003] B.C.J. No. 1872
15 (unreported) June 28th, 2006, No. L0422113, Vancouver Registry (S.C.B.C.).