2025 **Hfx No. 547515**

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

In The Matter of the Receivership of 4499127 Nova Scotia Limited

BETWEEN:

Express Mortgage Corporation Limited

Applicant

- and -

4499127 Nova Scotia Limited

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT

Application to appoint Receiver: Tuesday, October 21, 2025 at 9:30 a.m.

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I N D E X

TAB 1

SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82

Date: 2018-04-11
Docket: *Tru.* No. 470166
Registry: Truro

Between:

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 20, 2018, in Truro, Nova Scotia
Subject:	Appointment of a receiver, to seek repayment of indebtedness owed to a secured creditor as a final remedy, pursuant to ss. 243(1) *Bankruptcy and Insolvency Act*; Section 77, *Companies Act* (Nova Scotia); CPR 73; Section 43(9) *Judicature Act*
Summary:	LL's core business was a cattle farm. BMO was a secured creditor of LL, whose primary security was the cattle herd. LL failed to make payments for 18 months. It continued to grow the size of its distinctive and valuable herd. It owed at least $200,000 to the bank. BMO sought to have a receiver appointed, with power to sell, over time, portions of the herd, to effect a pay down of LL's debt.
Issues:	(1) Is it just or convenient to order the appointment of a receiver in the circumstances?
Result:	Receiver appointed. The Court found that at least $200,000 is owing. Order granted permitting the receiver to effect a reasonably timely reduction of that indebtedness by sale of portions of the cattle herd, the timing and amounts thereof to

be in its sole discretion, after collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for continued viability.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82

Date: 2018-04-11
Docket: Tru. No. 470166
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Between:

Bank of Montreal

Applicant

v.

Linden Leas Limited

Respondent

Judge: The Honourable Justice Peter P. Rosinski

Heard: March 20, 2018, in Truro, Nova Scotia

Counsel: Bruce Clarke, Q.C., and Leon Tovey for the Applicant
Jillian Foster representing the Respondent

By the Court:

Introduction

[1] Linden Leas Ltd. (LL) is a corporation. However, its embodiment is the Foster family.

[2] Frank and Edna Foster and their children started, and continue to grow, a distinctive herd of cattle, which are highly sought after by buyers. They have collectively worked and managed the farm that sustains the cattle herd that is its core enterprise. Their daughter, Jillian, is a veterinarian and intimately involved with the farm. Even in the documents filed herein, the respondent Corporation is referred to by the Fosters as the "Farmer". [1]

[3] The Bank of Montréal (BMO) are presently the *only* secured creditor having as security the farm's cattle herd. Its financial dealings with LL stretch back to at least May 2001. [2] It seeks a receivership order in relation to the cattle herd.

[4] LL contests the application. It does not deny that it owes approximately $200,000 in principal payments, while recognizing BMO is claiming a further $220,000 for legal *and* receiver fees to date, some of which began accruing between 2012 and 2017, and $165,000 in accrued interest on those outstanding amounts.

[5] BMO made a demand for the immediate full payment of those outstanding amounts on September 20, 2017. [3]

[6] LL has made no payments towards the claimed indebtedness since October 2016. [4]

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[1] Some of the background is contained in Justice Moir's decision- *Bank of Montréal v. Linden Leas Ltd.*, 2017 NSSC 223; the herd had grown between 2012 and 2016 from 650 to 850 head – para. 52 Rachel Chemtob affidavit sworn January 25, 2018

[2] See comprehensive affidavit of Rachel Chemtob, sworn January 25, 2018

[3] Exhibit "R", Chemtob affidavit

[4] The only payments made in 2015, were pursuant to the Fifth Forbearance Agreement, and limited to: $2000 in January; $900 in June; $1000 in August; and $1000 in December; the only payments made in 2016 were: $1000 in March, $1000 in August, and lastly $10,000 in September and October – see Exhibit "Q" and paras. 41-46, Chemtob affidavit

[7] LL says, based on various arguments, including that they were unnecessary and unreasonable, that it should not be responsible to pay a substantial portion of the legal and receiver fees to date and accrued interest thereon.

[8] BMO says that throughout, it is has made sustained diligent and good faith efforts to provide financing to LL, and particularly so over the course of the years 2011 to present, but that LL has not paid its indebtedness as agreed. BMO therefore no longer has confidence in the financial management of the farm by the Fosters. BMO is no longer prepared to place itself at such a level of ongoing risk. Its primary security is the herd, and it proposes to have the receiver sell off not more than $40,000 worth of cattle per month (without an express "total amount owing" limit in the draft order), which it suggests will still allow the herd to retain a critical mass for viability. BMO also wants the receiver to have the power to insure the herd.

[9] LL says that the farm is a "going concern", and still has a bright future, without the appointment of a receiver as suggested by BMO. It strenuously argues that insuring the herd is prohibitively expensive. From the evidence and representations presented I infer that no insurance is presently in place, nor has there been in the past [5]

[10] As Justice Moir summarized it in his recent decision, when the bank made its application for an interlocutory receivership:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[5] See also para. 26 *Linden Leas*, 2012 NSSC 223.

The evidence presented at the hearing

[11] BMO presented only the affidavit of Rachel Chemtob, sworn January 25, 2018. No notice of intent to cross-examine was filed – Civil Procedure Rule (CPR) 5.05(5), nor was there a request to do so at the hearing. [6]

[12] LL presented no evidence. I note that Jillian Foster, who was authorized to speak on behalf of the Corporation, indicated in her written materials that she wished to rely upon previous decisions of, and evidence from, proceedings in this court contained in files Tru. No. 408708 and Amh. No. 348700, including affidavits filed therein.

[13] I advised Ms. Foster that I would not be reviewing the contents of those files[7] or the affidavits therein, because BMO had provided evidence that was up-to-date and superseded any evidence presented therein; and our Civil Procedure Rules require that the affidavits be related to the same "proceeding". In my view that is not the case here. I have as the "proceeding", an originating application in chambers before me. [8]

[14] CPR 39.06 reads:

> (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit filed a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

[15] Thereafter, Ms. Foster spontaneously suggested that she wished to call as witnesses to give *viva voce* evidence to the court on the application, her brother Robert Foster, and David Boyd (the proposed receiver), both of whom were present.

---

[6] Rachel Chemtob was present at the hearing

[7] Keeping in mind the principles in *British Columbia (Atty. Gen.) v. Malik*, 2011 SCC 18

[8] Under the old Rule 38.14, see Justice Fichaud's comments at paras. 15-18, *Amica Mature Lifestyles Inc. v. Brett*, 2004 NSCA 100. Moreover, although the Truro file might have been readily available as we were sitting in Truro, the Amherst file was not.

[16] I ruled against her request. Nevertheless, I do believe that some of her representations of fact/opinion made by way of inclusion of her unsigned September 14, 2012 affidavit from the proceeding in Amh. No. 390679, found at Tab 8 of LL's "brief", are not disputed by the bank and remain relevant at present. Those representations include:

> I am a veterinarian with 25 years of professional experience in livestock medicine and health. I have witnesses [sic] firsthand on clients' farms in the Maritimes, and Ontario and through observation in Alberta, the effects of moving cattle from their "homes". Movement of cattle where unnecessary, results in direct costs and losses to health, life and consequently value and food safety.
>
> …
>
> a) the gestational period, the time from breeding or conception to calving or giving birth, for the common North American cattle breeds is between 275 and 292 days, with 285 being used as average.
>
> b) The ideal is for breeding females to calve or give birth to one calf every year (12 months)
>
> c) the weaning age in days used as an industry standard for calculations to compare animals is 205 days. Weaning is the graduation of calves from being dependent on their mother's milk for nutrition to not. Premature weaning causes stress to both calf and cow and consequentially results in a loss in value and becomes a welfare issue.
>
> d) Cows or breeding females ideally are already 3 to 5 months pregnant when their calves are weaned.
>
> e) Premature weaning of calves results in excess stress and consequently even if safeguarded for, can result in substantial losses and welfare concerns (see [reference to "shipping fever"]).
>
> f) Bred females are most safely moved between four and six months of gestation, after the risk of early embryonic death caused by change of home and stress, when their calf is naturally weaned and before they become heavy in calf. The calf they are pregnant with gets big.
>
> g) Pregnancy tested cattle, *certified safe in calf* at least four months, have a market value above that of *exposed to the bull* and not confirmed pregnant and substantially more than *open not bred* cattle.
>
> h) The Linden Leas herd is synchronized to optimize the benefits of the seasons and grass growth.
>
> i) Calving. Cows calve or give birth on grass with most births occurring in the summer months.

j) Breeding. Insemination. Eligible females are bred by bulls at pasture starting at the beginning of August.

k) Natural weaning of calves occurs between December and February as calves reach adolescence. At this age they are ruminating and able to forage on their own.

…

'Shipping fever' is the common term used to describe the diseases of cattle that occur when they are moved from their home. Orderly weaning, proper "preconditioning" at least five weeks ahead of shipping and an adequate period of bunk adjustment are preventative measures that can make a substantial difference to losses. Given the time that is needed to travel to the next "home" destination for calves weaned early the price paid by buyers is reflective of the expected morbidity and mortality rates that occur from purchasing "high risk" calves. The associated price drop per pound can be 50% of optimal for calves of the same weight as the losses can be substantial to the buyer not to mention the unnecessary suffering and deaths that occur.

The position of BMO

[17] The bank has established that no payments have been made since October 2016, and that at least $200,000 in principal payments presently remain outstanding. *Prima facie*, approximately $220,000 in legal counsel and receiver fees and $165,000 in interest are also presently outstanding. The bank has permitted LL to have the benefit of five Forbearance Agreements (October 4, 2012; February 7, 2013; June 24, 2013; September 4, 2014; and April 30, 2015). Mr. Clarke represented to the court that most of the legal counsel expenses arose not as a result of litigation, but rather solicitor work, in preparing and dealing with the forbearance agreements etc. Notably, within each Forbearance Agreement, LL acknowledged the debt outstanding, and that it was in default. There was no rectification to those defaults, and on September 20, 2017, the debt was again demanded to be immediately paid. On the limited evidence presented, I infer that it is more likely than not, that LL is insolvent.

[18] There is a provision in the contractual documentation for the bank to have a receiver appointed in circumstances such as in evidence before the court. BMO emphasizes that it is seeking the receivership as a "final remedy", and not as a

typical interim receivership. It points out that the Model Order from this court does *not* require a judgment amount to be determined before such appointment. [9]

[19] BMO relies on several legal bases to support its application in chambers, filed October 30, 2017, for the court-ordered appointment of a receiver:

> 1-Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA)- "… on application by a secured creditor, a court may appoint a receiver to do any or all of the following *if it considers it to be just or convenient to do so*:
>
> a-take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> b-exercise any control of the court considers advisable over that property and over the insolvent persons or bankrupt's business; or
>
> c-take any other action that the Court considers advisable."
>
> 2-Section 77 of the *Companies Act*, RSNS 1989, C. 81-"upon an application by a receiver or receiver manager, whether appointed by a court or under an instrument, or upon an application by any interested person, *a court may make any order it thinks fit including*, without limiting the generality of the foregoing,
>
> a-*An order appointing*, replacing or discharging *a receiver* or receiver manager and approving his accounts;
>
> …
>
> c-An order fixing the remuneration of the receiver or receiver manager;
>
> …"
>
> 3-Civil Procedure Rule 73 and specifically 73.02(2)(b) and 73.04 –
>
> 73.01 (1) This Rule provides for receivership as a final remedy, such as an order appointing a receiver to liquidate mortgaged property or to sell a business as a going concern.
>
> (2) An interlocutory or interim receivership may be obtained under Rule 41…
>
> (3) A receivership may be ordered and conducted in accordance with this Rule.

[9] However, in these specific circumstances, the bank requests the Receiver be appointed soley to sell cattle and effect a pay down of the debt. In my view, the better practice is to determine a fixed amount that this Receiver will be authorized to reduce over time by sales of cattle (as well as payment of its own reasonable fees and disbursements, and any statutory claims having priority to the bank's security).

> 73.02 (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.
>
> (2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:
>
> (a) the party is entitled to the order under Rule 8 – default judgment, or Rule 13 – summary judgment;
>
> (b) *a judge determines, after* the trial of the action or *hearing* of the application in which the claim is made, *that the appointment should be made*.
>
> 4-Section 43(9) of the Nova Scotia *Judicature Act*, RSNS 1989 c. 240 - "A… receiver [may be] appointed by an interlocutory order of the Supreme Court, in all cases in which *it appears to the Supreme Court to be just or convenient* that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just…" based on principles established pursuant to the equitable common-law jurisdiction of this Superior Court.

[20] The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; and the decision of Justice Morawetz, in *Bank of Montréal v. Sherco Properties Inc*., 2013 ONSC 7023, which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.

[21] Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;

(g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

(i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

(j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) The effect of the order on the parties;

(l) The conduct of the parties;

(m) The length of time that a receiver may be in place;

(n) The cost to the parties;

(o) The likelihood of maximizing return to the parties; and

(p) The goal of facilitating the duties of the receiver.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc*., 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See Textron Financial Canada Limited v. Chetwynd Motels Limited, 2010 BCSC 477; Freure Village, supra; Canadian Tire Corp. v.Healy,2011 ONSC 4616 and Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd., 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc*. offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) The terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;

> (b) The terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) The value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

[22] *Crown Jewel* involved a request for the appointment of a receiver to effect a final remedy. As was the case there, here, a security instrument contains an express clause permitting the creditor to appoint a receiver. Justice Edwards reiterated the importance of appreciating the distinction between a court-appointed and private receiver:

> 40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. *A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court.* Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.
>
> 41 *The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However,* in Houlden, Morawetz and Sarra at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or

> convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].

42 Finally, the authors note at p. 1024 of The 2013-2014 Annotated Bankruptcy and Insolvency Act that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In Romspen Investment Corp. v. 1514904 Ontario Ltd. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.
>
> [My italicization]

[23] Notably, although Justice Moir was dealing with a request for an interlocutory appointment of a receiver in *Linden Leas*, 2017 NSSC 223, he did state in relation to the appointment of receivers to effect a final remedy:

> 19 While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order….
>
> 20 The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against pre-judgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

[24] **An examination of some factors relevant to whether it is just and equitable to appoint a receiver** [10]

a) Whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed) [11]

[25] Although BMO's security contains a provision permitting it to have a private receiver appointed, insofar as a court-appointed receiver is concerned, it still bears the onus. Its evidence as contained in the Chemtob affidavit suggests that:

i) On January 25, 2018 the outstanding amounts were: $203, $314.36 in principal; $220,419.12 in legal and receiver fees; and $164,915.63 in interest, for a total of $588,649.11.

ii) That indebtedness is also secured by the May 18, 2001 personal guarantees of Frank Foster and Edna Foster (limited to $200,000); the July 26 2004 personal guarantees of Frank Foster, Edna Foster, Jillian Foster and Robert Foster, (limited to $100,000) the July 26, 2004 guarantee of Robert Foster (limited to $100,000); and the July 26, 2004 guarantee of Jillian Foster (limited to $100,000).

iii) LL and the Nova Scotia Farm Loan Board are the registered owner of 24 real properties in Nova Scotia. The cattle herd has grown from 650 in 2012 to approximately 850 head in 2016. The 2017 financial statements of LL indicate the value of its cattle to be more than $1 million.

iv) "BMO is concerned about Linden Leas' ability and willingness to take necessary steps to reduce the Indebtedness… [and] is therefore of the view that a receiver needs to be appointed by the court with the authority to begin selling some of the company's cattle in order to reduce the amount of the Indebtedness.

[10] While these factors arise in the general context of interlocutory receivership applications, they do provide a ready starting point for determining whether, as a final remedy for a secured creditor, it is "just or convenient" to appoint a receiver.

[11] In the circumstances of this case, there is a serious concern that *any* culling of the herd could precipitously undermine the viability, and value of the cattle operation.

[26] In its brief, BMO argued that there exists a risk of such harm to its security. Because the herd is the company's most valuable asset,and is BMO's only direct security, BMO may be at greater risk. To the extent that there are valid concerns about the company's financial ability to care for the herd, and no insurance on the herd, its security is presently particularly vulnerable.

[27] On the facts and representations herein, I cannot conclude that BMO has established irreparable prejudice might occur, if no receiver is appointed by the court. I accept that, at law, it is not essential that BMO demonstrates irreparable harm.

b) The risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets, while litigation takes place

[28] As set out above, the cattle herd, which is the primary security that BMO can claim, has an estimated $1 million value. [12] The debtor's equity in the assets appears to be significant.

c) The nature of the property

[29] The cattle herd is an ever-changing group of living assets. By its nature, it requires intensive monitoring, handling and care, by trained or experienced personnel in order to ensure its maximum value. Realistically, this monitoring must be done by the Fosters, although it could be under the auspices of a court-appointed receiver.

d) The apprehended or actual waste of the debtor's assets

[30] This is not a significant concern here.

(e) The preservation and protection of the property pending judicial resolution (i.e. material reduction or elimination of the Indebtedness)

[31] While this is a significant concern given that the cattle herd is BMO's primary security (beyond any risk reduction attributable to the personal

[12] The bank's security includes the cattle specifically, pursuant to s. 427 *Bank* Act security documentation registered April 19, 2010 – see Exhibit "C" Chemtob affidavit referred to at paras. 4-6.Linden Leas also owns real property.

guarantees), LL, and the Fosters collectively, are similarly motivated to preserve and protect the cattle herd.

f) The balance of convenience as between the parties.

[32] LL argues that the receiver should not be appointed, but more importantly even if appointed, should not be permitted to sell off *any* of the cattle herd without its consent; and in particular not to do so to pay down the indebtedness attributable to past receiver and legal fees or any interest accruing on those amounts. The amount of that indebtedness is in dispute. In contrast, the approximately $200,000 in principal owing is not seriously in dispute. LL suggested at the hearing, it will be in a position within several weeks to pay close to $200,000 to BMO. [13]

[33] However, LL has presented no particularized plan to pay off, or pay down, the Indebtedness. BMO has received no payments since October 2016 – this is suggestive of a failing business. BMO could fairly comment that there is no evidence, but only a somewhat vague representation by Ms. Foster at the hearing, that there has been an accumulation by LL of such vast stores of surplus monies, now available to it to pay BMO $200,000.

[34] I observe that, if issued including terms to an order appointing a receiver is limit the sale of cattle to the amount of the principal owing such monies are paid, then LL would be able to avert the sale of any of the herd *at this time*.

g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan

[35] This factor generally strongly supports BMO's position that the Court should appoint a receiver.

h) The enforcement of rights under security instrument where the security holder encounters, or expects to encounter, difficulty with the debtor and others

[36] BMO and LL have fundamentally different perspectives on how to resolve the financial dispute between them. I repeat Justice Moir's recent comments:

[13] At the hearing, Jillian Foster alluded to monies LL had received from timbering operations, and suggested $200,000 would shortly be available to pay BMO.

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

[37] If the court appoints a receiver with conditions that ensure that the Foster family have meaningful input [14] into the decisions of the receiver which affect the viability of the herd, it would expect a genuine good faith collaborative effort by the parties will emerge.

i) The principle of the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly

[38] While this is generally true, here the contractual provisions between the parties permit a private receiver to be engaged, and LL does not seriously dispute that it owes at least $200,000 to BMO under the security, and has not made a payment since October 2016, thereon.

j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently

[39] I am satisfied that this is the case. The receiver is responsible to the court. This heightened fiduciary responsibility is to the benefit of both parties.

k) The effect of the order on the parties

[40] The Foster family is understandably very protective of its hands-on management of the cattle herd, and the farm generally. They have invested their lives, as much as their money and talent, in creating and growing this distinctive and valuable herd. However, while they appear to have had the determination, knowledge, and resources to be outstanding farmers, they have not managed their

[14] A right to be meaningful consulted in a timely manner regarding, but not a right to veto, decisions of the receiver in determining, which cattle, and how many should be sold, and when.

financial affairs to that same standard. The bank is entitled to be paid according to law. They have sought the Court's intervention to effect payment by LL of the Indebtedness. The appointment by the court of a receiver, who is an officer of the court, and must take instructions from the court, and not favour the interests of the debtor or creditor, can be an effective means of resolving disputes such as the one before the court. It is intended to let the Fosters be farmers, and the receiver be a conduit through which BMO can receive sufficient payments towards its indebtedness to alleviate its concerns.

l) The conduct of the parties

[41] There is no evidence of past misconduct, nor any anticipated.

m) The length of time that a receiver may be in place.

[42] If the receiver is entitled to sell some of the herd over time in order to satisfy at least the $200,000 principal indebtedness, and if the 850 head of cattle have a value of $1 million, then, in static terms, roughly speaking 20% of them (170 head) would need to be sold in order to generate $200,000. If BMO's proposal to sell *no more* than $40,000 worth per month is accepted by the court, that would see no more than 34 cattle sold monthly (presuming their price is approximately $1200 per head), for five months to reach 170 head in total.

[43] I am reluctant to arbitrarily set out a fixed monthly maximum allowable sale of the cattle by the receiver. No particulars were offered in evidence regarding such a timetable. Even presuming 20 head are sold per month continuously, that could entail roughly 8 consecutive months of sales. Given LL's legitimate concerns about sustaining a critical mass and mix required for herd viability, and the requirement to sell approximately 170 head in total to pay back $200,000, the receiver may need to be in place for an indefinite period of time. This cannot be calculated with precision. The court must accord the Receiver the necessary discretion to effect an orderly and thoughtful reduction of the debt.

Conclusion

[44] Upon consideration of all the circumstances, viewing those through the factors noted above, and collectively pursuant to the statutory and equitable

jurisdiction of the court, [15] I am satisfied that it is convenient or just to appoint a receiver.

The order to issue

[45] Specifically, I appoint Price Waterhouse Coopers Inc., without security. [16]

[46] Although, it is not necessary to articulate a precise amount of indebtedness in the order, I am satisfied it is more likely than not that LL is indebted to BMO for an amount of at least $200,000 as at March 23, 2018.

[47] The Receiver will effect a reasonably timely reduction of LL's indebtedness to BMO, only toward payment for any true principal and interest thereon outstanding as of March 23, 2018, and to a maximum of $200,000. [17] The Receiver will reduce that indebtedness, by making payments to BMO arising from the revenue generated by sales of portions LL's cattle herd. The timing, content, and amounts thereof to be in the Receiver's sole discretion, *but* only after having had genuine and timely collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for viability. LL will fulsomely facilitate the Receiver's patent and patently implied responsibilities to effect the debt reduction.

[48] I decline to order LL to be responsible for the cost of any herd insurance.

[49] I believe it appropriate for the court to order the parties to attend at a mutually convenient time for a status update in approximately six months. [18]

Costs

[15] As reflected in s. 43(9) of the *Judicature Act*, and s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 77 of the *Companies Act (Nova Scotia)* and our *Civil Procedure Rule* 73

[16] I am satisfied that this is appropriate – see Rule 73.07(a).

[17] The Receiver shall also pay from the proceeds before paying BMO's indebtedness: its costs incurred in acting as Receiver, including its own fees, charges and expenses; any statutory claims due and owing, which have prioirity over the secured claim of BMO.

[18] The mutually convenient date will be ascertained in advance and inserted into the body of the court's order. BMO also sought payment of the legal and Receiver fees and disbursements with interest to date, but were agreeable to defer the court's assessment of their reasonableness to a future date. I will leave it to the parties to arrange any further hearings required, on notice to all parties including the guarantors, regarding the remaining claimed indebtedness beyond $200,000, and costs of this Application. I direct the Applicant to draft the form of order.

[50] Typically, an application in chambers set for one half day, would justify an order of approximately $1,000 in costs as against the Respondent. I note that in the *Crown Jewel*, Justice Edwards ordered $1,500 costs. BMO has suggested deferring the determination of the costs of this proceeding to the date when the legal, professional fees and outstanding interest amounts are assessed. I believe this can best be addressed at a future date.

Rosinski, J.

TAB 2

SUPREME COURT OF NOVA SCOTIA
Citation: Bank of Montreal v. Sportsclick Inc., 2009 NSSC 354

Date: 20091117
Docket: Hfx 314220
Registry: Halifax

Between:

Bank of Montreal

Plaintiff

v.

Sportsclick Inc.

Defendant

Judge:	The Honourable Justice Patrick Duncan.
Heard:	November 10 and 12, 2009, in Halifax, Nova Scotia Orally on November 12, 2009
Counsel:	Stephen Kingston and Benjamin Durnford, for the Plaintiff Christopher Robinson, for the Defendant Dennis Pickup and Jonathan Saulnier, Articled Clerk, For Third Party T &A Venture Properties Inc.

By the Court:

Introduction

[1] This is a motion that seeks an order to approve the sale by the Receiver of Sportsclick Inc. of a certain asset of Sportsclick, being the shares of a company known as Southprint Inc. The application is supported by T & A Venture Properties Inc., the intended purchaser of the asset, who is participating as an interested non party. The motion is opposed by Sportsclick.

Background

[2] Upon application of the plaintiff, Bank of Montréal, an order was issued on July 14, 2009 by the Registrar of Bankruptcy appointing Ernst & Young Inc. as the interim Receiver of Sportsclick Inc. and Sun Vette Racing Inc. pursuant to section 47 (1) of the **Bankruptcy and Insolvency Act** (Canada), R.S. 1985, c. B-3.

[3] Following appointment the Receiver offered the personal assets of the defendant for sale by tender, excepting the Southprint shares, which the Receiver characterizes as a unique asset.

[4] The Receiver learned that the defendant is the parent company of Southprint Inc. a Martinsville, Virginia, USA based company which carries on business selling hats, jackets, shirts, toys and other items with NASCAR logos and designs. It prepares various artwork to customer specifications and silkscreens these designs on apparel and other textile products.

[5] The evidence indicates that Sportsclick completed the purchase of all shares of Southprint on or about May 12, 2009. The CEO and sole director of the company is Jack Ross, who is also the president, CEO and director of the defendant.

[6] During its investigations, the Receiver determined that the plaintiff has a charge on the shares of Sportsclick in Southprint. It does not have direct security or other agreements with Southprint.

[7] The information initially gathered by the Receiver indicated the following:

- Southprint had a net operating loss of $1.4 million in 2008 and $1.04 million in 2007;

- Southprint lacked operating capital, was in default in payments to trade suppliers and licensors, and did not have access to a bank operating line of credit;

- the majority of Southprint's accounts receivable were factored;

- important licensing agreements of its' major products were tied to the personal relationships of a small group of management personnel within Southprint;

- that on the eve of the appointment of the Receiver in July, 2009, $75,000 US was withdrawn from a then balance of $76,000 US that Southprint held in a US bank. This was done on the direction of Mr. Ross. Because of the concern that this may have been done as a preferential payment, the Receiver acted as a catalyst to have the signing authority of Mr. Ross, among others, removed from the Southprint bank accounts.

[8] The Receiver sent a representative to the Virginia plant to do a preliminary review of the business and operations of Southprint. The information indicated that the company was downsizing with declining sales, employees and facilities.

[9] On July 31, 2009 the Receiver was presented with an offer in the amount of $100,000 for the purchase of the Southprint shares. The prospective purchaser included the previous shareholders who had, only months before, sold their interest to Sportsclick. One of these persons was understood to be Butch Hamlet, one of the founders of Southprint, and a key player in the company's operation and management. The offer was reaffirmed in a letter of August 7 from counsel for the purchasers. It set 5 PM on August 12, 2009 as the deadline for acceptance.

[10] The fact of this offer was communicated to Mr. Ross and others associated with Sportsclick by counsel for the Bank of Montréal. He set out various adverse conditions associated with Southprint and states:

> The Bank of Montréal is not prepared to fund a very expensive receivership of Southprint in the United States to take control and operate the company. In light of the real and adverse situation presented by Mr. Hamlet, the receiver has to consider acceptance of the offer.

[11] The Receiver discussed a potential sale of the shares to Green Swan Capital Corporation, a company that held a subordinate security interest against Southprint. It was not in a position to make an offer and so the Receiver entered into negotiations with Mr. Hamlet and others, sometimes referred to as the "US group".

[12] In deciding to attempt a private sale of the shares, the Receiver considered the information identified previously, and also:

- that the assets of Southprint were fully encumbered, including accounts receivable factored to Amerisource Funding;

- the machinery and equipment were secured to River Community Bank. This bank, in view of the default by guarantor Sportsclick (by its being put into receivership), made a demand for repayment of the debt owed to it in the amount of $487,705 as of August 6, 2009;

- a review of the United States UCC filings and of the company financial statements indicated that there were multiple secured and unsecured

creditors of the company, which claims against Southprint assets would rank in priority to the plaintiff's security interest.

- that a legal opinion obtained by the Receiver indicated that under the laws of the state of Virginia, a claim by a shareholder to the assets of the company is subject to secured and unsecured creditors, making a shareholder a junior creditor;

- the Bank of Montréal again confirmed that it would not fund an action for the carrying on of the business of Southprint;

- the management team of Southprint was prepared to resign unless a deal was completed to assure the company's viability.

[13] The Receiver concluded that sale as a "going concern" represented the best option.

[14] A Nova Scotia-based group contacted the Receiver in mid-August indicating an interest in the Southprint shares. Believing that it should allow this new

expression of interest to be explored, it advised the US group who, as a result, withdrew their offer of $100,000.

[15] No other offers were forthcoming and so the Receiver proceeded with a public tender of the Southprint shares owned by Sportsclick. This was also in response to pressure being exerted by Sportsclick management who favored a public tender process.

[16] An advertisement of the sale was posted in newspapers in Nova Scotia and in Virginia in four successive weeks commencing September 5, with the deadline for offers by September 30, 2009.

[17] In addition, Ernst & Young developed a direct marketing list of prospective buyers who were contacted and advised of the opportunity to purchase the Southprint shares. Of this listing, 17 groups requested and were provided a copy of the Information Package.

[18] The advertising costs alone are valued at in excess of $24,000.

[19] Mr. Ross was also invited on various occasions to provide a list of names of any potentially interested parties for the purchase of these shares. No suggestions came forward.

[20] At the tender close date there was a single offer in the amount of $25,000US made by T & A Venture Properties Inc. There has been representations by counsel for T & A that this is a company that is separate from the previous shareholders. The evidence provided by Mr. Kinsman, being the only evidence I have on this issue, is that it consists of individuals who currently have a managerial or operational role in Southprint and is the same group that previously made the $100,000 offer.

[21] If the offer is accepted then it will barely cover the cost of the advertising.

[22] On October 13, 2009 Justice McDougall of this court issued an order appointing Ernst & Young Inc. as Receiver of all of the assets, property and undertaking of Sportsclick Inc. with broad powers that included:

> 2 (i) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such

> terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (j) To apply for any vesting order or other orders necessary to convey the Property or any part of parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such property;
>
> (o) to exercise any shareholder ... rights which the Company may have; and
>
> (p) take any steps reasonably incidental to the exercise of these powers.

[23] The Receiver has recommended to this court that it approve the sale of the Southprint shares for the sum of $25,000US because this is the value which presented itself to the Receiver when the asset was widely exposed to the market for sale, and after Sportsclick's principals and others (such as Green Swan capital Corporation) were consulted for assistance with marketing the asset.

Position of Sportsclick

[24] Jack Ross, in his affidavit, concisely sets out the basis of the defendant's opposition to approval of the sale.

[25] He says that the value of Southprint was, "...after considerable effort and due diligence, determined to be in the region of $4 million as at the date of acquisition by May 12, 2009." He rejects the suggestion that the assets deteriorated to $25,000US.

[26] He says that from the commencement of the receivership until September 2, 2009 the Southprint bank balance "consistently averaged $200,000 +" which challenges the accuracy of the assertions that there were cash flow problems in Southprint.

[27] He questions the effort expended by the Receiver in trying to achieve reasonable value for the asset alleging that the Receiver acted improvidently, without commercial reasonableness, and without regard for the best interests of the shareholders and creditors of Sportsclick. He maintains that the assistance and guidance of members of the Sportsclick management group should have been utilized to achieve reasonable value for the shares.

[28] In his submissions, counsel for the defendant expanded on these points. He argues that there were several failings of the Receiver which led to the current situation:

- that there is no evidence before the court to demonstrate that the Receiver conducted a proper valuation of the asset at any point during the receivership;

- that in eliminating the participation of Sportsclick management from a position where they could oversee the operations of Southprint, and by allowing the previous shareholders and management group of Southprint to have unfettered control of the company, the Receiver created the current situation where those same people are able to inhibit the marketability of the asset by threatening to withdraw or engage in activities that would be detrimental to the value of Southprint;

- that the most current value by which the offer should be measured is the acquisition price paid in May, 2009 which is so substantially more than the

amount offered in the tender process as to demonstrate that it is not commercially reasonable to accept it;

- that because of the unique nature of the asset, the marketing attempt of the Receiver was inadequate in that:

1. Newspaper advertising only referred to the “shares of Southprint” as being made available for sale. In Virginia the company operated under a different business name and so the Southprint name would not be meaningful to prospective purchasers;

2. The newspaper advertising in Virginia was confined to one paper with a circulation of 170,000 people;

3. The advertisement should have provided more detail about the nature of the asset in order to generate interest and should have been more widely disseminated through newspapers with larger circulation and broader geographic appeal;

- that the targeted group was not large enough.

Position of the Receiver

[29] The applicant submits that the nature of this asset, with its adverse characteristics for operation as a going concern, was unique and of interest to a very limited class of potential purchasers who it attempted to reach with its marketing efforts. It stands by the tender process as being a commercially reasonable effort to maximize the realization value of the shares.

[30] I have been referred to the principles set out in the decision of *Royal Bank of Canada v. Soundair Corporation* [1991] O.J. 1137 (Ont. C.A.) as addressing the criteria applicable to this court's review of the Receiver's sale of assets. I am urged that all of the criteria contained therein have been met.

[31] In response to the specifics of the allegations of Mr. Ross and Sportsclick the Receiver says:

- that Mr. Kinsman, acting on behalf of Ernst & Young in this matter, is an experienced and savvy Receiver who made adequate inquiries throughout to ensure that he understood the nature and financial characteristics of Southprint;

- that he was prepared to accept the risk in walking away from the $100,000 offer which demonstrates his commitment to achieve the best possible realization value;

- that the advertising of the shares undertaken in the tender process was consistent with the industry-standard;

- that the Receiver generated inquiries from 17 different parties through targeted marketing efforts;

- that due to the position taken by the Bank of Montréal in refusing to undertake the management or control of Southprint there was no direct route to liquidate the assets of Southprint. Further that it would be subject, as a shareholder, to taking a junior position as a creditor;

- that in triggering the removal of Sportsclick's management from signing authority at Southprint it was acting to preserve the value of the asset. The Receiver was concerned that on the direction of Sportsclick management $75,000US was transferred from Southprint to a principle of Sportsclick on the eve of the receivership in July. Fearing a preferential payment the Receiver sought to block future such transactions. The Receiver did not intend to, nor did it communicate to Mr. Ross that he was barred from otherwise taking an operational role in Southprint;

- And finally, that it has consistently invited the assistance of Mr. Ross, but that none has been forthcoming, except to the extent that Mr. Ross indicated he would assist in return for a six month contract paying him his then current salary of approximately $10,000 per month, an offer that the Receiver rejected. Mr. Ross rejected a counter proposal to be paid on an hourly rated basis. He also did not respond to an invitation by the Receiver to present another proposal to assist the Receiver.

Law

[32] In *Royal Bank of Canada v. Soundair Corp., supra,* Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:

> 1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

[33] Certain principles have been enunciated by the courts in consideration of these points:

- The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation... in any but the most exceptional circumstances... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see,* Anderson J. in *Crown Trust v Rosenberg* (1986), 60 O.R.(2d) 87 at 112;

- the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para 40;

- the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. V. Rosenberg, supra,* at page 124, Anderson J. said:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

- a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra*.

ANALYSIS

[34] I agree that the shares of Southprint presented as a unique or unusual asset. Southprint opened in 1991 and began operating under that name in 1992. It developed a customer base of large branded companies that grew to include Adidas, Big Dog Sportswear, J. America (college licensee), and MJ Soffe (U.S. Army exclusive licensee). In 1994 it purchased Checkered Flag Sports and

developed and marketed NASCAR apparel to retail outlets. It was owned and managed privately, with Mr. Hamlet being the president and majority shareholder.

[35] The evidence suggests the company became successful on the strength of the personal relationships of its management team, particularly with the licensors whose business was crucial to the viability of the company.

[36] Sportsclick had a Business Acquisition Plan that was intended to improve profitability in a relatively short time. i.e. within 12 months of acquisition. However, two months after acquisition, Southprint was in receivership and unable to carry out its plan.

[37] While Sportsclick made some initial changes to the operations of Southprint, including financing and some staffing changes, it does not appear from the evidence that it had any major influence on the operations. There is no evidence that Sportsclick provided an infusion of capital for Southprint nor did anything that substantially attacked the problems affecting its financial operating capabilities.

[38] In consequence thereof, the previous management team, that included its founders, remained in place. They have continued to operate the business under the benign oversight of the Receiver who has made it clear that it was never in the Receiver's mandate to operate or manage Southprint. There is no persuasive evidence on which to conclude that the financial situation of Southprint has improved.

[39] The prospective purchaser, I am told, includes members of the current management team. Those persons have threatened to walk away from the business if a purchaser is not in place to guarantee the financial viability of the company. Their participation in the operation of the company at this time is crucial if it is to continue as a going concern.

[40] The defendant complains that this is a situation that should not have been allowed to take place and that it has negatively impacted on the market for the shares of Southprint. The inference I am asked to draw is that either by the continued involvement of the Sportsclick management team, or the more active oversight of the Receiver, the shares of this company would have made a more attractive buying opportunity. It is also suggested that the equity in the assets

alone should attract a substantially greater purchase price. All of this presupposes that there is a person or company who sees that potential as significant enough to offset the problems that acquisition will inevitably entail.

[41] The Receiver says that the market place determines value and that the marketplace has spoken. No one agrees with the defendant's view of the value that this opportunity presents. Only T & A has an interest now.

[42] For its part the Bank of Montreal, a significant secured creditor of Sportsclick, has also accepted that it is not worth pumping more money into selling the shares. They have gauged the marketplace and obviously have come to the same conclusion as the Receiver.

[43] Neither have other creditors stepped up to offer, even a dollar, to acquire these shares in hopes of somehow realizing some greater return, in a break up of the assets of Southprint, or as a going concern.

[44] Unfortunately there is no evidence on which I could conclude that any marketing scheme would attract a better price or more interest. It is speculative to

suggest that it would. It is not sufficient, in my mind, to challenge the business judgment of an experienced Receiver on the basis of speculation.

[45] The underlying assumption of the defendant's argument is that the limited interest in the company is derived from the Receiver's handling of the company and the marketing effort. In support of this view, I have been referred to the valuation put on Southprint by Sportsclick at the time of purchase which closed in May, 2009.

[46] It is suggested that that is the best, if not the only reliable way to measure the value of the shares.

[47] I have examined Southprint's financial statements, the PWC due diligence draft report of January 2009 and the Southclick Inc. Business and Acquisition Plan, also dated January 2009. I have also considered the affidavits of Jack Ross.

[48] The following is a snapshot of what I view as indicators of the relative financial health of Southprint in the years 2004-2008:

	2004	2005	2006	2007	2008
Sales	20.1 M	18.8 M	16.7 M	14.01 M	13.9 M
Operating Loss	601.5 K	221 K	398 K	1.38 M	1.73 M
Net Operating Loss	396 K	242 K	306 K	1.04 M	1.4 M

[49] As can be seen, sales were dropping long before the current economic downturn. Net operating losses climbed to the point where they totaled $2.44 million on sales of $28 million in the last 2 years before Sportsclick made its purchase.

[50] Southprint was reliant for day to day operations on approximately $4.0 million in financing that was dependent on its then shareholders' personal financing backed by a traditional lender. It closed one plant in 2008, cut back shifts, laid off employees and in January 2009 closed completely for a short period of time.

[51] As at January 2009 a number of the 2009 licencing agreements had not been signed, including the contract thought to have the most value. One account that had generated sales of almost $2.0 million in 2007-2008 was not expected to be part of sales in 2009. It is not clear in the business plan how this significant loss of revenue was going to be replaced or how expenses were going to be controlled to off set such a loss.

[52] Notwithstanding its capital and real property assets Southprint is a company that has been in serious financial decline for several years.

[53] According to Mr. Ross's affidavit, Sportsclick acquired all of the outstanding shares of Southprint in exchange for the issuance of 6 million shares of Sportsclick to various of the former Directors and Officers of Southprint . The book value of the shares was $3 million. The value of the Sportsclick shares on the TSX Venture Exchange at the close of business on May 12, 2009 was $.15 per share, or $900,000. In addition, shareholder loans owed by the two previous principals of Southprint were treated as goodwill and taken off the books of the company in a non-cash transaction. While I agree that the purchase price was

approximately $4,000,000 in value, it was not put up in cash, which is the expectation of a Receiver.

[54] Put another way, there are certain methods of effecting a sale that would be available in an unfettered sale between a willing and financially stable vendor and a willing and financially stable purchaser that are not feasible on a liquidation. It is one of the reasons why it is common for assets to be sold off at significantly reduced prices in a Receivership from what might be negotiated in the ordinary course of business. In a liquidation the sale is typically for cash and is to be achieved in an abridged time frame. The longer the time extends, the greater the costs of the Receiver, and the greater the deterioration of the asset values to the creditors.

[55] The Sportsclick business plan for Southprint had the following general features:

- to improve the sales culture

- to reduce salary and benefit commitments by reducing staff and capping compensation

- renegotiating royalties

- reduction of some promotional costs

- to reorganize the financing

- to take advantage of the “synergies between Sportsclick and Southprint.”

[56] The result was predicted to reduce overhead by $1 million.

[57] Sportsclick intended to sell 2 pieces of real property for $150,000 and to obtain direct financing of $4.0 million by factoring accounts receivable, mortgage financing, term financing and inventory financing.

[58] These forms of financing would be dependent upon the financial soundness of Sportsclick as the owner and guarantor. At no point does the plan speak to the infusion of capital by Sportsclick to Southprint.

[59] Under its current situation, Sportsclick has no ability to guarantee, nor to otherwise financially support the operations of Southprint. Creditors of Southprint

who stand ahead of the shareholder have seen this and issued demand for payment. Neither is there a prospect for the predicted benefits of the “synergies” between parent and subsidiary.

[60] Southprint can only survive as a going concern with a purchaser that has the financial ability and the will to take on a company that is now losing almost $2 million per year on declining sales, has limited creditworthiness, and is largely dependent on the willingness of the existing management team to continue to use their knowledge of the company and of its existing business relationships to the benefit of Southprint.

[61] The Receiver has no mandate to operate Southprint. The only other option is to simply close Southprint down and liquidate the assets, hoping that the equity will cover the cost of acquisition. That option is not open to the Receiver in this case. None of the creditors of Sportsclick have seen fit to step forward to take on this challenge. Whether that is a good business decision is not relevant to the position of the Receiver, who can only act with the resources that it has available to it. As Mr. Durnford indicated in his submissions, there may be collateral issues to

this matter that arise for resolution in the principal action as between the Bank and Sportsclick, but that is not determinative of the considerations before me.

[62] Finally, I am urged to accept that the accumulated financial acumen of the management of Sportsclick in making this purchase is a reliable indicator of the accuracy of the value they attached to Southprint. With respect, even good business people fail as a result of unexpected conditions, or because of errors, some within their control, some beyond their control. In this case the fate of Sportsclick speaks to a business model that failed. I will not defer to the judgement of those who oversaw that failure over the judgment of the Receiver.

Conclusion

[63] In *Greyvest Leasing Inc.* v. *Merkur* [1994] O.J. 2465, the Ontario Court of Justice held at paragraph 45 as follows:

> Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A Receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. [See *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1

> (C.A.).] This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

[64] I am satisfied that the Receiver in this case did that. It is a most disappointing result for the creditors, and the debtor. It will at best cover some of the disbursements on sale. No one benefits greatly from this, except perhaps the principals of T & A, but the evidence suggests that they have significant challenges ahead of them to make this a profitable company, in difficult economic times. They may be the only ones who have the ability to do so.

[65] The decisions made by the Receiver were made in good faith, cognizant of the duties that a Receiver is subject to. It made business judgments that may be easy, with the benefit of hindsight, to criticize, but they were reasonable having regard to the circumstances in existence at the time. No alternatives to the targeted marketing approach have been shown to exist that would provide, beyond speculation, the potential for a greater return.

[66] The tender process, once decided upon, was carried out in a transparent and fair manner, consistent with industry standards.

[67] Having regard to the facts as set out herein, and the duties on a court as enunciated in *Soundair,* I am satisfied that the Receiver's recommendation should be accepted. I am prepared to grant an Order to give effect to the sale of the shares of Southprint to T & A Venture Property Inc for the sum of $25,000 US.

[68] Delivered orally at Halifax, Nova Scotia this 12th day of November 2009.

_____

Duncan J.

TAB 3

NOVA SCOTIA COURT OF APPEAL

Citation: Edwards v. Edwards Dockrill Horwich Inc., 2009 NSCA 37

Date: 20090416
Docket: CA 298463
Registry: Halifax

Between:

Michael L. Edwards, M. L. Edwards Inc. and Nican Incorporated

Appellants

v.

Edwards Dockrill Horwich Incorporated, Minnej (N.S.) Incorporated, Michael Dockrill and James N. Horwich, carrying on business under the firm name and style of "Dockrill Horwich Chartered Accountants", Michael Dockrill as principal trustee of the M. B. Dockrill Family Trust and James N. Horwich, as principal trustee of the J. N. Horwich Family Trust

Respondents

Judge: The Honourable Justice Roscoe

Appeal Heard: March 31, 2009

Subject: receivership, approval of receivers' report

Summary: After a lengthy trial involving a dispute between partners in an accounting practice, the trial judge appointed two receivers to wind up the practice and to determine amounts payable by and to the parties based on his decision. When the receivers filed that report, one of the parties objected and applied to the judge to amend the report in several respects. The judge dismissed the application after finding the receivers' report was reasonable.

Issues: Did the chambers judge apply the wrong test in dismissing the application or did the decision result in an injustice?

Result: With respect to all but one of the issues raised by the appellants, the judge applied the proper test in reviewing the receivers' report and there was no injustice requiring the intervention of the Court of Appeal.

However, with respect to the claim that the respondents may have received a $40,000 windfall as a result of an HST input tax credit, the appeal court found that the receivers did not inquire as to the possibility of such a windfall and the chambers judge did not address the issue in his decision. Therefore, in order to prevent a possible injustice, the appeal was allowed to a limited extent and the receivers were directed to make the appropriate inquiries and report back to the chambers judge.

NOVA SCOTIA COURT OF APPEAL

Citation: Edwards v. Edwards Dockrill Horwich Inc., 2009 NSCA 37

Date: 20090416
Docket: CA 298463
Registry: Halifax

Between:

Michael L. Edwards, M. L. Edwards Inc. and
Nican Incorporated

Appellants

v.

Edwards Dockrill Horwich Incorporated,
Minnej (N.S.) Incorporated, Michael
Dockrill and James N. Horwich, carrying on
business under the firm name and style of "Dockrill
Horwich Chartered Accountants", Michael
Dockrill as principal trustee of the M. B. Dockrill
Family Trust and James N. Horwich, as principal
trustee of the J. N. Horwich Family Trust

Respondents

Judges: Roscoe, Hamilton and Fichaud, JJ.A.

Appeal Heard: March 31, 2009, in Halifax, Nova Scotia

Held: Appeal is allowed to a limited extent involving the HST input credit on the legal fees. In all other respects the appeal is dismissed per reasons for judgment of Roscoe, J.A.; Hamilton and Fichaud, JJ.A. concurring

Counsel: Michael S. Ryan, Q.C. for the appellants
W. Augustus Richardson, Q.C., for the respondents

Reasons for judgment:

[1] This is an appeal from an unreported decision of Justice David MacAdam dismissing an application of the appellants to amend a joint receivers' report. The receivers were previously appointed by the judge after lengthy litigation regarding the dissolution of an accountancy practice (EDHI) and its associated management company (Minnej) formerly carried on by the individual parties.

[2] For the purposes of this appeal, it is not necessary to review the extensive background of the dispute between the parties which is set out in the decisions of Justice MacAdam. The decision after the 15 day trial is reported as 2005 NSSC 308. A supplemental decision, after several post trial applications, settling the form of order and providing more specific directions to the receivers, is reported as 2006 NSSC 157. The receivers, both chartered accountants, were directed to manage the affairs of EDHI and Minnej, ascertain amounts to be paid by the respective parties to give effect to the decision of Justice MacAdam, collect amounts owing to the companies, pay the proper creditors of the companies and distribute the balance to the shareholders. The order after trial provided 25 additional clauses of specific directions to the receivers.

[3] The receivers filed their 26 page final report with Justice MacAdam on June 21, 2007. As a result of their analysis, the receivers reported that the individual parties were to pay EDHI / Minnej the following amounts: Mr. Edwards - $117,069.75, Mr. Dockrill - $35,114.09 and Mr. Horwich - $35,200.82. The receivers concluded that after payment into the corporate entities of the various amounts owed and payment of all accounts owed by the companies, there would be very little, if any, in surplus funds left to distribute to the shareholders. Mr. Edwards sought numerous clarifications from the receivers who provided further explanation of their conclusions in correspondence to Justice MacAdam.

[4] The appellants then brought an application heard by Justice MacAdam on May 1, 2008 seeking to amend the receivers' report. Specifically, the appellants sought changes, corrections or additions to the report regarding: the extent of the obligation of EDHI to reimburse Messrs. Dockrill and Horwich for legal fees and disbursements they paid to defend the action against EDHI by Mr. Edwards, the payment of directors fees, the calculation of amounts due to the shareholders, the taxation of the legal accounts payable by EDHI, an input HST tax credit on the legal fees, and the cash disbursements made by EDHI.

[5] Justice MacAdam found that there was no excess of power, fraud or lack of *bona fides* on behalf of the receivers and therefore the question was whether the receivers' report was reasonable. He also adopted the test established in **Crown Trust Co. v. Rosenberg** (1987), 39 D.L.R. (4th) 526 (Ont. High Court) where Anderson, J., stated at page 548:

> . . . The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

and at page 550:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the courts will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

And further at page 551:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[6] Justice MacAdam found that the appellants did not meet the test of finding that the report was unreasonable or that there were exceptional circumstances

requiring the court to intervene and amend the receivers' report and he therefore dismissed the application. He indicated that if the appellants wanted further calculations to be done by the receivers, they would have to pay the receivers' fees.

[7] The grounds of appeal raised by the appellants are:

> .. that MacAdam, J. erred in fact and in law in dismissing the Appellants' application for an Order directing the Receivers to amend their Report dated June 21, 2007 as follows:
>
> (1) by determining that the Respondents, Michael Dockrill and James N. Horwich, and their respective corporations, shall not be entitled to any indemnification in respect of legal costs which they incurred in this proceeding including, for greater certainty, costs associated with preparation of the report of Susan MacMillan at Grant Thornton and their attendance on the trial of this proceeding;
>
> (2) by determining whether the Respondents have claimed and recovered as an input tax credit harmonized sales tax in the approximate amount of $40,000, being a component of the legal accounts rendered to them in this proceeding;
>
> (3) by performing the income calculation and allocation directed by paragraph 19 of the order granted by MacAdam, J. December 28, 2006 as amended January 15, 2007;
>
> (4) by pursuing taxation of all legal accounts rendered to or borne by the Respondents, Edwards Dockrill Horwich Incorporated and Minnej (N.S.) Incorporated in this proceeding;
>
> (5) by amending adjustment (d) to the report by reflecting $9,000 due to the Respondent Edwards Dockrill Horwich Incorporated as a reimbursement of harmonized sales tax funded by this Respondent for the benefit of the Respondent, Dockrill Horwich Chartered Accountants with 50% of such amount to be due and owing by each of the Respondents Michael Dockrill and James N. Horwich.

[8] The judge's order was discretionary and although interlocutory, it was a final disposition in respect to the issues involving the receivers' report. Therefore the appropriate standard of review here is whether there was an error of law resulting in an injustice. See: **Canada (Attorney General) v. Foundation Co. of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (C.A.); **Frank v. Purdy Estate**

(1995), 142 N.S.R. (2d) 50 (C.A.); and **Clarke v. Sherman** (2002), 205 N.S.R. (2d) 112 (C.A.).

[9] I am of the view that Justice MacAdam was correct to apply a reasonableness test. A similar approach was sanctioned by this court in **Re Hoque**, (1996), 148 N.S.R. (2d) 142 where Hallett, J.A. said:

> 34 ...The tests to be applied by a court reviewing the decision of a trustee appointed under the **Bankruptcy and Insolvency Act** or a receiver appointed by the court respecting the sale of an asset are substantially the same. Both a trustee under the **Bankruptcy and Insolvency Act** and a receiver appointed by the court must act in a reasonable and competent manner in the performance of their duties to the creditors. A difference between a trustee acting under the provisions of the **Bankruptcy and Insolvency Act** and a receiver appointed pursuant to a court Order, is that the trustee is governed by the **Act** and the receiver by the common law and the terms of the court Order. In addition, the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors who can bring their experience to bear on proposed dispositions of assets by the trustee. These differences do not alter the requirement that both trustees and receivers respectively act with integrity in a competent and reasonable manner.
>
> 35 When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the **Act** to make such decisions.

[10] Several of the appellants' arguments on appeal relate to the apportionment by the receivers of the legal fees between those payable by EDHI and the personal defendants. They submit that the apportionment was clearly unreasonable, that accounts for legal fees should have been subject to taxation and that the defendant should not have been reimbursed for the cost of the Grant Thornton expert's report. In addition, they submit that the receivers' failure to complete one of the tasks assigned to them by the order following the trial, with respect to the income calculation and allocation, should have been corrected by the chambers judge. Another complaint involves an adjustment for $9,000 for HST in respect to the transfer of office furnishings between the corporate parties.

[11] With respect to these issues, I am unable to agree with the appellants' submission that Justice MacAdam erred in the application of the test in his review of the receivers' report. Having been the trial judge, he was very knowledgeable of the underlying issues and the specific directions he gave to the receivers following the trial. It is not the role of this court to second-guess the chambers judge and substitute our opinion for his, especially in a situation such as this where the judge was so experienced with the context and complexities of the litigation. To resolve some of the appellants' complaints would require a review of the entire trial transcript which is not before us on this appeal. In light of the significant deference owed to the decision under appeal, the issues noted above do not require a reassessment by this court. In my view, the judge did not err in legal principle with respect to these issues. Neither is there an injustice resulting from the decision which requires intervention of this court regarding these adjustments.

[12] However, the ground of appeal regarding the $40,000 input tax credit for HST does raise concerns. With respect to this issue, the receivers failed to inquire into the question of whether the respondents may have received a windfall of approximately $40,000 by receiving an input tax credit. The windfall might have arisen because they paid the legal fees of EDHI of $309,324 including HST, and as a result of the receivers' apportionment of legal fees, they were being indemnified to the extent of $296,421 including HST of approximately $40,000, which they may not be required to remit to Revenue Canada. When asked by the appellants' counsel prior to filing their final report if they had considered that possibility, the receivers replied: "We did not take any steps to determine if the defendant's professional corporations recovered the HST."

[13] Although their application did not specifically refer to this issue it was squarely raised in the pre-application written submissions filed by the appellants' and fully addressed by the parties in oral argument in chambers. Unfortunately the chambers judge did not refer to this aspect of the application in his oral decision. The question becomes whether it was reasonable for the receivers not to make any inquiries as to whether the respondents received a windfall as a result of the HST input tax credit on the legal fees. Since the chambers judge did not answer that question, it is difficult for this court to defer to his reasoning. If in fact there has been a windfall, or the amount paid by EDHI to the respondents for legal fees was $40,000 more than ought to have been reimbursed because of the input tax credit, surely an injustice would arise as a result of the chambers judge's failure to address the issue.

[14] In my view the appellants have raised a question about the receivers' report that should have been addressed. In the circumstances, the failure of the receivers to inquire into whether the respondents were required to remit the HST on the reimbursed legal fees to Revenue Canada, and if not, whether the respondents have been overpaid by EDHI, and to report their answers on these points to the trial judge, was unreasonable. If the chambers judge had found that it was not necessary for the receivers to make inquiries, or that their failure to make inquiries was reasonable, this court may have been restrained by the applicable standard of review from interfering. However, since the chambers judge did not address the issue in his decision, the decision is not subject to the usual deference.

[15] I would allow the appeal to a limited extent involving the HST input credit on the legal fees. In all other respects the appeal should be dismissed. I would order that the matter of the HST input credit on legal fees be remitted to the receivers to inquire into whether a further adjustment to the amount payable by EDHI to the respondents should be made on account of the HST on the reimbursed legal fees. The receivers should report their findings to the parties and Justice MacAdam within a reasonable time, following which any party may make further application to the chambers judge for directions and further adjustments.

[16] Given the divided success, each party should bear their own costs of the appeal.

Roscoe, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.

TAB 4

CITATION: Elleway Acquisitions Limited v. 4358376 Canada Inc., 2013 ONSC 7009
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131203

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED.

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

4358376 CANADA INC. (OPERATING AS ITRAVEL 2000.COM), THE CRUISE PROFESSIONALS LIMITED (OPERATING AS THE CRUISE PROFESSIONALS), AND 7500106 CANADA INC. (OPERATING AS TRAVELCASH), Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD
&ENDORSED: NOVEMBER 4, 2013

REASONS: **DECEMBER 3, 2013**

ENDORSEMENT

[1] At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

[2] On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

[3] The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

[4] The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

[5] The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

[6] The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

[7] Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

[8] The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

[9] In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

[10] In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

[11] In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

[12] In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

[13] The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

[14] In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

[15] In January 2013, discussions ended and the independent committee was disbanded.

[16] In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

[17] In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

[18] In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

[19] In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

[20] In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

[21] On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for

Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

[22] The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

[23] itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

[24] The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

[25] Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

[26] In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;

(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

[27] The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

[28] The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

[29] Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

[30] Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

[31] It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

[32] In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

[33] Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

(a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

(b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp*. (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

[34] In the case of *Re Tool-Plas,* I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

[35] Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

[36] Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

[37] I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

[38] Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5^{th}) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

[39] This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

[40] It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

[41] Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

[42] Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

[43] Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

[44] In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[45] The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

[46] The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

[47] The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

[48] In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

[49] For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

MORAWETZ J.

Date: December 3, 2013

TAB 5

SUPREME COURT OF NOVA SCOTIA

Citation: *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128

Date: 20140410
Docket: Syd. No. 423486
Registry: Sydney

Between:

Enterprise Cape Breton Corporation, a body corporate, incorporated pursuant to the *Enterprise Cape Breton Corporation Act*, enacted as Part II to the *Government Organization Act, Atlantic Canada, 1987*, R.S., 1985, c. 41 (4th Supp.) ("ECBC")

Applicant

v.

Crown Jewel Resort Ranch, Inc., a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel")
And I.N.K. Real Estate Inc., a body corporate incorporated Under the laws of Nova Scotia ("I.N.K.")

Together the Respondents

LIBRARY HEADING

Judge: The Honourable Justice Frank Edwards

Heard: March 5, 2014 in Sydney, Nova Scotia

Written Decision: April 10, 2014

Subject: **Bankruptcy and Insolvency Act,** s. 243. **Judicature Act**, s.

[3]

43 (9) – Application to Appoint Receiver/Manager

Summary: Respondent Companies (RC's) set up to operate high end tourist resort. Husband and wife principals in RC's became embroiled in protracted divorce proceedings which effectively caused resort to cease operation. Loans (secured and unsecured) of almost three quarters of a million dollars seriously in arrears. Monthly payments were just under $19,000.00 per month. Municipal taxes over $70,000.00 in arrears – prospect of tax sale imminent. Remaining principal, Mr. Korem, had no realistic prospect of significantly reducing debt nor refinancing it.

Issue: Whether just and convenient to appoint a receiver/manager.

Result: Receiver/manager appointed. Just and convenient to do so:

1. Need for protection of the assets;
2. Apprehended or actual waste of assets;
3. Creditor had right to appoint a private receiver pursuant to a general security agreement;
4. Court appointed receiver required as cooperation of Mr. Korem with private receiver highly unlikely;
5. Appointment the most practical and prudent approach to maximizing the return to the parties.

Cases Noted: **Bank of Montreal** v. **Sherco Properties Inc.,** 2013 ONSC 7023 (S.C.J.); **Textron Financial Canada Limited** v. **Chetwynd Motels Limited**, 2010 BCSC 477, **Canadian Tire Corp.,** v. **Healy**, 2011 ONSC 4616; **Bank of Montreal** v. **Carnivale National Leasing Ltd.**; **Carnivale Automobile Ltd.**., 2011 ONSC 1007; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J.; **Bank of Nova Scotia** v. **Freure Village of Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div.) [Commercial List]; **Romspen Investment**

Corp. v. **1514904 Ontario Ltd.**, et al (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.).

SUPREME COURT OF NOVA SCOTIA

Citation: *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch, Inc.* 2014 NSSC 128

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Between:

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Crown Jewel Resort Ranch, Inc., a body corporate Incorporated under the laws of Nova Scotia ("Crown Jewel")
And I.N.K. Real Estate Inc., a body corporate incorporated Under the laws of Nova Scotia ("I.N.K.")

Together the Respondents

[2]

Judge:	Justice Frank Edwards
Heard:	March 5, 2014, in Sydney, Nova Scotia
Written Decision	April 10, 2014
Counsel:	Robert Risk, for the Applicant Nahman Korem, for the Respondent Companies

[2]

By the Court:

The applicant is applying for an order appointing Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. ("MGM") as receiver and manager of all of the undertakings, property and assets of Crown Jewel and I.N.K. pursuant to Section 243(1) of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3, and/or Section 43(9) of the **Judicature Act,** R.S.N.S. 1989, c. 240

Grounds for Order: The applicant is applying for the order on the following grounds:

1. A General Security Agreement made between Crown Jewel Resort Ranch, Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213736 on February 8, 2005, as amended by Registration No. 21915103 on October 11, 2013.

2. A Mortgage made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated February 4, 2005 registered at the Victoria County Registry of Deeds on February 8, 2005 as Document No. 81337157 (PID Nos. 85017614, 85079127 and 85155281), said Mortgage having been assigned to Enterprise Cape Breton Corporation pursuant to a General Conveyance, Assignment and Assumption of Liabilities Agreement dated March 31, 2008 and registered at the Victoria County Registry of Deeds on May 30, 2008 as Document No. 90774226;

3. A General Security Agreement made between I.N.K. Real Estate Inc. and the Cape Breton Growth Fund Corporation dated on or about February 3, 2005 and registered in the Nova Scotia Personal Property Registry as Registration No. 9213692 on February 8,

2005, as amended by Registration No. 13924725 on May 23, 2008 (together with the above the "Security")

4. The Respondent Companies (RC's) have defaulted on their payments and failed to honour their obligations pursuant to a Letter of Offer made between Crown Jewel, I.N.K. and ECBC dated on or about October 2, 2003 with respect to Project No. 8600338-1 (the "Letter of Offer").

5. The total amount of indebtedness secured by the Security is $226,134.00 as at October 8, 2013 together with overdue interest on arrears in the amount of $1,738.19 and interest thereafter at a per diem rate of $37.17.

6. The RC's were provided with respective Notices of Intention to Enforce Security pursuant to section 244 of the **Bankruptcy and Insolvency Act** on October 24, 2013.

7. Greg MacKenzie of MGM has agreed to act as the court-appointed receiver and manager of all of the undertakings, property and assets of both Crown Jewel and I.N.K. and the Applicant consents to his appointment.

8. The Applicant, ECBC relies on Section 243(1) of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3, which reads:

> 243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

9. The Applicant, ECBC relies on Section 43(9) of the **Judicature Act**, R.S.N.S. 1989, c. 240, which reads:

> 43. (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Background: The RC's had obtained financing from the Cape Breton Growth Fund Corporation (CBGF), the Atlantic Canada Opportunity Agency (ACOA), and the Applicant, Enterprise Cape Breton Corporation (ECBC).

ECBC succeeded CBGF when the latter wound up in 2008. ECBC delivers and administers all programs offered by ACOA.

The RC's' intent was to establish an upscale, four-season, fly-in active vacation resort near Baddeck, Nova Scotia. Operations commenced in 2006 but struggled financially from the outset. The financial problems multiplied when the two principals in the RC's, Nahman Korem (Korem) and Iris Kedmi (Kedmi) became embroiled in protracted divorce proceedings. These continued between 2010 and December, 2012 when the Nova Scotia Court of Appeal dismissed Kedmi's appeal.

The resort essentially ceased to function as of the start of the domestic trouble between Korem and Kedmi in 2010.

By October 8, 2013, the RC's were in serious arrears on their loans. By that date, the total amount of indebtedness was as follows:

1. **ECBC Secured Letter of Offer:** $226,134.00 with overdue interest on arrears of $1,738.19 plus interest of $37.17 per day.
2. **ECBC Unsecured Letter of Offer:** $268,254.86 with overdue interest on arrears of $1,738.19 plus interest of $44.10 per day.
3. **ACOA Unsecured Loan:** $256,642.00 plus arrears of $4,425.80.

Throughout the period of 2005-2009 the RC's were able to make their regular scheduled payments on the ACOA Unsecured Loan, having repaid approximately $234,360.00 of the initial $500,000.00 loan disbursement. (Lane affidavit para. 22)

The RC's have, however, paid only approximately $6,000.00 toward the outstanding principal on the ACOA Unsecured Loan since 2009. Further, no repayments at all have been made on this loan within the 12 month period from December of 2012 to December of 2013. (Lane Affidavit para. 23)

[2]

With respect to both the ECBC Secured and Unsecured Letters of Offer, the RC's have to date made only a combined repayment in the approximate amount of $9,235.00. As noted above, these loans are in significant arrears. Furthermore, overdue interest is due and owing and is accruing daily. (Lane affidavit para. 24)

The Applicant gave the RC's Notices of Intention to Enforce Security on October 24, 2013. Korem knew by November 2013 at the latest that ECBC intended to apply to have a receiver/manager appointed by the Court. A General Security Agreement given to CBGF/ECBC by the RC's provided for the appointment of a private receiver upon default.

Despite the fact that the loans were already overdue, ECBC took a hands-off approach during the divorce proceedings. Korem and Kedmi were making competing claims regarding the assets of the RC's. ECBC thus decided not to enforce its security until the divorce outcome was known. After dismissal of the Kedmi Appeal in December, 2012, Korem became the effective owner of all the assets and liabilities of the RC's.

Korem insists that ECBC is partially responsible for the present situation because it allowed Kedmi to liquidate some of the assets. I reject any such notion. During the 2010 – 2012 period, the resort was clearly in survival mode. The two

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principals were locked in a particularly acrimonious marital dispute. The resort was generating no revenue. Kedmi was living on the resort property and was assuring ECBC that she was doing her best to maintain it.

It was in that context that ECBC allowed Kedmi to liquidate some assets that were not essential to the survival of the resort. ECBC also allowed her to liquidate assets which in fact had actually become liabilities. These included the horses which were very expensive to maintain but had no foreseeable prospect of generating revenue. Korem's grievance with ECBC is misplaced.

Korem now rests his hopes of financial recovery on the possibility of operating a timber cutting business. He presented ECBC with an appraisal of the timber resources on the resort property. The appraisal indicated that the value of the standing timber was 1.5 to 2 million dollars less harvesting costs.

ECBC gave Korem permission to do some limited wood harvesting but insisted upon the presentation of a business plan by July, 2013. The business plan Korem provided did not address how the RC's intended to service the ECBC and ACOA debts. Nor did it indicate how the RC's would finance the start-up of the timber business.

[2]

In October, 2013, ECBC again reviewed proposals put forward by Korem. Incidentally, ECBC learned that property taxes for the resort were $80,000.00 in arrears (Korem says it's now $75,000.00) and that a tax sale was imminent. ECBC decided it was time to apply to have a Receiver/Manager appointed.

RC's' Objections to Appointment of Receiver/Manager: Korem acted for the RC's without legal counsel. He put forward three objections to the appointment of a Receiver/Manager:

1. That the Mortgage dated February 4, 2005 is not valid;
2. That I.N.K. Real Estate Inc. is capable of making payments;
3. That it is not "just and convenient" to appoint a receiver.

I will deal with the objections in turn:

1. The Mortgage is Valid: It was properly executed by Korem and was duly recorded. Its repayment terms reflect those agreed to by Korem when he signed as president of I.N.K. Real Estate Inc. on October 2, 2003. Those repayment terms were subsequently modified (in I.N.K.'s favor) on March 23, 2005 and October 30, 2010. On both occasions, Korem signed. (See Lane Affidavit Tabs A & B).

[2]

The Mortgage was given as security for a Promissory Note dated January 21, 2005. Korem's objection seems to be based upon his view that ECBC's counsel at the time questioned the promissory note. On the contrary, the record shows that the lawyer was satisfied with the promissory note and authorized ECBC to disburse funds.

The RC's' obligations and ECBC's rights under the Mortgage remain in full force and effect.

2. The RC's are not Capable of Making Payments: As an aside, Korem seeks to claim that he cannot speak for Crown Jewel Resort Ranch Inc. (CJRR) because Kedmi still owns that company. At the same time Korem acknowledges that all CJRR's assets and liabilities have been transferred to him. Korem is the effective principal of both companies.

To service their debts to ECBC and ACOA, the RC's would have to make monthly payments of just under $19,000.00 per month. (To say nothing of the arrears). As noted they are also in substantial arrears regarding property taxes ($75,000.00) and owe contractor D.W. Matheson about $35,000.00.

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Korem has provided no details to show how he can finance the start-up of the timber business. By his own estimate, he would need one to two years just to pay off the ECBC Secured debt. He give no indication of how much longer it would take to pay off the Unsecured debts. Korem has been given ample opportunity to seek re-financing with another lender. He admits that commercial lenders will not go near him. There is no realistic prospect that the RC's will ever be able to address their debts.

It is Just and Convenient that a Receiver/Manager be Appointed: What follows, I adopt, in large measure from the Applicant's Brief.

In **The 2013-2014 Annotated Bankruptcy and Insolvency Act**, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c)the nature of the property;

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(d)the apprehended or actual waste of the debtor's assets;

(e)the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

(i)the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order on the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.

The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument –

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appoint a receiver. In **Bank of Montreal** v. **Sherco Properties Inc**., 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc. , finding at paragraph 42 that:

> [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See **Textron Financial Canada Limited** v. **Chetwynd Motels Limited**, 2010 BCSC 477; Freure Village, supra; **Canadian Tire Corp**. v. **Healy,** 2011 ONSC 4616 and **Bank of Montreal** v**. Carnivale National Leasing Ltd**. and **Carnivale Automobile Ltd.**, 2011 ONSC 1007.

The court in **Bank of Montreal v. Sherco Properties Inc**. offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
>
> (b) the terms of the mortgages permit the appointment of a receiver upon default;

> (c) the value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

As noted at paragraph 33 of the Affidavit of Steve Lane, the General Security Agreement entered into by Crown Jewel provides ECBC with the specific authority to appoint by instrument a receiver or receiver and manager of the assets of the company upon default. The RC's are in default of the obligations owed to ECBC pursuant to the Secured Letter of Offer as referenced in paragraph 4 of the Affidavit of Steve Lane.

Certain other factors to be considered in determining whether it is just and convenient to appoint a receiver are particularly relevant to the case at Bar. These are:

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

Mr. Lane states at paragraphs 50 and 51 of his Affidavit that the RC's owe outstanding property taxes to Victoria County, Cape Breton in the approximate

amount of $80,000.00 as of October, 2013 and that, failing payment, Victoria County intends to put the lands up for tax sale in March of 2014. Permitting this situation to continue will undoubtedly place ECBC's security interest at risk.

Paragraphs 58 and 59 of the Affidavit of Steve Lane sets out the concerns ECBC has with the alleged lease agreements entered into by Korem. Clearly Korem did not have, on behalf of the RC's, any authority to enter into these lease agreements without the consent of ECBC. Further, the lease agreements appear to have been made by the RC's under a different business name, notwithstanding the fact that this entity has no legal standing. Clearly the RC's can no longer be entrusted with protecting and safeguarding their assets and the actions they have taken with respect to these alleged lease agreements clearly places ECBC's security interest at risk.

(d) the apprehended or actual waste of the debtor's assets;

It is apparent that Korem intends to continue with timber harvesting on the lands of the RC's that are subject to the ECBC security interest. Although limited timber harvesting was permitted by ECBC while Korem attempted to resolve the outstanding matrimonial property dispute, ECBC is understandably not confident

that Korem will seek such consent in future. Given what appears to be an increasingly desperate financial situation of the RC's, ECBC holds a reasonable apprehension that the assets of the RC's, and in particular the timber resources, may be depleted or wasted.

(e) the preservation and protection of the property pending judicial resolution;

Crown Jewel Resort is no longer in operation and has been closed down for quite some time. ECBC remains concerned as to whether the assets of the resort are being adequately preserved and protected. For instance, ECBC has no way of ensuring that Korem will continue to properly maintain the resort property. Further, ECBC is concerned as to whether the assets of the resort will be properly insured on a continuing basis.

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

As noted above, ECBC has the right to appoint a receiver by instrument under the General Security Agreement entered into by the Respondent, Crown Jewel. ECBC advised the RC's of its intention to appoint a private receiver with respect to this matter during the November 20, 2013 negotiation referenced at paragraph 53 of Mr. Lane's Affidavit.

[2]

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

In **Bank of Nova Scotia v. Freure Village of Clair Creek** (1996), 40 C.B.R. (3d) 274 (Ont) S.C.J. granted the motion for appointment by the court of a receiver-manager, holding at paragraph 13:

> [13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1½ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[2]

Mr. Lane, at paragraph 60 of his Affidavit, notes the concerns ECBC has with the ability of MGM to carry out its duties. It is clear from the email stream of correspondences referenced at paragraph 59 of the Affidavit that Korem intends to set up as many road blocks as he can with respect to both the appointment of the receiver and the subsequent carrying out of its duties. As in **Bank of Nova Scotia v. Freure Village of Clair Creek** above, it appears inevitable that Korem will continue to bring costly, protracted and unproductive litigation against both ECBC and its privately appointed receiver. Further, it appears clear that Korem will not agree on the proper approach to be taken to marketing and selling the assets of the RC's subject to the ECBC security interest. Certainly any such attempts to dispose of the property by the privately appointed receiver would be met with further litigious skirmishing.

(l) the conduct of the parties;

It is clear from a reading of Mr. Lane's Affidavit that ECBC has extended the RC's with every opportunity to turn the resort business around. Unfortunately, the business became insolvent and has not been in operation for some time. Ultimately, ECBC had no option other than to enforce its security in an attempt to recover some of the losses it incurred in relation to the loans granted to the RC's.

[2]

Despite the personal investment Korem has made in the resort, as well as the arduous and extremely adversarial divorce proceedings with Kedmi in regard to the assets of the RC's, Korem has not, despite being given ample opportunity to do so, made any reasonable progress in obtaining alternate financing with a view to paying out the ECBC indebtedness. Further, Korem has yet to provide ECBC with a meaningful business plan outlining the timely repayment of the ECBC debt.

(o) the likelihood of maximizing return to the parties;

The most practical and prudent approach to maximizing the return to the parties, including the unsecured debt, would be to proceed with a sale of the resort as soon as possible. In the interim, it remains open to Korem, while the receiver is in place, to obtain alternate financing with a view to paying out the ECBC debt.

The authors of **The 2013-2014 Annotated Bankruptcy and Insolvency Act** comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed

receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court. Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.

The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in Houlden, Morawetz and Sarra at p. 1024 below:

> The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: **Bank of Nova**

[2]

> **Scotia v. Freure Village on Clair Creek** (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].

Finally, the authors note at p. 1024 of **The 2013-2014 Annotated Bankruptcy and Insolvency Act** that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In **Romspen Investment Corp. v. 1514904 Ontario Ltd**. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.

Conclusion:

I therefore order the appointment of Greg MacKenzie of MacKenzie, Gillis, MacDougall Inc. as the receiver and/or manager of all of the undertakings, property and assets of the RC's, Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Applicant shall also have its costs in the amount of $1500.00 payable forthwith.

Edwards, J.

Sydney, Nova Scotia

[2]

TAB 6

SUPREME COURT OF NOVA SCOTIA

Citation: *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420

Date: 20141125
Docket: SN No. 423486
Registry: Sydney

Between:

Enterprise Cape Breton Corporation

Applicant

v.

Crown Jewel Resort Ranch Inc. and I.N.K. Real Estate

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	November 3, 2014 in Sydney, Nova Scotia
Final Written Submissions:	November 10, 2014
Subject:	Receivership – Approval of Sale and Vesting Order
Summary:	Court appointed receiver advertised the sale of the debtors' assets by public tender. Motion for approval of sale and vesting order discharging encumbrances and transferring title to purchaser.
Issues:	(1) Was the evidence on the motion sufficient? (2) Should the sale be approved? (3) Should a vesting order be granted?
Result:	The Court was not satisfied with the evidence filed by the receiver and directed counsel to provide supplemental affidavits. After being satisfied that none of the affected

parties who had notice of the motion were opposed the Court approved the sale agreement.

The Court had doubts about its jurisdiction to grant the requested vesting order. Even if there was jurisdiction such an order should not be issued in the circumstances.

SUPREME COURT OF NOVA SCOTIA

Citation: *Enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420

Date: 20141125
Docket: *SN*, No. 423486
Registry: Sydney

Between:

Enterprise Cape Breton Corporation

Applicant

v.

Crown Jewel Resort Ranch Inc. and I.N.K. Real Estate Inc.

Respondents

Judge: The Honourable Justice Michael J. Wood

Heard: November 3, 2014 in Sydney, Nova Scotia

Final Written Submissions:	November 10, 2014
Counsel:	Robert Risk, for the Applicant Iris Kedmi, self represented

By the Court:

[1] On March 27, 2014 the Court appointed MacKenzie, Gillis, MacDougall Inc. as Receiver all of the assets, undertaking and properties of the respondents Crown Jewel Resort Ranch, Inc. and I.N.K. Real Estate Inc. The Receiver's powers included the authority to market any or all of the companies' property and to sell, convey, transfer, lease or assign it with the approval of this Court.

[2] The Receiver marketed the assets of the respondents through a public tender process. After reviewing the submissions the Receiver entered into an Asset Purchase Agreement with the highest bidder. On November 3, 2014 I heard the Receiver's motion for approval of the sale and the granting of a vesting order. The only person appearing in opposition to the Receiver's motion was Ms. Iris Kedmi. Ms. Kedmi received notice of the motion as the recognized agent of the respondent, I.N.K. Real Estate Inc. Her submissions to the Court related to her personal interest in the assets, and in particular some of the chattels located on the property. She wanted to ensure the sale did not adversely affect her potential claim to an ownership interest in any of the items being sold.

[3] At the time of the hearing counsel for the Receiver acknowledged the transaction would not affect any claim by Ms. Kedmi and agreed that a clause to this effect would be included in the approval order, if granted. This acknowledgement dealt with the issues raised by Ms. Kedmi and meant that the motion was essentially unopposed.

Evidence on the Motion

[4] In support of the motion the Receiver filed two affidavits of Marianne Steele-MacSween who is Vice-President of the Receiver. An affidavit of Steven Lane of Atlantic Canada Opportunities Agency was also filed.

[5] At the time of the hearing I expressed concern about the sufficiency of the evidence filed. In particular I noted the following:

- There were no abstract of title or PPSA searches which would show existing encumbrances on the assets to be sold.

- There was no affidavit of service confirming who had received the motion documents and when.

- The affidavit of Ms. Steele-MacSween referred to an appraisal of the real estate to be sold, but did not attach a copy.

- The affidavit of Ms. Steele-MacSween noted the tender had been advertised in three newspapers and a number of websites, but did not attach copies of the notices. There was no evidence of the date or number of newspaper insertions.

- The affidavit of Ms. Steel-MacSween did not explain why the Receiver concluded that sale by public tender was the best option. There was also no explanation as to why the three newspapers in question (Ottawa Citizen, Toronto Star and Chronicle Herald) were selected.

[6] When I raised my concerns about this lack of information with counsel for the Receiver, he requested leave to have Ms. Steel-MacSween provide *viva voce* testimony on those issues. I granted permission for him to do so.

[7] Following the testimony of Ms. Steele-MacSween I directed that a supplement affidavit be filed attaching the documentation relating to advertising as well as the real estate appraisal. I also requested a solicitor's certificate of title, proof of service and PPSA search results. Supplemental affidavits of Ms. Steel-MacSween and counsel for the Receiver were filed on November 10, 2014.

Approval of the Sale

[8] According to the Receiver's report as well as Ms. Steele-MacSween's affidavits and testimony the Receiver placed notices in the three newspapers noted above, as well as five websites. The notices said the Receiver was selling the assets of an inn and restaurant tourist operation located in Big Baddeck, Nova Scotia. A general description of the property and buildings was included and readers were advised that further information could be obtained from the Receiver's website or by contacting Ms. Steele-MacSween directly.

[9] Ms. Steele-MacSween says she received 17 inquiries concerning the tender. At the time of closing three formal bids were received; the highest of which was submitted by Dr. Mary Doyle and Mr. Nahman Korem in the amount of $402,000.00.

[10] The Receiver entered into an Asset Purchase Agreement on August 14, 2014 with Dr. Doyle. Mr. Korem had previously transferred his interest in the tender to

her. The assets to be conveyed consisted of two parcels of land and various chattels associated with the operation of the inn and resort.

[11] The Receiver had a copy of a real estate appraisal report effective as of May 2011 which concluded that the market value for the two lots of land and the associated buildings was $748,000.00. In addition the Receiver had an opinion from a forest technician that the timber on the two lots had a roadside value of $88,000.00. There was also an appraisal of the equipment and furnishings located on the premises giving a value between $46,000.00 and $50,000.00.

[12] According to the affidavit from the Receiver's counsel filed on November 10, 2014 the only parties with encumbrances against the land and assets included in the sale are the Atlantic Canada Opportunities Agency (formerly Enterprise Cape Breton Corporation), Allan A. Kennedy, D.W. Matheson & Sons Contracting Limited and the Nova Scotia Department of Labour and Advanced Education. These parties, as well as the debtors Crown Jewel Resort Ranch Inc. and I.N.K. Real Estate Inc., received notice of the motion for approval of the sale. As noted above, none of these parties have appeared in opposition.

[13] In accordance with the applicable case authorities I have considered the efforts of the Receiver to obtain the best price for the assets, the interests of all parties as well as the process by which offers were obtained. In light of the lack of any opposition from the parties who might be affected by the sale I am prepared to accept the Receiver's recommendation that the agreement with Dr. Doyle be approved.

[14] In giving my approval I recognize that it is not the role of the Court to review in detail every element of the process followed by the Receiver. I need only conclude they have acted fairly, reasonably, and not arbitrarily. I am satisfied that this is the case.

Vesting Order

[15] In addition to approval of the sale the Receiver is asking the Court to issue what is referred to as a "vesting order". The effect of the order would be to transfer the debtor's interest from the Receiver to the purchaser without the necessity of any conveyancing documents, such as deeds or bills of sale. The form of vesting order requested goes even further and includes a declaration that title shall:

> …vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise…

[16] The order also provides that any claims or encumbrances which it discharges shall attach to the net proceeds of sale of the assets.

[17] At the hearing I asked counsel for the Receiver the basis for the court's jurisdiction to issue such an order. He requested the opportunity to file a supplemental memorandum on the issue, which he did on November 10, 2014. In his memorandum counsel suggests two potential sources for the authority to grant a vesting order. The first is s.243(1)(c) of the *Bankruptcy and Solvency Act* which provides:

> 243.(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> …
>
> (c) take any other action that the court considers available.

[18] The other is s.41(g) of the *Judicature Act* R.S.N.S. 1989, c.240 which says:

> The Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[19] It would appear that the jurisdiction to grant vesting orders arises out of legislation. In *Halsbury's Laws of Canada – Receivers and other Court Officers* section HRC-70 indicates that provincial legislation may provide the Court with jurisdiction to make an order vesting property in a purchaser. The sample vesting

order found in *Halsbury's* is virtually identical to that proposed by the Receiver in this case. That form is described as arising out of the Commercial List of the Ontario Superior Court of Justice.

[20] According to *Halsbury's* Nova Scotia is one of four Provinces and Territories that do not have legislation giving the court jurisdiction to make a vesting order.

[21] The authority for a vesting order was discussed by the Ontario Court of Appeal in *Re: Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 at paras 31 and 32:

> **31** In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, which provides as follows:
>
> - A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.
>
> **32** The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of Sarnia Band v. Canada (2000), 195 D.L.R. (4th) 135 at 227, where it was observed that:
>
> - Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly:* see McGhee, Snell's Equity 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

[22] I do not believe the sections of the *Bankruptcy and Insolvency Act* and *Judicature Act* relied on by the Receiver give the Court jurisdiction to issue a vesting order as requested. I need not come to a firm conclusion on that point as I would not exercise my discretion and approve a vesting order in this case in any event.

[23] The material filed by the Receiver does not satisfy me that a vesting order is necessary. If the purpose is to simplify the transfer of assets and avoid the necessity of obtaining releases from the encumbrancers I have no evidence that they have been requested to provide releases and refuse to do so.

[24] A more important circumstance justifying refusal is that the tender documents and Asset Purchase Agreement say the Receiver will provide a deed and bill of sale. That is what Dr. Doyle contracted to receive. The documents include standard provisions permitting the purchaser to conduct inquiries into the assets and raise objections with respect to title. The Receiver is then given an opportunity to try and deal with the objection to the satisfaction of the purchaser. If they are unable to do so the purchaser is released from their obligations under the Agreement. The Receiver makes no representations with respect to title to the assets or any encumbrances which may exist.

[25] The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

[26] All bidders were aware of the process by which title to the assets would be investigated and that the debtor's interest would be transferred without any representation or promise on the part of the Receiver. It would be unfair to other potential bidders to change the rules of the game at this point and issue a vesting order in favour of Dr. Doyle.

[27] I dismiss the request for a vesting order in the circumstances of this transaction.

Conclusion

[28] For the reasons outlined above I will approve the sale from the Receiver to Dr. Doyle as contained in the Asset Purchase Agreement dated August 14, 2014. I will not issue the vesting order.

[29] I have reviewed the draft order provided by counsel for the Receiver as of November 12, 2014. In order to reflect my decision paragraphs 2, 3, 4, 5 and 7 should be deleted. I will sign the revised form of order upon receipt.

Wood, J.

TAB 7

SUPREME COURT OF NOVA SCOTIA

Citation: *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235

Date: 20180511
Docket: Hfx No. 474742
Registry: Halifax

Between:

First National Financial GP Corporation and
First National Financial LP

Applicants

v.

3291735 Nova Scotia Limited

Respondent

RECEIVERSHIP AND SALES PROCESS

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 11, 2018, in Halifax, Nova Scotia
Oral Decision:	May 11, 2018
Written Decision:	September 27, 2018
Counsel:	D. Bruce Clarke, Q.C. for the Applicants Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver for the Respondent, 3291735 Nova Scotia Limited) Brian W. Stilwell, Watching Brief

By the Court:

Overview

[1] This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

[2] The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

[3] The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the

affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

[4] The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

[5] The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

[6] I have reviewed all the materials with regard to the proposed Receivership Order.

[7] I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

[8] I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

[9] Section 243(1) of the BIA provides:

> Subject to subsection (1.1) , on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be, 'just or convenient to do so'.
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

[10] In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just […].
>
> [emphasis added]

[11] The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

[12] In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;
2. The Company is in default of its obligations to First National;
3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
4. Both the Demand Letter and the Notice have expired, without payment being made;
5. First National is in a position to enforce its security as against the Company should it choose to do so;

6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and

7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the property is handled expeditiously and in a commercially reasonable manner.

[13] I have reviewed the case law and, in particular, ***Bank of Montreal v. Carnival National Leasing Limited et al.***, 2011 ONSC 1007. In that case, the Court noted that under section 243 of the *BIA* and section 101 of the ***Courts of Justice Act***, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

> 23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[14] In ***Bank of Nova Scotia v. Freure Village on Clair Creek*** (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the

> circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[15] *Bank of Montreal v. Carnival Leasing Limited*, 2011 ONSC 1007, spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

> 25. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[16] I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

[17] Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

[18] Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

[19] The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

[20] First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

[21] KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

[22] KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

[23] On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order to maximize the value for creditors and to minimize the risk of losing this

offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

[24] The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308
- **Purchased Assets:**
  - (i) The Real Property
  - (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property
  - (iii) plans
  - (iv) contracts
  - (v) permits in connection with the Real Property, to the extent transferable
  - (vi) all intellectual property, if any, owned by the Company with respect to the project
- **Purchase Price:** $3,708,750, including HST
- **Deposit:** $322,500 being 10% of the purchase price (before HST)
- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds
- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.
- **Closing:** first business day which is five business days after receipt of Sale Approval Order
- **Material Conditions:**
  - (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;
  - (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to

the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

. **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

[25] 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the “stalking horse” sales process.

[26] A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in ***CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd***., 2012 ONSC 1750. While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies’ Creditors

Arrangement Act proceeding: ***Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited,*** Hfx. No. 454744.

[27] Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

[28] D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd*., at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

[29] I must consider the following factors as set forth in ***CCM Master Qualified Fund, Ltd., supra*****:**

> 1. The fairness, transparency and integrity of the proposed process;
> 2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
> 3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[30] In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding

procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

[31] The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

[32] First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

[33] I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

[34] In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

[35] I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

[36] I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Brothers, J.

TAB 8

CITATION: Montrose Mortgage Corporation v. Kingsway Arms Ottawa, 2013 ONSC 6905
COURT FILE NO.: CV-13-10298-00CL
DATE: 20131106

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Montrose Mortgage Corporation Ltd., Applicant

AND:

Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Dietrich, for the Applicant

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited

HEARD: November 5, 2013

REASONS FOR DECISION

I. Application for approval of a "pre-pack" credit bid sale in a proposed receivership

[1] Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

[2] On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

[3] The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013,

advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

[4] The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

[5] As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

[6] In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

[7] The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

[8] Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

[9] In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the

leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

[10] "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

[11] In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior

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[1] *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.)
[2] (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List)
[3] (1991), 4 O.R. (3d) 1 (C.A.)
[4] *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

[12] Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

[13] Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

[14] Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D. M. Brown J.

Date: November 6, 2013

TAB 9

CITATION: Rompsen Investment Corporation v. 1514904 Ontario Ltd., 2000396 Ontario Inc., 1278502 Ontario Inc, 1259121 Ontario Inc., and Almonte Land Management Inc., 2010 ONSC 832
COURT FILE NO.: 09-47115
DATE: 2010-02-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROMPSEN INVESTMENT CORPORATION, Applicant

AND:

1514904 ONTARIO LTD., 2000396 ONTARIO INC., 1278502 ONTARIO INC, 1259121 ONTARIO INC., and ALMONTE LAND MANAGEMENT INC., Respondents

BEFORE: Justice Rick Leroy

COUNSEL: David P. Preger and Elisa Giacomelli, SOLOMON, GROSBERG
for the Applicant

Mario Mannarino, BARNES, SAMMON
for the respondents

Jahmiah Ferdinand-Hodkin, GOWLING LAFLEUR HENDERSON

HEARD: January 22, 2010

ENDORSEMENT

[1] This is an application by Romspen Investment Corporation (Romspen) for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA) and section 101 of the Courts *of Justice Act*, R.S.O. 1990 c. C.43 as amended (CJA) appointing SF Partners Inc. as receiver and manager (receiver) without security of all the assets, undertakings and properties of the Respondents. SF Partners Inc. consents in writing to act as Receiver.

[2] The application was returnable in Ottawa on December 17, 2009 on short notice. The respondents requested an adjournment to marshal and file materials and conduct cross examinations. The respondent argued that the conduct of Wesley Roitman, the managing general partner of the applicant, displayed animus toward the respondents in his dealings. The appointment of a receiver/manager is a serious matter. A hasty appointment made without proper foundation could cause serious financial harm and prejudice to innocent investors and third parties – Fisher Investments v. Nusbaum (1988), 31 C.P.C. (2d) 158. In the circumstances I granted the respondents an adjournment until January 22, 2010.

The parties graciously agreed to re-attend for argument in Cornwall in order to expedite the hearing.

[3] The issue to be decided on this application is whether the appointment of the receiver is just and convenient having regard to balancing the inconvenience facing the creditor in using the usual means of execution with the cost, ultimately to be borne by the debtors, of appointing a receiver. The appointment of a receiver derives from the court of equity and as such is an equitable remedy. The appointment of a receiver is intrusive and an appointment should be granted sparingly. In exercising its discretion the court should consider the effect of the order on the parties as well as their conduct.

Factual Overview

[4] The applicant is a secured lender to the respondents. The subject loan in the amount of $10 million was made July 18, 2006 and matured July 15, 2008, was not renewed and is in financial default. The aggregate amount owing on the loan on September 29, 2009 was $11,439,197.32. The per diem interest is $3,567.20. The applicant made demand and delivered the section 244(1) BIA notice on October 5, 2009. Payment has not followed. As a term of the adjournment on December 17, 2009 the respondent was ordered to remit all rent income from all of its income property to the applicant pending return of the application for argument on merits. No rent was paid. Mr. Bassile for the respondents in his affidavit deposed January 22, 2010 declared that he paid the expenses and trades, otherwise construction liens might have been registered.

[5] Over the adjournment period the respondents remitted the sum of $1.1 million on account which was paid and received on terms that the transaction and partial discharge do not affect the parties' standings in this application.

[6] The applicant's enforcement situation is complicated. The respondents are engaged in real property development and management in the Almonte area. There are 11 real properties involving four different owners encumbered by the applicant's security interest. They include 6 vacant commercially zoned lots, 1 commercial plaza and 1 commercial retail building – the only current income properties, eighty acres of residentially zoned land designated for a 420 lot residential subdivision, 1 residence and 1 cottage. The applicant discharged the residence and cottage from its charge in return for payment of the $1.1 million on account. While the residential subdivision is laid out services have not been installed.

[7] The applicant's security consist, *inter alia* of first mortgage security over the real properties and a security interest over the personal property of all respondents – first against all respondents but 1259121 Ontario Limited where it holds a fourth ranking charge..

[8] There are other stake holders. There is a second mortgage in favour of 1067278 Ontario Inc. on the eleven real properties securing payment of $2,500,000.00 with interest at the rate of 15% taken out in February 2006 that now stands at $5.5 million. The second

mortgagee consents to the instant application. The applicant's loan is personally guaranteed by three private individuals, namely Wilson Bassile, Jeffrey Jackson and David Simpson. Mr Bassille is the principal of the respondent development corporations. Jackson is the principle of the second mortgagee corporation and Simpson is an investor. The Township of Mississippi Mills has a direct option to purchase interest in two lots in the subdivision as well as a significant interest in development of the subdivision. Priority of rights issues between the municipality and second mortgagee may be unresolved.

[9] Mr. Bassille needs the lenders to indulge default and delay if he has any chance of successfully developing the subdivision to completion. Over the term of the adjournment the respondent did not initiate steps to examine the applicant and has not compiled further materials. Mr. Bassile acknowledges that the project suffers from lack of money. In addition to the debt and interests indicated there is another $300K in outstanding payables and engineering fees need to be paid before he can move forward on the subdivision. He is attempting to refinance all or part of the project.

Positions of the parties

[10] The applicant characterizes the respondent's circumstance as akin to engagement in a poker game with someone else's money. The respondent is asking that the applicant extend trust and indulgence on faith that it will all work out in the end. Meanwhile the loan account with the applicant grows at the rate of $3,000 daily. The second mortgage is in the same situation in that its account has doubled since inception for the same reason. The respondent is unable to pay municipal taxes as they come due, there are no sales pending, no offers and no firm mortgage commitments. The applicant argues that this is a serious default and that given the number of properties, interested parties and conflicts, enforcement in the usual fashion would lead to extended litigation and expense that will make the receiver's fees seem a bargain. The viability of the project is questionable. Every day that passes means less recovery for the second or other creditors. This is a classic case for a receiver. The second secured party endorses the appointment. The receiver is appointed by the court and is responsible to all parties in a fiduciary role. The receiver is expected to work closely and cooperatively with the debtor to achieve the best outcome in a liquidation. The debtor is protected from improvident dispositions as every proposed sale can be subjected to scrutiny of the court. The debtor does not relinquish the right to redeem and displace the receiver at any time. The applicant suggested as a term of the order that the receiver be precluded from entering in to any sales agreement for a period of 30 days to allow the debtor time to implement a refinance plan. In summary the applicant submits that the respondent developer will not be prejudiced by the insertion of a receiver unless the value is not there or there are structural sales and marketing deficits.

[11] The applicant cites the applicant's willingness to facilitate in a commercially responsible fashion vis a vis the payment of $1.1 million and discharge of the home and cottage as evidence of good faith and lack of animus.

[12] Mr. Bassille holds himself out as an accomplished developer who has invested everything he has into development in Almonte. He presented the residential subdivision to the lender in 2006 as the crown jewel of the development that would eventually serve to pay out the loan. He thought the lender was committed until completion. He argues that the shopping plaza alone appraised at $9.5 million as if complete and fully leased with normal vacancy in March 2007. He reports that following receipt of the BIA notice he was reassured by Mr. Roitman. The respondent argues that the applicant has orchestrated default in a fashion comparable to what was ascribed to the Royal Bank in Royal Bank of Canada v. Chongsim Investments Ltd. et. al. (1997), 32 O.R. (3d) 565. He suspects that Blake Cassidy, an 8% shareholder in the applicant has persuaded Mr. Roitman to bring enforcement proceedings for ulterior motives. He cites offers to purchase in October 2009 and concludes that Mr. Roitman wants all of the property to the detriment of the respondent and second mortgagee. The respondent argues that no one can complete this project as efficiently as he can. He suggests that the applicant is in error in its assessment of equity in the subject lands.

Analysis

[13] Successful real estate development requires a vision, a plan, dedication and committed financing. The respondent has three of four. In every such development there is a lag between the significant financial outlay and return on the project. It can and does take years as it has in the instant case. The respondent's mistake, if there is one, was made in 2006 when he accepted the applicant's $10 million promising to repay in two years. The developer respondent asks for more time, thereby converting a short term lender into a long term one.

[14] In terms of effect on the respondent's business, a distinction has to be made between the effects of appointment of a receiver on the day to day operations of, for example, a nursing home as in Fisher v. Nusbaum and a real estate development project. In Fisher/Nusbaum Mr. Nusbaum had been efficiently operating the nursing home for many years. It was not suggested that if he remained in control the business would be in jeopardy. There was no advantage to appointing a receiver pending the wind up hearing and there was serious risk of prejudice to the business operation inherent in appointing a receiver unfamiliar with the effective business operation. The prejudice to the respondent in that case outweighed the nominal advantage to the applicant in appointing a receiver.

[15] The developer is undercapitalized. As in Fisher/Nusbaum the applicant is not advancing an argument suggesting that the respondent is an incapable developer. The respondent does not have the resources to put toward debt. Unsecured payables are in the range of $300K and the respondent is unable to obtain credit from the engineer to complete and release necessary plans. The subdivision is some time and much money away from readying the property for market. The respondent requires more money than he has and can only offer third standing security behind $15 million.

[16] The just and convenient assessment involves consideration of the interests of lender and borrower. The wrap around financing in 2006 was such that the respondent had to know at the time that in the event of default and enforcement a receiver would be advanced. The number and nature of properties, the subdivision agreements, the involvement of the municipality, the second mortgage suggests that enforcement on a piecemeal basis is contraindicated. The fact that the second mortgagee under the direction of a guarantor to the instant indebtedness supports the appointment suggests that they, too, have seen equity evaporate and are concerned that this development is near or past the point of repayment in full. The principals and investors in the second mortgagee are familiar with the Almonte market and their support for the application is a significant factor.

[17] The developer respondents are insolvent. They owe more than $1K and are unable to pay. The first mortgage has been in default since July 2008. The developer respondents are unable to allocate any proceeds of commercial rent to the secured creditors as the rent is consumed by monthly expenses of operation.

[18] I don't discern the animus alleged by the developer. What I do discern is a very concerned group of lenders who has been in collection mode since July 2008 and achieving little. The exchange of money for discharges over the adjournment indicates that the principal of Romspen, Mr. Roitman continues to act in a commercially responsible fashion in interaction with the developer. Mr. Bassille has a personal interest in his holdings. It is only to be expected that Mr. Bassille is not going to part with his hard won assets without a contest. That does not translate into animus of the part of people with the means who offer less than he expects for property in a changed market.

[19] In the instant case as opposed to the circumstances in Fisher/Nusbaum there is advantage to bringing in a receiver to direct the resolution of the outstanding debt. The status quo is untenable even in the short term. There is a daily erosion of equity if there is any. If there is not, it is the second and unsecured lenders who are being compromised. A receiver is a significant intrusion but is clearly the most efficient in a difficult situation. It does not mean the end of the development. It does result in an orderly liquidation of assets bearing in mind the best interest of all parties and when required subject to court approval. The respondent developer is not precluded from obtaining alternate financing. The representation made is that the developer may be able to implement a refinance in 30 days.

Disposition

[20] In the circumstances the just and convenient disposition is to appoint the receiver on terms of the order attached hereto. Paragraph 3(l) will not come into force for a period of thirty days of even date.

Justice Rick Leroy

Date: February 3, 2010

TAB 10

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.
To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

> (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
>
> (2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct

in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court

should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the

process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A. **:**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

Goodman J.A. **(dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of

Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to

adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

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TAB 11

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Royal Bank of Canada v. 2M Farms Ltd*, 2017 NSSC 105

Date: 2017-04-18
Docket: Hfx. No. 425907
Registry: Halifax

Between:

Royal Bank of Canada

Applicant

v.

2M Farms Ltd.

Respondent

Decision

Judge:	The Honourable Justice Moir
Heard:	February 23, 2017 & March 2, 2017, in Halifax, Nova Scotia
Oral Decision:	March 3, 2017
Transcribed & Edited:	April 18, 2017, in Halifax, Nova Scotia
Counsel:	Gavin D.F. MacDonald & Meryn Steves, for the Applicant Tim Peacock, for the Intervenor, National Building Group Inc. Marc Comeau, for Dana Robinson Fisheries Limited

Moir, J. (Orally):

Introduction

[1] BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: "foreclose out the encumbrances on title to the property." The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

[2] The other encumbrancer is National Building Group Inc. It has a builder's lien that was registered after the banks' security. The priority between the banks' security and the builder's lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the *Builder's Lien Act.*

[3] The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

[4] In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale

before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

Approval of Sale

[5] The receiver submits that *Royal Bank of Canada v. Soundair Corporation* [1991] O.J. 1137 (CA) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

[6] The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

[7] As stated by Justice Wood at paragraph 14 of *ECBC v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420: "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the *Bankruptcy and Insolvency Act*, a receiver must deal with the receivership property

in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

[8] As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

[9] BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

[10] The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

[11] To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

[12] The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015..... $600,000

January, 2016..... $550,000

March, 2016..... $500,000

June, 2016..... $425,000

July, 2016..... $350,000

October, 2016..... $315,000.

[13] The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

[14] Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

[15] In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

[16] National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

[17] National Building Group also argues "the reasonableness of the purchase price… is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property." It proposed that we determine the priorities before considering sale approval or "delay the proposed sale for 30 days to allow for an accounting", and an opportunity for National Building Group "to explore its' options".

[18] The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot "delay the proposed sale". Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

[19] This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver's failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

[20] The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

[21] The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

[22] The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed

about the property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

[23] In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

[24] Communications between the receiver and National Building Group were through lawyers.

[25] In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

[26] On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

[27] Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

[28] There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

[29] By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

[30] An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building

Groups' counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

[31] After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

[32] A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd*. (1983), 57 N.S.R. (2d) 20 (S.C.).

[33] The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

[34] National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

[35] National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

[36] I find that the sale process was fairly conducted in the interest of the various parties.

Proposed Terms for Foreclosure

[37] The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

[38] However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

[39] Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

Foreclosure-Based Versus Vesting Order-Based Receiverships

[40] Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc*. 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

[41] Counsel then argues that s. 15 the *Real Property Act* incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

[42] This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited*, 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

[43] Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

[44] Justice Wood's decision in *ECBC v. Crown Jewel Resort Ranch Inc*. is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel*.

[45] Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

[46] The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

[47] I respectfully adopt Justice Wood's reasons in *Crown Jewel*. In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the *Bankruptcy and Insolvency Act.* In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

[48] I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

The Need to Join Interested Parties

[49] We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

[50] I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in

this province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

[51] *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

[52] There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

[53] The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

Dispute about Priorities

[54] When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

[55] Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

Conclusion

[56] I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Moir, J.

TAB 12

SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243

Date: 20190607
Docket: Hfx No. 483616
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

Judge: The Honourable Justice D. Timothy Gabriel

Heard: June 7, 2019, in Halifax, Nova Scotia

Oral Decision: June 7, 2019

Counsel: Gavin D.F. MacDonald, for the Plaintiff
Kevin A. MacDonald, for the Defendants
Stephen J. Kingston and Colin J. Boyd (summer student) for Ernst and Young (Receiver-Monitor)

By the Court (orally):

Background

[1] The Plaintiff, Royal Bank of Canada ("RBC"), moves for an order appointing Ernst and Young ("EY") as a receiver of the property of the Defendants, Eastern Infrastructure Incorporated and Allcrete Restoration Limited. Both are, of course, corporate entities, and I will refer to them individually as "Eastern" and "Allcrete", and jointly as "the Companies".

[2] EY already has an appointment as Receiver-Monitor of the assets of the Companies, pursuant to an order of this court dated February 4, 2019 ("the first order"). All parties consented to it.

[3] However, the scope of that order limits the powers of EY as compared to those which would ordinarily be contained in a receivership order under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The order sought by the Plaintiff would discharge EY of its obligations under the order of February 4, 2019, and substitute therefore the expanded powers and responsibilities contained in the order sought, which is a "traditional" receivership order.

[4] For its part, EY supports RBC's motion. It has indicated that it is prepared to "act as a fully empowered Receiver of the Companies pursuant to s. 243 of the *BIA*", if RBC's motion is granted.

[5] The second order issued in this proceeding was granted by Justice Michael J. Wood (as he was then) on March 19, 2019. It came about after RBC had filed a motion "seeking the advice and direction of the court as regards to the further discharge of its powers and duties under the Consent Order" of February 4, 2019. The Defendant Companies were ordered to provide EY with certain information as set out in Schedules "A" and "B" thereto on or by 5 p.m. on March 22, 2019.

[6] The first order did not empower the Receiver-Monitor, EY, to take possession or control of the Defendant Companies' assets or business. It was, however, similar in most other ways to a standard Receivership Order. This limitation resulted, primarily, from concerns raised by the Companies, the most pressing of which was to the effect that they should be permitted more time to arrange their own sale process, while their businesses remained going concerns.

Having said that, EY asserts that it has not yet been provided with all of the information contemplated by the second order.

[7] There are also other matters of concern both to the Plaintiff and EY. For example, the Companies have not provided a sales plan or a proposal for the sale of their assets, or a plan for debt restructuring either to this court or to EY, the Receiver-Monitor. Nor is there a plan or agreement in place to repay monies owing to RBC. Indeed, no such payments have been made by the Companies since RBC commenced this proceeding. More concerningly, the Companies' financial positions have become much worse over that interval.

[8] RBC contends that the situation has become untenable, that the powers under the first order are not sufficient to protect either RBC's interests or those of the other creditors, and that the only way to extend appropriate safeguards for the benefit of all is to provide EY with a full receivership. The Companies have filed no materials or written brief in response. However, their counsel attended the hearing and initially stated that he took "no position" with respect to the relief sought by RBC. He then proceeded to argue vehemently against it.

Discussion and Analysis

[9] It is clear from the affidavit of Dave Northup (Special Loans and Advisory Services for RBC), dated December 21, 2018, that the Companies are indebted to RBC. For example at para. 4 we note that:

> According the records of RBC, Eastern Infrastructure Inc. ("Eastern") was directly indebted to it as of November 19, 2018 in the aggregate amount of $523,088.61 excluding accruing interest and costs of enforcement. In addition, Eastern has guaranteed the obligations of Allcrete Restoration Limited ("Allcrete") limited to the amount to $1,600,000.00 plus interest accruing from the date of demand. Therefore, Eastern's total obligation to RBC is $2,131,088.61 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[10] In para. 15, Mr. Northup continues:

> According the records of RBC, Allcrete was directly indebted to it as of November 19, 2018 in the aggregate amount of $2,096,167.86 excluding accruing interest and costs of enforcement. In addition, Allcrete has guaranteed the obligations of Eastern to RBC limited to the amount of $1,600,000,000.00 plus interest from the time of demand. Therefore, Allcrete's total obligation to RBC is 2,619,256.47 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[11] Demands for payment were issued by RBC on March 9, 2018. The demands were reissued on November 18, 2018. This latter instance included provision to the Companies by RBC of fresh notices of intention to enforce security pursuant to s. 244 of the *BIA*.

[12] During RBC's forbearance, or the hiatus between the two demands, significant negotiations took place between the parties. No settlement was made, nor was repayment of the debts effected. No payments have been made by the Companies to RBC or EY at all since the second demand was made in November 2018.

[13] I am satisfied that both the General Security Agreement and collateral mortgage provide RBC with the ability to appoint a receiver. For example, at Tab "J" of Mr. Northup's affidavit, we find the former, executed by Eastern Infrastructure, para. 2 of which reads:

> The Security Interest granted hereby secures payment and performance of any and all obligations, indebtedness and liability of Debtor to RBC (including interest thereon) present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wheresoever and howsoever incurred and any ultimate unpaid balance thereof and whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again and whether Debtor be bound alone or with another or others and whether as principal or surety (hereinafter collectively called the "Indebtedness"). If the Security Interest in the Collateral is not sufficient, in the event of default, to satisfy all Indebtedness of the Debtor, the Debtor acknowledges and agrees that Debtor shall continue to be liable for any Indebtedness remaining outstanding and RBC shall be entitled to pursue full payment thereof.

[14] Para. 13(a) goes on to provide:

> Upon default, RBC may appoint or reappoint by instrument in writing, any person or persons, whether an officer or officers or an employee or employees of RBC or not, to be a receiver or receivers (thereinafter called a "Receiver", which term when used herein shall include a receiver and manager) of Collateral (including any interest, income or profits therefrom) and may remove any Receiver so appointed and appoint another in his/her stead. Any such Receiver shall, so far as concerns responsibility for his/her acts, be deemed the agent of Debtor and not RBC, and RBC shall not be in any way responsible for any misconduct, negligence or non-feasance on the part of any such Receiver, his/her servants, agents or employees. Subject to the provisions of the instrument appointing him/her, any such Receiver shall have power to take possession of Collateral, to preserve Collateral or its value, to carry on or concur in carrying on all or any part of the business of Debtor and to sell, lease, license or otherwise dispose of or

> concur in selling, leasing, licensing or otherwise disposing of Collateral. To facilitate the foregoing powers, any such Receiver may, to the exclusion of all others, including Debtor, enter upon, use and occupy all premises owned or occupied by Debtor wherein Collateral may be situate, maintain Collateral upon such premises, borrow money on a secured or unsecured basis and use Collateral directly in carrying on Debtor's business or as security for loans or advances to enable the Receiver to carry on Debtor's business or otherwise, as such Receiver shall, in its discretion, determine. Except as may be otherwise directed by RBC, all Money received from time to time by such Receiver in carrying out his/her appointment shall be received in trust for and paid over to RBC. Every such Receiver may, in the discretion of RBC, be vested with all or any of the rights and powers of RBC.

[15] Sub paras. (b) – (h) go on to further particularize powers that RBC may exercise ancillary to the appointment of a receiver.

[16] At tab (h) of Mr. Northup's affidavit, we find the collateral mortgage executed by Eastern on November 24, 2011. The relevant portions of para. 12.1 (i) and (j) of that instrument provide as follows:

> Notwithstanding anything herein contained, it is declared and agreed that if at any time when there shall be default under the provisions of this Mortgage, the Mortgagee may, at such time and from time to time, and with or without entry into possession of the Mortgaged Premises, or any part thereof, by instrument in writing appoint any person, whether an officer or officers or an employee or employees of the Mortgages or not, to be a receiver (which term, as used herein, includes a receiver manager) of the Mortgaged Premises, or any part thereof, and of the rents and profits thereof, and with or without security, and may from time to time by similar writing remove any receiver and appoint another receiver, and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor, but no such appointment shall be revocable by the Mortgagor. Upon the appointment of any such receiver from time to time, the following provisions shall apply:
>
> …
>
> (j) The rights and powers conferred herein in respect of the receiver are supplemental to and not in substitution of any other rights and powers which the Mortgagee may have.

[17] Since EY's appointment as Receiver-Monitor pursuant to the first order on February 4, 2019, it has issued three reports. The first report is dated March 8, 2019. In the interests of brevity, I will point to only some of its relevant features. All references to "RM" in the reports relate to Ernst and Young, the receiver-monitor.

[18] First, para. 10:

> On 6 February 2019, the RM, through its counsel, issued a preliminary request for information to both the Company and RBC (the "Preliminary Request"). A copy of the Preliminary Request is attached as Appendix "B". The Preliminary Request included among other items that RBC provide copies of all appraisals commissioned and copies of its loan agreements with the Company and that the Company produce various financial data, including a 13-week cash flow projection with primary assumptions (the "Cash Flow"), necessary to provide the RM with an overview of the Company's current financial situation.

[19] Then, paras. 17 and 18:

> During the February 18 Call, Management advised that t he Company had limited liquidity and anticipated cash flow challenges in the next few weeks. The RM reiterated its request for the Cash Flow during the call. Management undertook to provide the Cash Flow prior to 21 February 2019, being the date of the next scheduled in person meeting between the RM and management at Company premises at 129 Park Street, in Elmsdale, Nova Scotia.
>
> The RM provided Management, including Mr. Wheaton (who was unavailable for the February 18 Call) a summary of the February 18 Call to which Mr. Wheaton provided his comments. A summary of the call and email exchanges as between the RM and the Company is attached as Appendix "C".

[20] Then, at para. 20:

> The Company did not produce a Cash Flow during the February 21 Meeting notwithstanding the RM's Preliminary Request, the February 12 Email, the February 14 Email and the February 18 Call. During the February 21 Meeting Management and Mr. Wheaton undertook to prepare and provide the RM with the Cash Flow by 22 February 2019. The RM offered to assist the Company in the preparation of the Cash Flow if required and, in an effort to advance the process, the RM provided the Company with a Cash Flow template for guidance.

[21] Then, at para. 23:

> The Company again failed to produce the information requested by the 28 February 2019 deadline. On 1 March 2019, correspondence from the RM's counsel was delivered to counsel for the Company and RBC confirming that:
>
> a. information requests remained outstanding;
>
> b. the production of the Cash Flow was critical in relation to the RM's monitoring, efforts to develop a sales process, and the RM's assessment of the Company's liquidity concerns;

c. The RM was, as a result of information requests not being provided, unable to respond to concerns raised by counsel for Intact Insurance (as described below), referencing certain bonded Company projects, and their confirmation request that the Company was meeting its obligations under the *Builder's Lien Act*; and

d. The current status quo situation was untenable and that the RM would be issuing a report to advise the Court on the lack of cooperation being provided.

[22] Next, at paras. 26 and 27:

> As noted above, the RM received correspondence from Intact Insurance ("Intact"), a copy of which is attached as Appendix "F", which provides surety bonding for EII and various Performance and Labour and Material Payment Bonds ("Bonds") in relation to Company projects. Intact advised the RM that it had received various claims under its Bonds and accordingly requested confirmation from the RM that the Company was meeting its obligations under the *Builder's Lien Act*. The RM advised Intact that it was not in a position to confirm the information requested because the RM's information requests to the Company remaining outstanding. A copy of the RM's response, through counsel, is attached as Appendix "G".
>
> The RM received e-mail correspondence on a without prejudice basis from counsel of an alleged unpaid vendor seeking the RM's consent to allow said vendor to register a lien claim against ARL pursuant to the *Builder's Lien Act*. In addition, the RM has been contacted by a third counsel also seeking to file a lien claim against ARL. Counsel for the Company and RBC have been provided with copies of the lien claim correspondence.
>
> [Emphasis added]

[23] Finally, at paras. 29 and 30:

> In addition to possible prejudice to lien claimants the RM is concerned, based upon initial comments arising from the 18 February Call in which Management advised that the Company had limited liquidity and anticipated cash flow challenges in the next few weeks, that the Company may not be in a position to sustain its operations on a cash flow positive basis such that other creditor interests (including but not limited to RBC, Canada Revenue Agency and/or other trade vendors providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> The RM has serious concerns that such stakeholders may have a false sense of comfort that the RM is monitoring the Company operations pursuant to the terms of the Consent Order when, in fact, the RM is not in a position to provide comfort to these stakeholder groups or the Court with respect to the financial position of

the Company as a result of the lack of cooperation extended by the Company to date.

[Emphasis added]

[24] Reference to the second report, dated April 12, 2019, indicates:

Pursuant to the terms of the Production Order, the Company was directed to provide the RM with specific information on or before 22 March 2019 (the "Deadline"). A portion of the specific information required to be produced was delivered to the RM on the Deadline date. However, not all of the Court ordered information was provided. Most notably, the Company failed to provide the RM with its bank statements (and/or online access to the bank statements) for the periods requested. The Company did produce a 13-week cash flow projection, a copy of which is attached as Appendix C (the "Original Cash Flow"). The Original Cash Flow unfortunately did not provide sufficient disclosure to address the RM's monitoring needs.

[25] At paras. 13 and 14 we find:

The Company, with the assistance and guidance of the RM, agreed to prepare an amended cash flow incorporating actual cash receipts and disbursements from the date of the Consent Order through 29 March 2019 (the "Period") and a 12 week forecast for the period ending 21 June 2019 (the "Projected Period").

The amended cash flow report was provided to the RM on 2 April 2019. The RM adjusted and reconciled the Period results to the EII's bank statements. A copy of the reconciled amended cash flow report (the "Amended Report") is attached as Appendix E. No banking activity was processed through ARL's bank account during the Period with the exception of service fees. ARL's closing cash balance at the end of the Period was $6,122.

[26] Paras. 16 and 17 tells us that:

Actual cash receipts of $496,686 were comprised of:

a. Trade accounts receivable collections - $451,999;

b. Advances from Related Parties (as defined below) - $20,000;

c. Advances from third parties - $16,500 (see below offsetting disbursement); and

d. Rental (69 Park Road) receipts - $8,188.

Actual cash disbursements of $468,930 were comprised of:

a. Payroll and source deductions - $226,175;

b. Related Party (as defined below) payments - $137,100;

c. Repayment of third party advances - $16,500 (see above offsetting advance);

d. HST payment - $10,000; and

e. General operating disbursements - $79,155.

[27] Paras. 18 - 20 of the second report go on to describe the relentless deterioration of the Companies' financial structures. For example, although the Companies' net cash positions remained neutral, there was a troubling erosion of net working capital during the period from February 4, 2019 to March 2019. Accounts receivable were utilized to cover payroll and other operating expenses. Sufficient new revenue was not generated to replace the funds exhausted by this process to sustain the Companies' capital positions.

[28] As a result, the extrapolated cash flow for the ensuing period ending June 21, 2019 forecasted a cash deficiency position of $242,019, even excluding those professional fees which are being funded directly by RBC. Moreover, EY indicated that it was unaware of any credit facilities to which the Companies could turn to remediate or mitigate their dire straits.

[29] At para. 22 of the second report, EY notes:

> The reduction of the trade accounts receivable balance since the issuance of the Consent Order has negatively impacted the value of the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist.

[30] Para. 24:

> The RM has requested the necessary information to enable it to assess whether there are any unpaid subcontractors and/or potential Builder's Lien claims pertaining to these projects, but the requested information has not been provided to date.

[31] Paras. 31 – 34:

> <u>HST Filings and Obligation</u>
>
> The RM has reviewed EII's HST account obligation due to the Canada Revenue Agency (the "CRA") which totals approximately $305,000.
>
> Management have not filed their December 2018 HST return nor their February 2019 HST return. EII anticipates the filing of these returns will generate HST refunds thereby reducing EII's net HST exposure to the CRA. The RM submits that an organization benefiting from a Court ordered stay of proceeding has an

> obligation to file its statutory remittances when due. As such, the RM has advised Management to file its December 2018 and February 2019 returns forthwith.
>
> Workers' Compensation Filings and Obligation
>
> The RM understands that EII has a Workers' Compensation Board (the "WCB") obligation of $25,226 and that it has not filed WCB reports for the months of October 2018, November 2018, December 2018, January 2019 and February 2019.
>
> The RM advised Management to file the outstanding WCB returns forthwith.

[32] Then, there are the lien claimants. Battlefield Equipment Rentals has filed a lien under the *Builders Lien Act* ("*BIA*") in the amount of $27,304.70 plus interest and costs against Allcrete. One of Eastern's subcontractors, Arrow Construction Products Limited has filed against the Queen's Marque Development Limited project ($16,271.44). Queen's Marque made a $13,287.99 payment directly to Arrow under s. 14 of the *BIA*. (para. 36, second report). All of this on top of Intact's (Eastern's bonding company) earlier noted indication that it has received $222,767.78 in bond claims as of March 27, 2019.

[33] The concerns of the Plaintiff should now be obvious. RBC fears that the Companies will not be in a position to sustain their operations even over the short term, and that creditor interests (including RBC, lien claimants, CRA, Workers' Compensation, and other trade vendors or employees) may be adversely affected while the Companies continue to operate.

[34] The third report of May 10, 2019 continues in the same vein. For example in para. 17:

> The continued reduction of the trade accounts receivable balance further erodes the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist. The RM anticipates the operating lenders security position will continue to erode unless immediate action is taken to discontinue operations as there is no evidence available to suggest that a viable and profitable operating plan is in place.

[35] It also references concerns about additional related party payments which are either being made to Brian Wheaton, who is the controlling mind of both Companies, or to other entities controlled or related to Mr. Wheaton.

[36] At paras. 23 and 24 of the third report, we find again a reference to the fact that the Companies are failing on an ongoing basis to comply with statutory obligations respecting payment of HST and WCB premiums. As we have seen

from the second report, they already had (at the time of that report) accumulated indebtedness of $305,000.00 respecting HST and $25,266.00 for WCB. No evidence of any resolution of the lien claims is noted in the third report, either.

[37] At paras. 27 and 28 of the third report, EY points out:

> There has been further erosion to the security positions of certain affected creditors since the issuance of the Second Report and further erosion is likely to be crystallized if the Company is permitted to continue to operate. The RM remains concerned that the Company's access to cash may run out should accounts receivable collections fail to materialize and that creditor interests (including but not limited to RBC, Lien Claimants, CRA, Workers' Compensation Board and/or other trade vendors or employees providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> Management has not responded to various RM information requests and accordingly our ability to monitor the operations has been challenging. Absent the Company immediately securing profitable projects and adequate financing to complete same a liquidity crisis may be inevitable. In the interim, the security positions of the affected creditors are deteriorating.

Issues

[38] In order to determine whether to grant the relief sought it is necessary to consider:

(i) the nature of the receivership sought,

(ii) whether the Companies are "insolvent persons" within the meaning of the *BIA* and,

(iii) if it is "just or convenient" that the remedy sought be granted.

Analysis

(i) The nature of the receivership sought.

[39] At the outset, I observe that RBC has the power to appoint a receiver pursuant to its security documents. Some reference to these documents has earlier been made. It is important, however, to appreciate the distinction between a privately appointed receiver and one appointed by the court.

[40] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128, Justice Edwards put it this way:

> The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed …
>
> The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in *Houlden, Morawetz and Sarra* at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> [Emphasis added]

[41] Obviously, there are myriad creditors beside RBC in this case. We have heard of lien claimants, and significant amounts owed pursuant to both HST and WCB legislation, to name just some. This would, in my view, tend to favour a court appointed receiver, accountable to the court, who will be able to offer protection to all of the various interests involved, as opposed to one appointed privately by the Plaintiff pursuant to its security documents. To be fair (and to repeat), this is in accord with RBC's position.

[42] As to whether it is appropriate to make such an appointment, the legislation itself must be considered. As section 243(1) of the *BIA* states:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) Exercise any control that the court considers advisable over that property and over the insolvent person s or bankrupt's business; or
>
> (c) Take any other action that the court considers advisable.
>
> [Emphasis added]

(ii) Are the Companies "insolvent persons" within the meaning of the BIA?

[43] The Companies are clearly insolvent within the meaning of s. 243(1) of the *BIA*. Consider that the legislation defines "insolvent person" to mean:

> … a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this act amount to $1,000, and
>
> (i) Who is for any reason unable to meet his obligations as they generally become due
>
> (ii) Who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) The aggregate of whose property is not at a fair valuation, sufficient or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;"

[44] The evidence of the receiver-monitor, EY, is uncontradicted. The Companies are indebted to and/or cannot meet their "obligations as they generally become due" with respect creditors including CRA (on account of HST), WCB (second report para. 30), Battlefield Equipment Rentals and Arrow Construction (second report paras. 35-36) not to mention RBC itself, to whom they have significant financial obligations that have long been outstanding. There are also the performance bond claims which have been brought by some other creditors of the Companies, as reported by Intact Insurance and noted in the second report (para. 37). Also troubling is the forecasted cash deficiency position of the Companies posited by EY in its reports.

[45] Criteria (i) and (ii) of the characteristics which define an "insolvent person" pursuant to the *BIA* have been established. Also, the third criterion has likely been established as well. In any event, given the disjunctive nature of the definition of "insolvent person" in the legislation, the threshold specified in s. 243(1) is easily met in this case.

(iii) Is it "just or convenient" that the remedy sought by RBC be granted?

[46] The seemingly innocuous words "just or convenient" do not, of course, clothe the court with *carte blanche* to do as it pleases. There is authority as to what they mean within the current lexicon. Consider, for example, the following excerpt from *Enterprise Cape Breton* (supra) at pp. 13 - 16:

> In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell: Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) The risk to the security holder taking into consideration the size of the debtor s equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;
>
> (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) The effect of the order on the parties;
>
> (l) The conduct of the parties;

(m) The length of time that a receiver may be in place;

(n) The cost to the parties;

(o) The likelihood of maximizing return to the parties; and

(p) The goal of facilitating the duties of the receiver.

The author's further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument – appoint a receiver.

[Emphasis added]

[47] It is not necessary that RBC or EY demonstrate irrevocable harm in order to succeed. Certainly, one may agree with RBC's contention that its position is being harmed or seriously compromised on the basis of what is contained in EY's reports, without necessarily accepting that this harm is irrevocable. I will state, however, that the failure by the Companies to bring forward or lead a single piece of evidence at this hearing, in the face of significant evidence that their capital position is relentlessly deteriorating, is very troubling.

[48] Certainly, there is significant risk to RBC and the other creditors. The Companies' capital positions have inexorably and precipitously declined, particularly during the period from November 2018 to the present. The powers provided under the first Order have proven inadequate to the job with which EY has been tasked. The overall tenor of EY's three reports is that cash reserves and assets are being depleted. That pool is shrinking and it not being replenished. Related party transactions are also taking place.

[49] Many of the Companies' assets are mobile. Some of these assets consist of equipment that is used at many different construction sites, some in different provinces. If equipment is being used by the Companies without adequate payments being received by them to maintain operations, this equipment could be damaged (as RBC argues) or dissipated, along with the cash reserves.

[50] As we continue to consider the apprehended or actual waste of the debtor's assets, it is also difficult to overlook the decrease in accounts receivable and cash balances, and the steady increase in liabilities having statutory priority outside of a bankruptcy (including the HST and WBC amounts). We have earlier discussed the related party transactions reported by EY. Even if the submissions of the Defendants' counsel are accepted (which is to the effect that they were repayments of monies earlier loaned by Mr. Wheaton to the Companies), these would still constitute "preferences" under virtually every relevant or potentially relevant

statutory regime. Further, neither company has offered one iota of evidence on this point, or with respect to any of the other concerns raised by the Plaintiff and/or EY.

[51] As to the balance of convenience between the parties, I first note that the court has been provided with no plan by the Companies to repay or pay down their obligations. Justice Rosinski in *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, at para. 33 treated such as a factor to be considered under this rubric.

[52] I also note that an order for a court appointed receiver will not necessarily "dictate the financial end" of the Companies (to borrow from the language used in *Enterprise Cape Breton*, at page 23). Indeed, it would be expected that the Companies would continue in their efforts to cooperate with the receiver in order to maximize the returns, even though their previous efforts to keep the businesses afloat since the first Order was granted have generated such unencouraging results.

Conclusion

[53] It is not necessary to "check all the boxes" with respect to the factors noted in *Enterprise Cape Breton* in order for the Plaintiff to succeed. Indeed, not all of these factors will be applicable to every case. Those that do apply in a given situation will also vary to some extent in the weight to be assigned to them. Conversely, in some cases, there will be additional factors which may militate for or against the remedy sought. The list is not exhaustive.

[54] It is correct to observe that a receivership is an extraordinary remedy, and is often sparingly granted. This concern is significantly attenuated, however, by the fact that RBC has a contractual right to appoint a receiver.

[55] I have concluded that the totality of the relevant factors noted in the *Enterprise Cape Breton* case, as well as the significant efforts made by RBC to accommodate the Companies since at least January 2019, shows that the decision to approach the court for relief in the present context has not been made precipitously.

[56] Moreover, the futility of other alternatives has been exposed over the period of time from at least November 2018 to the present. A private receivership was attempted, the Companies resisted. A limited receivership-monitoring regime was put in place by the first order as a result. Moreover, the Companies have cooperated only sparingly with provisions in the second order to supply EY with information that it needed to do its job. The present limited receivership/monitoring powers contained in the first Order, which were

anticipated to culminate in a mutually acceptable sales process, instead saw the Companies' fortunes continuously decline while their operations continued.

[57] The Companies are, at their best, presently stagnant. However, an analysis of all relevant factors demonstrates that if the order sought by RBC is not granted, Eastern and Allcrete will soon likely hit the proverbial "wall". The prejudice to existing creditors will be exacerbated. In all likelihood, new creditors will come into being. The status quo is untenable. The order sought is necessary. More to the point, it is both "just" and "convenient", given the present factual matrix.

[58] There are a number of problems with which EY will have to contend. Most are obvious, and include the need to collect mobile equipment, come up with a sales process that maximizes returns, and seek court approval. I will grant the receivership Order sought without security, and without specifying a limited time period for the appointment.

Gabriel, J.

TAB 13

SUPREME COURT OF NOVA SCOTIA

Citation: Royal Bank of Canada v. Eastern Infrastructure Inc., 2019 NSSC 297

Date: 20191010
Docket: 483616
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendant

Decision

Judge: The Honourable Justice Peter P. Rosinski

Heard: September 19, 2019, in Halifax, Nova Scotia

Counsel: Gavin MacDonald, for Royal Bank of Canada
Stephen Kingston, for the Receiver

By the Court:

Introduction

[1] The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia,* I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

[2] Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case[1].

The authority for vesting orders pursuant to s. 243(1)(c) BIA

[1] Attached hereto as Appendix "A" is the order granted.

[3] Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc*., 2014 NSSC 420 and *Royal Bank of Canada v 2M Farms Ltd.*, 2017 NSSC 105), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744, in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

[4] As Justice Blair stated for the court in *Regal*:

> [23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -- particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).
>
> [24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:
>
> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b)the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See Toronto-Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in Toronto-Dominion Bank v. Usarco, supra, at p. 459 D.L.R.

[27] **The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.**

…

[31] **In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] **The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

(Emphasis added)

> [33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.
>
> [34] I reach this conclusion for the following reasons.
>
> …
>
> [45] Vesting orders properly registered on title, then -- like other conveyances -- are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

[5] Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v Ressources Dianor Inc*., 2019 ONCA 508 per Pepall JA:

> **"(e) Section 243 of the BIA**
>
> **43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a)take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b)exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c)take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a)is appointed under subsection (1); or
>
> (b)is appointed to take or takes possession or control -- of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt -- under

> (i)an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii)a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver -- manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

…

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

Section 243 -- Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515**. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain."

[6] Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel.*

[7] *Lemare Logging* was released one year after Justice Wood made his comments in *Crown Jewel.* Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor,* the court cited *Crown Jewel* at para. 78, noting that "…the case law on vesting orders in the insolvency context is limited."

[8] Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montréal v. Sportsclick Inc*., 2009 NSSC 354 at paras 32-33, which the court will eventually apply to all such sales:

> **"Law**
>
> **32** In *Royal Bank of Canada v. Soundair Corp., supra,* Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:
>
> 1.It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2.It should consider the interests of all parties.
>
> 3.It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4.It should consider whether there has been unfairness in the working out of the process.
>
> **33** Certain principles have been enunciated by the courts in consideration of these points:
>
> The decision must be assessed as a matter of business judgment on the

> elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see,* Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
>
> the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para. 40;
>
> the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra,* at page 124, Anderson J. said:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

> a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra*."

Conclusion

[9] As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Rosinski, J

Appendix “A”

2018

Hfx. No. 483616

Supreme Court of Nova Scotia
in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and
Allcrete Restoration Limited

Defendants

APPROVAL AND VESTING ORDER (AUCTION)

Before the Honourable Justice Peter P. Rosinski in Chambers:

UPON HEARING Stephen Kingston on behalf of Ernst & Young Inc. (the "**Receiver**") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "**Debtor**");

AND UPON appearing that appropriate Notice of this Motion has been provided to all interested parties;

AND UPON having read the First Report of the Receiver dated September 11, 2019 (the "**Receiver's First Report**") and all other materials filed in connection with this Motion;

AND UPON the Receiver having negotiated an Auction Agreement (the "**Auction Agreement**") with Mirterra Industrial Appraisers & Auctioneers (the "**Auctioneer**") as more particularly described in the Receiver's First Report;

AND UPON the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "**Alberta Assets**"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

NOW UPON MOTION:

IT IS ORDERED THAT:

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "**Transactions**") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "**Purchased Assets**").

3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "**Purchaser**") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "**Purchaser Bill of Sale**"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and

   (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.

4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. Notwithstanding:

   (a) the pendency of these proceedings;

   (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and

   (c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this 19 day of September, 2019

Kim Webber
~~Prothonotary~~

KIMBERLEY WEBBER
Deputy Prothonotary

TAB 14

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al. | 2023 ONSC 5911, 2023 CarswellOnt 16404 | (Ont. S.C.J. [Commercial List], Oct 19, 2023)

2008 CarswellOnt 6258
Ontario Superior Court of Justice [Commercial List]

Tool-Plas Systems Inc., Re

2008 CarswellOnt 6258, [2008] O.J. No. 4218, 172 A.C.W.S. (3d) 112, 172 A.C.W.S. (3d) 113, 48 C.B.R. (5th) 91

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Receiver, RSM Richter Inc.
R. van Kessel for EDC, Comerica
C. Staples for BDC
M. Weinczok for Roynat

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Debtor manufactured auto parts — Debtor wished to appoint receiver and execute "quick flip", including terms that purchaser would acquire assets of debtor and hire same employees, and assume debt to secured lenders — Receiver brought motion for approval of transaction — Motion granted — Transaction was best available option, and was reasonable — Plan was in best interests of shareholders — Certain parties would benefit, including secured lenders, certain lessors, and certain employees — Certain employees and suppliers would have no possibility of recovery, but were unlikely to recover under any scenario — Price proposed was higher than liquidation value or value of going concern — Secured lenders supported transaction and subordinated secured lenders did not object — Harm could be caused by delay in that relationship with customers could be harmed by disruption.

MOTION by receiver for approval of purchase of debtor corporation.

***Morawetz J.*:**

1 This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which

the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

2 The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position — which recommends approval of the sale.

3 The transaction has the support of four Secured Lenders — EDC, Comerica, Roynat and BDC.

4 Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers — namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

5 Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

6 Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

7 The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

8 The only substantial condition to the transaction is the requirement for an approval and vesting order.

9 The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

10 The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

11 The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

12 Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

13 This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs

has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

14 Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order — specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

15 A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

16 In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally — the customers of the mould division who stand to benefit from continued supply.

17 On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

18 I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

19 I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

20 In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) have been followed.

21 In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

22 The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

Motion granted.

End of Document

TAB 15

A-183-18
2020 FCA 80

The Toronto-Dominion Bank (*Appellant*)

v.

Her Majesty the Queen (*Respondent*)

and

The Canadian Bankers' Association (*Intervener*)

Indexed as: Toronto-Dominion Bank v. Canada

Federal Court of Appeal, Dawson, Near and Gleason JJ.A.—Toronto, October 8, 2019; Ottawa, April 29, 2020.

Customs and Excise — Excise Tax Act — Deemed trusts — Appeal from Federal Court decision concluding that appellant obligated under Excise Tax Act (Act), s. 222(3) to remit to Receiver General portion of sale proceeds caught by deemed trust — Act, s. 222(1) creating deemed trust with respect to amounts collected as GST to be remitted to Receiver General — S. 222(3) extending trust to property of tax debtor held by secured creditor — Here, debtor collecting, but not remitting GST in relation to his business before becoming banking customer of appellant — Appellant unaware of debts, granting line of credit secured by charge against debtor's property — Debtor selling, transferring said property — Issuing trust cheques to repay appellant — Appellant subsequently discharging mortgage — Canada Revenue Agency asserting deemed trust claim under Act, s. 222 against appellant — Appellant refusing to pay amount claimed — Main issues whether Federal Court erring by finding (1) that deemed trust not requiring triggering event to cause trust to crystallize around specified assets, (2) that bona fide purchaser for value defence not available to secured creditors — Issues herein turning on proper interpretation of Act, ss. 222(1),(3) — Case law on deemed trust provisions of Income Tax Act relevant — Amendments post-Royal Bank of Canada v. Sparrow Electric Corp. (Sparrow) to Act, s. 222 assigning absolute priority to deemed trust — Parliament intending to grant priority to deemed trust in respect of property also subject to security interest, regardless of when security interest arising — Here, debtor deemed to hold GST amount in trust separate from property — Debtor's property to extent of tax debt deemed to be beneficially owned by Crown — Appellant under statutory obligation to remit proceeds from sale of property to Crown — Evolution of legislation part of "entire context" in which statutes to be read — Parliament enlarging scope of deemed trust provisions so as to ensure that

A-183-18
2020 CAF 80

La Banque Toronto-Dominion (*appelante*)

c.

Sa Majesté la Reine (*intimée*)

et

L'Association des banquiers canadiens (*intervenante*)

Répertorié : Banque Toronto-Dominion c. Canada

Cour d'appel fédérale, juges Dawson, Near et Gleason, J.C.A.—Toronto, 8 octobre 2019; Ottawa, 29 avril 2020.

Douanes et Accise — Loi sur la taxe d'accise — Fiducies réputées — Appel d'une décision de la Cour fédérale, qui a conclu que, selon l'art. 222(3) de la Loi sur la taxe d'accise (la Loi), l'appelante devait verser au receveur général une partie du produit de la vente faisant l'objet d'une fiducie réputée — L'art. 222(1) de la Loi dispose que les montants perçus au titre de la TPS sont réputés être détenus en fiducie et doivent être versés au receveur général — L'art. 222(3) dispose que les biens du débiteur fiscal détenus par un créancier garanti sont également détenus en fiducie — Avant de devenir client de l'appelante, le débiteur dans la présente affaire a perçu de la TPS en raison de son entreprise, mais il ne l'a pas versée au receveur général — L'appelante, qui n'était pas au fait des dettes du débiteur, a accordé à ce dernier une marge de crédit qui était garantie par une sûreté enregistrée sur un immeuble lui appartenant — Le débiteur a vendu et transféré l'immeuble — Il a remis à l'appelante deux chèques en fiducie pour lui rembourser les sommes dues — Par la suite, l'appelante a levé l'hypothèque — L'Agence du revenu du Canada a fait valoir un droit à l'encontre de l'appelante en raison d'une fiducie réputée au titre de l'art. 222 de la Loi — L'appelante a refusé de payer le montant réclamé — Il s'agissait principalement de savoir si la Cour fédérale a commis une erreur en concluant 1) qu'il n'est pas nécessaire qu'il y ait d'événement déclencheur pour que des biens précis soient visés par la fiducie, et 2) que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert à l'acquéreur de bonne foi à titre onéreux — Les questions soulevées dans le présent appel portaient sur l'interprétation correcte des art. 222(1) et (3) de la Loi — La jurisprudence portant sur les fiducies réputées selon la Loi de l'impôt sur le revenu est pertinente — À la suite de la décision dans l'arrêt Banque Royale du Canada c. Sparrow

unremitted source deductions, unremitted GST recovered in priority to all debts — Federal Court not erring by finding that no triggering event required to cause trust to crystallize around specified assets — Words that spoke to triggering events removed from current version of deemed trust provisions — This reflecting Parliament's intent that no triggering event required — Federal Court not erring in finding that secured creditors cannot avail themselves of bona fide purchaser for value defence — This defence not available to secured creditors — Appeal dismissed.

This was an appeal from a Federal Court decision concluding that the appellant was obligated under subsection 222(3) of the *Excise Tax Act* (Act) to remit to the Receiver General a portion of the sale proceeds caught by a deemed trust.

Subsection 222(1) of the Act creates a deemed trust with respect to amounts that are collected as goods and services tax and are to be remitted to the Receiver General. Subsection 222(3) extends the trust created by subsection (1) to the property of the tax debtor and property of the tax debtor held by any secured creditor. Before he became a banking customer of the appellant, the debtor in the present case collected, but did not remit to the Receiver General, GST in relation to his landscaping business. In 2010, the appellant, who was not aware of any debts owed by the debtor pursuant to the Act, granted a line of credit to the debtor that was secured by a charge in favour of the appellant registered against a property owned by the debtor. In 2011, the debtor sold and transferred the property. The debtor issued two trust cheques to the appellant to repay the line of credit and the mortgage, and discharge the charges registered against the property. The appellant subsequently discharged the charge and mortgage registered against the property. The Canada Revenue Agency asserted a deemed trust claim under section 222 of the Act against the appellant on the basis that the proceeds it

Electric Corp (Sparrow), des modifications ont été apportées à l'art. 222 de la Loi pour accorder la priorité absolue à la fiducie réputée — Le législateur a voulu accorder la priorité de rang à la fiducie réputée lorsque les biens sont également grevés d'une garantie, que celle-ci ait pris effet avant ou après la perception de la TPS — En l'espèce, le débiteur était réputé détenir le montant au titre de la TPS en fiducie, séparé de ses propres biens — Les biens du débiteur, jusqu'à concurrence de la dette fiscale, étaient réputés être des biens dans lesquels la Couronne avait un droit de bénéficiaire — L'appelante avait l'obligation légale de verser le produit qu'elle a reçu à la Couronne — L'évolution de la loi fait partie du « contexte global » dans lequel les lois doivent être interprétées — Le législateur a élargi la portée des dispositions sur les fiducies réputées afin de garantir le recouvrement des retenues à la source et de la TPS non versées en priorité sur toutes les dettes — La Cour fédérale n'a pas commis d'erreur en concluant qu'il ne doit pas y avoir d'événement déclencheur pour que la fiducie s'applique à des biens précis — La version antérieure des dispositions sur la fiducie réputée renvoyait à des événements déclencheurs — Il n'est plus question d'événements déclencheurs dans la version actuelle — Cela représente l'intention du législateur qu'il ne doit pas y avoir d'événement déclencheur — La Cour fédérale n'a pas commis d'erreur en concluant que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert aux acquéreurs de bonne foi à titre onéreux — Les créanciers garantis ne peuvent avoir recours à ce moyen de défense — Appel rejeté.

Il s'agissait d'un appel d'une décision de la Cour fédérale, qui a conclu que, selon le paragraphe 222(3) de la *Loi sur la taxe d'accise* (la Loi), l'appelante devait verser au receveur général une partie du produit de la vente faisant l'objet d'une fiducie réputée.

Le paragraphe 222(1) de la Loi dispose que les montants perçus au titre de la taxe sur les produits et services sont réputés être détenus en fiducie et doivent être versés au receveur général. Le paragraphe 222(3) dispose que les biens du débiteur fiscal et les biens du débiteur fiscal détenus par un créancier garanti sont également détenus en fiducie selon le paragraphe (1). Avant de devenir client de l'appelante, le débiteur dans la présente affaire a perçu de la TPS en raison de son entreprise d'aménagement paysager, mais il ne l'a pas versée au receveur général. En 2010, l'appelante, qui n'était pas au fait des dettes du débiteur en application de la Loi, a accordé à ce dernier une marge de crédit qui était garantie par une sûreté enregistrée sur un immeuble lui appartenant. En 2011, le débiteur a vendu et transféré l'immeuble. Il a remis à l'appelante deux chèques en fiducie pour rembourser la marge de crédit et l'hypothèque et acquitter les sûretés enregistrées sur l'immeuble. Par la suite, l'appelante a levé la sûreté et l'hypothèque enregistrées sur l'immeuble. L'Agence du revenu du Canada a fait valoir un droit à l'encontre de l'appelante en raison d'une

received from the sale of the property ought to have been paid to the Receiver General up to the amount deemed to be held in trust. The appellant refused to pay the amount claimed. The Federal Court found, *inter alia*, that the appellant had a statutory obligation to pay the tax debt out of the proceeds it had received; the appellant could not invoke the *bona fide* purchaser defence to counter the statutory obligation imposed by subsection 222(3) of the Act; no triggering event was necessary to bring the deemed trust into operation; and the Crown's deemed trust is the reflection of a considered legislative priority scheme between certain tax debts and secured claims.

The main issues were whether the Federal Court erred by finding that the deemed trust does not require a triggering event to cause the trust to crystallize around specified assets and that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence.

Held, the appeal should be dismissed.

The issues raised in this appeal turned on the proper interpretation of subsections 222(1) and (3) of the Act. Case law that has considered the deemed trust provisions of the *Income Tax Act* is relevant to the interpretation of the deemed trust provisions of the *Excise Tax Act*. Following the decision of the Supreme Court in *Royal Bank of Canada v. Sparrow Electric Corp.* (*Sparrow*), amendments were made to section 222 of the Act to assign absolute priority to the deemed trust. According to the grammatical and ordinary sense of the language of subsections 222(1) and (3) of the Act, Parliament intended to grant priority to the deemed trust in respect of property that is also subject to a security interest, regardless of when the security interest arose in relation to the time the GST was collected. This flows from Parliament's use of the phrase "despite any security interest in the amount" in subsection 222(1). In the present case, when the debtor collected amounts as or for GST he was deemed "for all purposes … to hold the amount in trust for Her Majesty … separate and apart from" his property (subsection 222(1)). When the appellant lent money to the debtor and took its security interests, the debtor's property to the extent of the tax debt was already deemed to be beneficially owned by the Crown (subsection 222(3)). It followed that when the debtor's property was sold, by operation of subsection 222(3) the appellant was under a statutory obligation to remit the proceeds it received to the Crown. The purpose of the provision is to protect the collection of unremitted GST by construing the deemed trust provisions to apply so as to recognize that a secured creditor is obliged to remit proceeds it receives from the disposition of a debtor's property that are impressed with a trust in favour of the Crown. In exchange for the super priority

fiducie réputée au titre de l'article 222 de la Loi, au motif que le produit que l'appelante avait reçu de la vente de l'immeuble aurait dû être versé au receveur général, jusqu'à concurrence du montant réputé être détenu en fiducie. L'appelante a refusé de payer le montant réclamé. La Cour fédérale a conclu notamment que l'appelante avait l'obligation légale de rembourser la dette fiscale au moyen du produit qu'elle avait reçu; que l'appelante ne pouvait pas invoquer le moyen de défense offert à l'acquéreur de bonne foi à l'encontre de l'obligation légale au paragraphe 222(3) de la Loi; qu'il n'était pas nécessaire qu'il y ait d'événement déclencheur pour que la fiducie réputée existe; et que la fiducie réputée de la Couronne découle de l'intention expresse du législateur que certaines dettes fiscales aient un rang supérieur aux créances garanties.

Il s'agissait principalement de savoir si la Cour fédérale a commis une erreur en concluant qu'il n'est pas nécessaire qu'il y ait d'événement déclencheur pour que des biens précis soient visés par la fiducie et que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert à l'acquéreur de bonne foi à titre onéreux.

Arrêt : l'appel doit être rejeté.

Les questions soulevées dans le présent appel portaient sur l'interprétation correcte des paragraphes 222(1) et (3) de la Loi. La jurisprudence portant sur les fiducies réputées selon la *Loi de l'impôt sur le revenu* est pertinente pour l'interprétation des dispositions sur les fiducies réputées de la *Loi sur la taxe d'accise*. À la suite de la décision de la Cour suprême dans l'arrêt *Banque Royale du Canada c. Sparrow Electric Corp* (*Sparrow*), des modifications ont été apportées à l'article 222 de la Loi pour accorder la priorité absolue à la fiducie réputée. L'on peut déduire du sens grammatical et ordinaire du libellé des paragraphes 222(1) et (3) de la Loi que le législateur a voulu accorder la priorité de rang à la fiducie réputée lorsque les biens sont également grevés d'une garantie, que celle-ci ait pris effet avant ou après la perception de la TPS. Cela découle du libellé « malgré tout droit en garantie le concernant » au paragraphe 222(1). En l'espèce, lorsque le débiteur a perçu le montant au titre de la TPS, il était réputé « à toutes fins utiles [...] le détenir en fiducie pour Sa Majesté [...], séparé de ses propres biens » (paragraphe 222(1)). Lorsque l'appelante a prêté de l'argent au débiteur et a reçu sa garantie, les biens du débiteur, jusqu'à concurrence de la dette fiscale, étaient déjà réputés être des biens dans lesquels la Couronne avait un droit de bénéficiaire (paragraphe 222(3)). Il s'ensuit que lorsque les biens du débiteur ont été vendus, l'appelante avait l'obligation légale de verser le produit qu'elle a reçu à la Couronne en raison du paragraphe 222(3) de la Loi. Cette disposition vise à assurer la perception de la TPS non versée en interprétant la disposition sur la fiducie réputée de manière à assurer qu'un créancier garanti soit tenu de remettre le produit de la vente d'un bien du débiteur qu'il reçoit et qui devient assujetti à une

ordinarily given to the deemed trust provision of the *Excise Tax Act*, Parliament made a policy decision wherein the priority does not survive bankruptcy under the *Bankruptcy and Insolvency Act* and does not apply to arrangements under the *Companies' Creditors Arrangement Act*. This is a relevant, extrinsic interpretive aid that adds context to the interpretation of section 222. The evolution of the legislation is part of the "entire context" in which statutes are to be read. Here, the legislation was amended in response to *Sparrow*. Parliament intended to enlarge the scope of the deemed trust provisions so as to ensure that unremitted source deductions and unremitted GST are to be recovered in priority to all debts.

The Federal Court did not err by finding that no triggering event is required to cause the trust to crystallize around specified assets. The word "priority" appears only once in subsections 222(1) and (3). The appellant failed to take into account the balance of the words found in subsections 222(1) and (3) and the conferral of a beneficial interest, the proceeds of which "shall be paid" to the Crown. The appellant also failed to take into account the legislative evolution of the deemed trust provisions. The words that spoke to the triggering events of "liquidation, assignment, receivership or bankruptcy" were found in the prior iteration of the deemed trust provisions but removed from the current version. This reflects Parliament's intent that no triggering event was to be required to cause the trust to crystallize around specified assets. The appellant's reliance on references to the use of the word "priority" in *Sparrow* and in *First Vancouver Finance v. M.N.R.* (*First Vancouver*) was misplaced. In *First Vancouver*, the Supreme Court's likening of the deemed trust to a "floating charge" did not support the requirement of a triggering event to crystallize the deemed trust. While Parliament drafted provisions directed to collecting tax debt from third parties, the Crown's right to the proceeds of property deemed to be held in trust is an assertion of the statutory obligation created when the tax debtor collected and failed to remit GST.

The Federal Court did not err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence. The *bona fide* purchaser for value defence is not available to secured creditors such as the appellant. It would be irrational for Parliament, in an effort to ensure that collected, unremitted GST was to be recovered in priority to all debts, to intend the *bona fide* purchaser defence to be available so as to undo the Crown's pre-existing beneficial interest in the property of the deemed trust. This would eviscerate the deemed trust provisions.

fiducie en faveur de la Couronne. Le législateur a pris la décision de politique générale qu'en échange de la priorité absolue habituelle des fiducies prévues par la *Loi sur la taxe d'accise*, la priorité n'existe plus en cas de faillite aux termes de la *Loi sur la faillite et l'insolvabilité* et ne s'applique pas aux arrangements en application de la *Loi sur les arrangements avec les créanciers des compagnies*. Il s'agit d'un outil d'interprétation extrinsèque pertinent qui ajoute un contexte à l'interprétation de l'article 222. L'évolution de la loi fait partie du « contexte global » dans lequel les lois doivent être interprétées. En l'espèce, la Loi a été modifiée en réponse à l'arrêt *Sparrow*. Le législateur a voulu élargir la portée des dispositions sur les fiducies réputées afin de garantir le recouvrement des retenues à la source et de la TPS non versées en priorité sur toutes les dettes.

La Cour fédérale n'a pas commis d'erreur en concluant qu'il ne doit pas y avoir d'événement déclencheur pour que la fiducie s'applique à des biens précis. Le terme « priorité » n'apparaît qu'une seule fois aux paragraphes 222(1) et (3). L'appelante n'a pas tenu compte des autres termes des paragraphes 222(1) et (3) et de l'attribution d'un droit de bénéficiaire, dont le produit « est payé » à la Couronne. L'appelante n'a pas tenu compte non plus de l'évolution des dispositions sur la fiducie réputée. La version antérieure des dispositions sur la fiducie réputée renvoyait à des événements déclencheurs comme la liquidation, la cession, la mise sous séquestre ou la faillite; il n'en est plus question dans la version actuelle. Cela représente l'intention du législateur qu'il ne doit pas y avoir d'événement déclencheur pour que la fiducie s'applique à des biens précis. L'appelante s'est appuyée à tort sur l'utilisation du terme « priorité » dans l'arrêt *Sparrow* et dans l'arrêt *First Vancouver Finance c. M.R.N.* (*First Vancouver*). Dans l'arrêt *First Vancouver*, la comparaison par la Cour suprême de la fiducie réputée à une « charge flottante » n'étayait pas l'exigence qu'il y ait un événement déclencheur pour que la fiducie réputée s'applique. Même si le législateur a rédigé des dispositions visant à recouvrer les dettes fiscales de tiers, le droit de la Couronne au produit d'un bien réputé être détenu en fiducie découle de l'obligation légale créée lorsque le débiteur fiscal a perçu la TPS et a omis de la verser.

La Cour fédérale n'a pas commis d'erreur en concluant que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert aux acquéreurs de bonne foi à titre onéreux. Les créanciers garantis, comme l'appelante, ne peuvent avoir recours au moyen de défense offert à l'acquéreur de bonne foi à titre onéreux. Il serait irrationnel que le législateur, dans le but de s'assurer que la TPS perçue et non versée soit recouvrée par priorité sur toutes les dettes, entende maintenir le moyen de défense offert à l'acquéreur de bonne foi et ainsi annuler le droit de bénéficiaire préexistant de la Couronne aux biens de la fiducie réputée. Cela aurait pour effet de vider de leur contenu les dispositions sur les fiducies réputées.

STATUTES AND REGULATIONS CITED

Bank Act, S.C. 1991, c. 46.
Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.
Canada Pension Plan, R.S.C., 1985, c. C-8, s. 23(3).
Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 37.
Employment Insurance Act, S.C. 1996, c. 23, s. 86(2).
Excise Tax Act, R.S.C., 1985, c. E-15, ss. 221, 222, 317, 323, 325.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, s. 227.
Personal Property Security Act, S.A. 1988, c. P-4.05.
Security Interest (GST/HST) Regulations, SOR/2011-55, s. 2.

LOIS ET RÈGLEMENTS CITÉS

Loi de l'impôt sur le revenu, L.R.C. (1985) (5e suppl.), ch. 1, art. 227.
Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3.
Loi sur la taxe d'accise, L.R.C. (1985), ch. E-15, art. 221, 222, 317, 323, 325.
Loi sur l'assurance-emploi, L.C. 1996, ch. 23, art. 86(2).
Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36, art. 37.
Loi sur les banques, L.C. 1991, ch. 46.
Personal Property Security Act, S.A. 1988, ch. P-4.05.
Régime de pensions du Canada, L.R.C. (1985), ch. C-8, art. 23(3).
Règlement sur les droits en garantie (TPS/TVH), DORS/2011-55, art. 2.

CASES CITED

CONSIDERED:

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, (1997), 208 N.R. 161; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Canada (Attorney General) v. Community Expansion Inc.* (2004), 72 O.R. (3d) 546, [2004] O.J. No. 5493 (QL) (Sup. Ct.), affd 2005 CanLII 1402, [2005] O.J. No. 186 (QL) (C.A.); *i Trade Finance Inc. v. Bank of Montréal*, 2011 SCC 26, [2011] 2 S.C.R. 360; *Canada (Attorney General) v. National Bank of Canada*, 2004 FCA 92, 324 N.R. 31.

REFERRED TO:

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379.

JURISPRUDENCE CITÉE

DÉCISIONS EXAMINÉES :

Banque royale du Canada c. Sparrow Electric Corp., [1997] 1 R.C.S. 411; *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720; *Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425; *Canada (Attorney General) v. Community Expansion Inc.* (2004), 72 O.R. (3d) 546, [2004] O.J. nº 5493 (QL) (C.S.), conf. par 2005 CanLII 1402, [2005] O.J. nº 186 (QL) (C.A.); *i Trade Finance Inc. c. Banque de Montréal*, 2011 CSC 26, [2011] 2 R.C.S. 360; *Canada (Procureure générale) c. Banque nationale du Canada*, 2004 CAF 92.

DÉCISION CITÉE :

Century Services Inc. c. Canada (Procureur général), 2010 CSC 60, [2010] 3 R.C.S. 379.

AUTHORS CITED

Department of Finance, Press Release, 1997-030, "Unremitted Source Deductions and Unpaid GST" (April 7, 1997).

DOCTRINE CITÉE

Ministère des Finances, communiqué de presse, 1997-030, « Retenues à la source non versées et TPS impayée » (7 avril 1997).

APPEAL from a Federal Court decision (2018 FC 538, 60 C.B.R. (6th) 173) concluding that the appellant was obligated under subsection 222(3) of the *Excise Tax Act* to remit to the Receiver General a portion of the sale proceeds caught by a deemed trust. Appeal dismissed.

APPEL d'une décision de la Cour fédérale (2018 CF 538), qui a conclu que, selon le paragraphe 222(3) de la *Loi sur la taxe d'accise*, l'appelante devait verser au receveur général une partie du produit de la vente faisant l'objet d'une fiducie réputée. Appel rejeté.

APPEARANCES

Christine Lonsdale and *Daniel Goudge*
for appellant.
Louis L'Heureux and *Edward Harrison*
for respondent.
Harvey Chaiton for intervener.

SOLICITORS OF RECORD

McCarthy Tétrault LLP, Toronto, for appellant.
Deputy Attorney General of Canada
for respondent.
Chaitons LLP, Toronto, for intervener.

The following are the reasons for judgment rendered in English by

[1] Dawson J.A.: As a general principle, subject to certain exceptions that do not apply in the present case, "[e]very person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect" the goods and services tax "payable by the recipient in respect of the supply" (section 221, *Excise Tax Act*, R.S.C., 1985, c. E-15 (sometimes the Act)).

[2] Subsection 222(1) of the Act creates a deemed trust with respect to amounts that are collected as goods and services tax. Amounts deemed to be held in trust are to be remitted to the Receiver General or properly withdrawn from the trust as input tax credits or deductions:

Trust for amounts collected

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2). [Underlining added.]

[3] Subsection 222(3) extends the trust created by subsection (1) to the property of the tax debtor and property of the tax debtor held by any secured creditor:

ONT COMPARU :

Christine Lonsdale et *Daniel Goudge*
pour l'appelante.
Louis L'Heureux et *Edward Harrison*
pour l'intimée.
Harvey Chaiton pour l'intervenante.

AVOCATS INSCRITS AU DOSSIER

McCarthy Tétrault LLP, Toronto, pour l'appelante.
La sous-procureure générale du Canada
pour l'intimée.
Chaitons LLP, Toronto, pour l'intervenante.

Ce qui suit est la version française des motifs du jugement rendus par

[1] La juge Dawson, J.C.A. : En règle générale, sous réserve de certaines exceptions qui ne s'appliquent pas en l'espèce, la « personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe » sur les produits et services « payable par l'acquéreur » (article 221, *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15 (la Loi)).

[2] Le paragraphe 222(1) de la Loi dispose que les montants perçus au titre de la taxe sur les produits et services sont réputés être détenus en fiducie. Ces montants doivent être versés au receveur général ou retirés de la fiducie en tant que crédits de taxe sur les intrants ou de déduction de taxe :

Montants perçus détenus en fiducie

222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2). [Non souligné dans l'original.]

[3] Le paragraphe 222(3) dispose que les biens du débiteur fiscal et les biens du débiteur fiscal détenus par un créancier garanti sont également détenus en fiducie selon le paragraphe (1) :

222 (1) …

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests. [Underlining added.]

222 (1) […]

Non-versement ou non-retrait

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie. [Non souligné dans l'original.]

[4] These are the provisions that form the basis of this appeal. Section 222 in its entirety is set out in the appendix to these reasons.

[5] The central issue raised on this appeal is the correct interpretation of subsections 222(1) and (3) of the Act: is a secured creditor who receives proceeds from a tax debtor's property at a time when the debtor owes GST to the Crown required to pay the proceeds, or a portion thereof equalling the tax debt, to the Receiver General in priority to all security interests? This issue arises in the following circumstances.

Factual background

[6] Mr. M. Weisflock (the debtor) owned and operated a landscaping business as a sole proprietorship.

[4] Ce sont là les dispositions qui constituent le fondement du présent appel. L'article 222 est reproduit intégralement à l'annexe des présents motifs.

[5] La question centrale soulevée dans le présent appel est l'interprétation juste des paragraphes 222(1) et (3) de la Loi : un créancier garanti qui reçoit le produit de la vente des biens d'un débiteur fiscal à un moment où celui-ci doit de la TPS à la Couronne est-il tenu de payer le produit, ou une partie de celui-ci égale à la dette fiscale, au receveur général par priorité sur tout droit en garantie? La question se pose en raison des faits qui suivent.

Les faits

[6] Monsieur M. Weisflock (le débiteur) possédait et exploitait une entreprise d'aménagement paysager à titre

The debtor was required to collect and remit GST to the Receiver General.

[7] In 2007 and 2008, before he became a banking customer of the Toronto Dominion Bank, the debtor collected, but did not remit to the Receiver General, GST in the amount of $67 854 in relation to his landscaping business.

[8] In 2010, the Bank extended loans to the debtor. In March 2010, the Bank granted a line of credit to the debtor and his wife with a credit limit of $246 000. The line of credit was secured by a charge in favour of the Bank registered against a property owned by the debtor (the property). Later, in April 2010, the Bank extended a loan to the debtor and his wife in the amount of $352 000. This loan was secured by mortgage, also registered against the property.

[9] At the time of both loan applications the Bank was not aware of any debts owed by the debtor pursuant to the Act.

[10] On or about October 28, 2011, the debtor sold and transferred the property to third party purchasers for $881 000. The Bank did not enforce its security against the debtor. Rather, the debtor's lawyer issued two trust cheques to the Bank in the amounts of $245 147.78 and $334 546.49 to repay the line of credit and the mortgage and discharge the charges registered against the property.

[11] Subsequently, the Bank discharged the charge and mortgage registered against the property.

[12] On April 18, 2013, and February 2, 2015, the Canada Revenue Agency asserted a deemed trust claim under section 222 of the Act against the Bank on the basis that the proceeds it received from the sale of the property ought to have been paid to the Receiver General up to the amount deemed to be held in trust. The amount of the deemed trust claim was $67 854.

[13] The Bank refused to pay the amount claimed.

d'entreprise à propriétaire unique. Il était tenu de percevoir et de verser la TPS au receveur général.

[7] En 2007 et en 2008, avant de devenir client de la Banque Toronto-Dominion, le débiteur a perçu de la TPS de 67 854 $ en raison de son entreprise d'aménagement paysager, mais ne l'a pas versée au receveur général.

[8] En 2010, la Banque a accordé des prêts au débiteur. En mars 2010, la Banque a accordé une marge de crédit de 246 000 $ au débiteur et à son épouse. La marge de crédit était garantie par une sûreté enregistrée sur un immeuble appartenant au débiteur consentie à la Banque. Plus tard, en avril 2010, la Banque a accordé un prêt de 352 000 $ au débiteur et à son épouse. Ce prêt était garanti par une hypothèque, qui était également enregistrée sur l'immeuble.

[9] Au moment des deux demandes de prêt, la Banque n'était pas au fait des dettes du débiteur en application de la Loi.

[10] Vers le 28 octobre 2011, le débiteur a vendu et transféré l'immeuble à des acquéreurs sans lien de dépendance pour 881 000 $. La Banque n'a pas exécuté sa sûreté contre le débiteur. L'avocat du débiteur a plutôt remis à la Banque deux chèques en fiducie de 245 147,78 $ et de 334 546,49 $ pour rembourser la marge de crédit et l'hypothèque et acquitter les sûretés enregistrées sur l'immeuble.

[11] Par la suite, la Banque a levé la sûreté et l'hypothèque enregistrées sur l'immeuble.

[12] Le 18 avril 2013 et le 2 février 2015, l'Agence du revenu du Canada a fait valoir un droit à l'encontre de la Banque en raison d'une fiducie réputée au titre de l'article 222 de la Loi, au motif que le produit que la Banque avait reçu de la vente de l'immeuble aurait dû être versé au receveur général, jusqu'à concurrence du montant réputé être détenu en fiducie. Le montant réclamé au titre de la fiducie réputée était de 67 854 $.

[13] La Banque a refusé de payer le montant réclamé.

[14] Accordingly, the Crown commenced an action against the Bank seeking $67 854 plus interest and costs. The Bank defended the claim.

[15] The trial in the Federal Court proceeded solely on the basis of an agreed statement of facts.

The decision of the Federal Court

[16] For reasons cited as 2018 FC 538, 60 C.B.R. (6th) 173 the Federal Court found that subsection 222(3) of the Act obliged the Bank to remit that portion of the sale proceeds caught by the deemed trust. In reaching this conclusion the Federal Court found that:

- The amounts paid by the debtor to the Bank were "proceeds" of the sale of the debtor's property and were subject to the deemed trust (reasons, paragraph 16).

- Upon the sale of a tax debtor's property, the debtor is obliged to pay the proceeds, or the portion of the proceeds required to retire the tax debt, to the Receiver General (reasons, paragraph 31).

- In the present case, the debtor was obliged to pay his tax debt out of the sale proceeds of the property, but failed to do so. Instead, he used the proceeds to pay the Bank, a secured creditor. In this circumstance, the Bank had a statutory obligation to pay the tax debt out of the proceeds it received (reasons, paragraph 33).

- As a secured creditor of the debtor, the Bank cannot invoke the *bona fide* purchaser defence to counter the statutory obligation imposed by subsection 222(3) of the Act. To allow the Bank to invoke the defence would defeat the purpose of the deemed trust, rendering it meaningless (reasons, paragraphs 44 and 46).

[14] En conséquence, la Couronne a intenté une action contre la Banque pour obtenir 67 854 $, ainsi que les intérêts et les dépens. La Banque a contesté la demande.

[15] Le procès devant la Cour fédérale s'est déroulé uniquement sur la base d'un exposé conjoint des faits.

La décision de la Cour fédérale

[16] Pour les motifs dont la référence est 2018 CF 538, la Cour fédérale a conclu que, selon le paragraphe 222(3) de la Loi, la Banque devait verser la partie du produit de la vente qui faisait l'objet de la fiducie réputée. En arrivant à cette conclusion, la Cour fédérale a estimé ce qui suit :

- Les montants versés par le débiteur à la Banque étaient le « produit » de la vente de l'immeuble du débiteur et faisaient l'objet de la fiducie réputée (motifs, au paragraphe 16).

- Lors de la vente de l'immeuble du débiteur fiscal, celui-ci est tenu de verser le produit de la vente, ou le montant moindre qu'il faut pour rembourser la dette fiscale, au receveur général (motifs, au paragraphe 31).

- En l'espèce, le débiteur était tenu de rembourser sa dette fiscale avec le produit de la vente de l'immeuble, mais il ne l'a pas fait. Il a plutôt remboursé la Banque, une créancière garantie. Par conséquent, la Banque avait l'obligation légale de rembourser la dette fiscale au moyen du produit qu'elle a reçu (motifs, au paragraphe 33).

- En tant que créancière garantie du débiteur, la Banque ne peut pas invoquer le moyen de défense offert à l'acquéreur de bonne foi à l'encontre de l'obligation légale au paragraphe 222(3) de la Loi. Si la Banque pouvait invoquer ce moyen de défense, cela contrecarrerait l'objectif de la fiducie réputée, ce qui lui ferait perdre tout son sens (motifs, aux paragraphes 44 et 46).

- No triggering event is necessary to bring the deemed trust created by section 222 of the Act into operation (reasons, paragraphs 54 through 56).

- The Crown's deemed trust is the reflection of a considered legislative priority scheme between certain tax debts and secured claims. Parliament's intention to confer a super priority to the Crown for unremitted GST over secured creditors is clear (reasons, paragraphs 63 and 64).

- Parliament considered the potential challenges posed by the deemed trust on secured lenders by providing a remedy in the form of the prescribed security interest under subsection 222(4) of the Act (reasons, paragraph 65).

[17] This is an appeal from the judgment of the Federal Court that required the Bank to pay the sum of $67 854 plus interest to the Crown.

The issues on appeal

[18] The Bank raises three issues on this appeal:

1. Did the Federal Court err by finding that the deemed trust does not require a triggering event which causes the trust to crystallize around specified assets?

2. Did the Federal Court err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence?

3. Did the Federal Court err by failing to consider that the security interests of the Bank were not created and granted in a transaction providing financing to the debtor's business?

- Il n'est pas nécessaire qu'il y ait d'événement déclencheur pour que la fiducie réputée qu'établit l'article 222 de la Loi existe (motifs, aux paragraphes 54 à 56).

- La fiducie réputée de la Couronne découle de l'intention expresse du législateur que certaines dettes fiscales aient un rang supérieur aux créances garanties. Le législateur voulait que le versement de la TPS à la Couronne l'emporte sur les versements aux créanciers garantis (motifs, aux paragraphes 63 et 64).

- Le législateur s'est penché sur les difficultés que la fiducie réputée pouvait présenter aux créanciers garantis en prévoyant qu'on pouvait, aux termes du paragraphe 222(4) de la Loi, avoir recours à une sûreté visée par règlement (motifs, au paragraphe 65).

[17] Il s'agit d'un appel du jugement de la Cour fédérale selon lequel la Banque devait verser à la Couronne 67 854 $, ainsi que les intérêts.

Les questions soulevées en appel

[18] La Banque soulève trois questions dans le présent appel :

1. La Cour fédérale a-t-elle commis une erreur en concluant qu'il n'est pas nécessaire qu'il y ait d'événement déclencheur pour que des biens précis soient visés par la fiducie?

2. La Cour fédérale a-t-elle commis une erreur en concluant que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert à l'acquéreur de bonne foi à titre onéreux?

3. La Cour fédérale a-t-elle commis une erreur lorsqu'elle n'a pas tenu compte du fait que les sûretés de la Banque ne découlaient pas d'un prêt accordé à l'entreprise du débiteur?

Consideration of the issues

a. Text, context and purpose

[19] The issues raised on this appeal turn on the proper interpretation of subsections 222(1) and (3) of the Act. This is a question of law and the Federal Court's interpretation of the provisions is reviewable on the standard of correctness.

[20] I begin by ascertaining the proper interpretation to be given to subsections 222(1) and (3) of the Act. These provisions must be interpreted using a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. The Court would have benefitted from well-developed submissions from the Bank and the intervener on these points. Instead, aside from brief references to sections 317, 323 and 325 of the Act (which are dealt with below) their submissions focused in the largest part on prior jurisprudence and passages contained in the jurisprudence that supported their submissions. The intervener also made submissions based on policy considerations. In its view, the decision of the Federal Court creates unacceptable uncertainty for secured lenders which will have a material, adverse impact on commercial transactions and secured lending.

[21] I begin by observing, by way of background, that amounts withheld by employers from salaries and wages paid to employees on account of income tax, the Canada Pension Plan and Employment Insurance (often referred to as source deductions) are to be remitted to the Receiver General within a specified period of time. Employees are credited for the amounts withheld whether or not the employer remits the withholdings to the Receiver General. When an employer withholds source deductions, but has not yet remitted the deductions to the Receiver General, the amounts are deemed by subsection 227(4) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 to be held in trust for Her Majesty.

Examen des questions en litige

a. Interprétation textuelle, contextuelle et téléologique

[19] Les questions soulevées dans le présent appel portent sur l'interprétation correcte des paragraphes 222(1) et (3) de la Loi. Comme il s'agit d'une question de droit, l'interprétation des dispositions par la Cour fédérale est susceptible de contrôle selon la norme de la décision correcte.

[20] Je commence en examinant l'interprétation qu'il convient de donner aux paragraphes 222(1) et (3) de la Loi. Il faut interpréter ces dispositions suivant une analyse textuelle, contextuelle et téléologique destinée à dégager un sens qui s'harmonise avec la Loi dans son ensemble. La Cour aurait pu tirer profit d'observations bien étayées de la Banque et de l'intervenante sur ces points. Au lieu de cela, à part de brèves mentions des articles 317, 323 et 325 de la Loi (que j'examinerai ci-dessous), leurs observations ont surtout porté sur la jurisprudence antérieure et sur les passages de la jurisprudence qui appuyaient leurs observations. L'intervenante a également présenté des observations fondées sur des considérations de politique générale. Selon elle, la décision de la Cour fédérale mène à une incertitude inacceptable pour les prêteurs garantis, ce qui nuirait de façon importante aux opérations commerciales et aux prêts garantis.

[21] Je commence en soulignant, à titre de contexte, que les montants retenus par les employeurs des salaires versés aux employés au titre de l'impôt sur le revenu, du Régime de pensions du Canada et de l'assurance-emploi (les retenues à la source) doivent être versés au receveur général dans un délai donné. Les employés sont réputés avoir payé ces montants, que l'employeur les verse ou non au receveur général. Lorsqu'un employeur a effectué des retenues à la source, mais ne les a pas encore versées au receveur général, les montants sont réputés être détenus en fiducie pour Sa Majesté en raison du paragraphe 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1.

[22] This trust is similar to the deemed trust provisions found in subsection 222(1) of the *Excise Tax Act*, subsection 23(3) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 and subsection 86(2) of the *Employment Insurance Act*, S.C. 1996, c. 23.

[23] The relevance of this is that, due to the similarity of the deemed trust provisions (including subsection 227(4.1) of the *Income Tax Act* and subsection 222(3) of the *Excise Tax Act*), jurisprudence which has considered the deemed trust provisions of the *Income Tax Act* is relevant to the interpretation of the deemed trust provisions of the *Excise Tax Act*.

[24] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, (1997), 208 N.R. 161 [at pages 431–432], the Supreme Court considered the scope of the deemed trust provisions of the *Income Tax Act* then in force. Subsections 227(4) and (5) of the *Income Tax Act* then provided in material part:

227. …

(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

(5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(*a*) deemed by subsection (4) to be held in trust for Her Majesty, ...

…

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

[22] Cette fiducie est semblable aux fiducies réputées visées au paragraphe 222(1) de la *Loi sur la taxe d'accise*, au paragraphe 23(3) du *Régime de pensions du Canada*, L.R.C. (1985), ch. C-8, et au paragraphe 86(2) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23.

[23] Ainsi, en raison de la ressemblance des dispositions sur les fiducies réputées (notamment le paragraphe 227(4.1) de la *Loi de l'impôt sur le revenu* et le paragraphe 222(3) de la *Loi sur la taxe d'accise*), la jurisprudence portant sur les fiducies réputées selon la *Loi de l'impôt sur le revenu* est pertinente pour l'interprétation des dispositions sur les fiducies réputées de la *Loi sur la taxe d'accise*.

[24] Dans l'arrêt *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411 [aux pages 431 et 432] la Cour suprême a examiné la portée des dispositions sur les fiducies réputées de la *Loi de l'impôt sur le revenu* qui étaient alors en vigueur. Les paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu* disposaient notamment ce qui suit :

227. …

(4) Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

(5) Malgré la *Loi sur la faillite*, en cas de liquidation, cession, mise sous séquestre ou faillite d'une personne, un montant égal à l'un ou l'autre des montants suivants est considéré comme tenu séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine :

a) le montant réputé, selon le paragraphe (4), être détenu en fiducie pour Sa Majesté;

[25] By way of comparison, subsections 222(1) and (3) of the *Excise Tax Act* at that time read:

> **222**. (1) Subject to subsection (1.1), where a person collects an amount as or on account of tax under Division II, the person shall, for all purposes, be deemed to hold the amount in trust for Her Majesty until it is remitted to the Receiver General or withdrawn under subsection (2).
>
> …
>
> (3) In the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to the amount deemed under subsection (1) to be held in trust for Her Majesty shall, for all purposes, be deemed to be separate from and to form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

[26] In *Sparrow*, the majority of the Supreme Court held that the deemed trust that then arose in favour of the Crown by operation of subsection 227(4) of the *Income Tax Act* did not take priority over the security interests that the Royal Bank possessed under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 (reasons, paragraph 89). The deemed trust did not have the effect of undoing an existing security interest; rather, it was "a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest" (reasons, paragraph 99). This said, the majority emphasized that it was open to Parliament to use clear language to "assign absolute priority to the deemed trust" (reasons, paragraph 112).

[27] Parliament accepted this invitation, and amendments were made to section 227 of the *Income Tax Act*, section 222 of the *Excise Tax Act* and the equivalent provisions of the *Canada Pension Plan* and the *Employment Insurance Act*. The amended, deemed trust provisions of the *Income Tax Act* were then considered by the Supreme Court in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720. At that time, subsections 227(4) and (4.1) provided:

[25] À titre de comparaison, les paragraphes 222(1) et (3) de la *Loi sur la taxe d'accise* étaient libellés comme suit à l'époque :

> **222.** (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles, détenir ce montant en fiducie pour Sa Majesté jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).
>
> [...]
>
> (3) En cas de liquidation, cession, mise sous séquestre ou faillite d'une personne, un montant égal à celui réputé par le paragraphe (1) détenu en fiducie pour Sa Majesté est considéré, à toutes fins utiles, comme tenu séparé et ne formant pas partie des actifs visés par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des actifs.

[26] Dans l'arrêt *Sparrow*, la majorité des juges de la Cour suprême ont conclu que la fiducie réputée au profit de la Couronne en application du paragraphe 227(4) de la *Loi de l'impôt sur le revenu* n'avait pas priorité de rang sur les garanties que la Banque Royale possédait aux termes de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act* (Loi sur les sûretés mobilières), S.A. 1988, ch. P-4.05 (au paragraphe 89). La fiducie réputée n'avait pas pour effet de supprimer une garantie existante; elle permettait plutôt « de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée » (au paragraphe 99). Cela dit, la majorité des juges ont souligné qu'il était loisible au législateur d'utiliser un libellé clair pour « accorder la priorité absolue à la fiducie réputée » (au paragraphe 112).

[27] Le législateur a accepté cette invitation et a modifié l'article 227 de la *Loi de l'impôt sur le revenu*, l'article 222 de la *Loi sur la taxe d'accise* et les dispositions équivalentes du *Régime de pensions du Canada* et de la *Loi sur l'assurance-emploi*. La Cour suprême a ensuite examiné les dispositions modifiées sur les fiducies réputées de la *Loi de l'impôt sur le revenu* dans l'arrêt *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720. À l'époque, les paragraphes 227(4) et (4.1) disposaient ce qui suit :

227.…

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[28] Justice Iacobucci, writing for a unanimous Court in *First Vancouver*, held that Parliament had amended the deemed trust provisions "to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property" (reasons, paragraph 28). The

227. …

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf les articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[28] Le juge Iacobucci, s'exprimant au nom de la Cour unanime dans l'arrêt *First Vancouver*, a conclu que le législateur avait modifié les dispositions relatives à la fiducie réputée « de façon à accorder la priorité de rang à la fiducie réputée lorsque le ministre et des créanciers garantis font valoir concurremment un droit sur les biens

deemed trust did not, however, impress the property of a tax debtor sold to a *bona fide* purchaser for value (reasons, paragraph 43).

[29] With this background, I now turn to the text, context and purpose of subsections 222(1) and (3) of the *Excise Tax Act*.

[30] Post-*Sparrow* amendments comparable to the amendments made to subsection 227(4) of the *Income Tax Act* were made to the deemed trust provision in subsection 222(1) of the *Excise Tax Act*. The words "despite any security interest in the amount" were added. Thus, "every person who collects an amount as or on account of" GST is "deemed, for all purposes" to hold the amount in trust for the Crown "despite any security interest in the amount" collected until the amount is remitted to the Receiver General or properly withdrawn.

[31] Again, comparable to the post-*Sparrow* amendments made to the *Income Tax Act*, subsection 222(3) of the *Excise Tax Act* was amended to extend the scope of the deemed trust to include "property of the person and property held by any secured creditor … that, but for a security interest, would be property of the" tax debtor. Subsection 222(3) was also amended to remove reference to the triggering events of liquidation, assignment, receivership or bankruptcy. Instead, "if at any time an amount deemed … to be held by a person in trust … is not remitted to the Receiver General" or properly withdrawn, the property of the tax debtor and "property held by any secured creditor" of the tax debtor that "but for a security interest, would be property" of the tax debtor is deemed to be held "from the time the amount was collected by the [tax debtor] in trust for Her Majesty … whether or not the property is subject to a security interest". While subsection 222(3) continued to provide that monies deemed to be held in trust were also deemed to be separate and apart from the property of the tax debtor, the phrase "whether or not the property is subject to a security interest" was added. Finally, subsection 222(3) was amended to add that the property deemed to be held in trust is further deemed to be "property beneficially owned by Her Majesty in right of Canada despite

du débiteur fiscal » (au paragraphe 28). La fiducie réputée n'a toutefois pas d'effet sur les biens que le débiteur fiscal vend à un acquéreur de bonne foi à titre onéreux (au paragraphe 43).

[29] Après l'examen du contexte, j'examinerai maintenant le libellé, le contexte et l'objet des paragraphes 222(1) et (3) de la *Loi sur la taxe d'accise*.

[30] Après l'arrêt *Sparrow*, des modifications semblables à celles apportées au paragraphe 227(4) de la *Loi de l'impôt sur le revenu* ont été apportées à la disposition sur les fiducies réputées au paragraphe 222(1) de la *Loi sur la taxe d'accise*. Les mots « malgré tout droit en garantie le concernant » ont été ajoutés. Ainsi, la « personne qui perçoit un montant au titre de la [TPS] est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, [...] le détenir en fiducie pour » la Couronne, « jusqu'à ce qu'il soit versé au receveur général ou retiré » en application de la Loi.

[31] De même, et de manière comparable aux modifications apportées à la *Loi de l'impôt sur le revenu* après l'arrêt *Sparrow*, le paragraphe 222(3) de la *Loi sur la taxe d'accise* a été modifié pour que la fiducie s'applique également aux « biens [du débiteur fiscal] — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens ». Le paragraphe 222(3) a également été modifié pour supprimer le renvoi aux événements déclencheurs, soit la liquidation, la cession, la mise sous séquestre ou la faillite. Au lieu de cela, « lorsqu'un montant qu'une personne est réputée [...] détenir en fiducie [...] n'est pas versé au receveur général ni retiré » de la façon prévue par la Loi, « les biens [du débiteur fiscal] — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — » sont réputés « être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par [le débiteur fiscal], [...] qu'ils soient ou non assujettis à un droit en garantie ». Alors que le paragraphe 222(3) continuait de disposer que les montants réputés être détenus en fiducie étaient également réputés être séparés des biens du débiteur fiscal, le passage « qu'ils soient ou non assujettis à un droit en garantie » a été ajouté. Enfin, le paragraphe 222(3) a été modifié pour ajouter que les biens

any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests."

[32] This analysis has proceeded on the basis of the English version of the provisions. No one submitted that any ambiguity exists between the English and equally authoritative French versions of the provisions.

[33] I take from the grammatical and ordinary sense of the language of subsections 222(1) and (3) that Parliament intended to grant priority to the deemed trust in respect of property that is also subject to a security interest, regardless of when the security interest arose in relation to the time the GST was collected. This flows from Parliament's use of the phrase "despite any security interest in the amount" in subsection 222(1).

[34] In the present case, when the debtor collected amounts as or for GST he was deemed "for all purposes … to hold the amount in trust for Her Majesty … separate and apart from" his property (subsection 222(1)).

[35] When the debtor failed to properly remit or withdraw amounts "in the manner and at the time provided" the debtor's property "equal in value to the amount … deemed to be held in trust" was further deemed "to be held, from the time the amount was collected … separate and apart from the property of the" debtor and "to form no part of the estate or property of the person from the time the amount was collected" and to be "property beneficially owned by Her Majesty … despite any security interest in the property or in the proceeds thereof".

[36] Thus, when the Bank lent money to the debtor and took its security interests, the debtor's property to the extent of the tax debt was already deemed to be beneficially owned by the Crown (subsection 222(3)).

[37] On the sale of the debtor's property "despite any security interest in the property or in the proceeds thereof … the proceeds of the property shall be paid to the Receiver General in priority to all security interests."

réputés être détenus en fiducie sont en outre réputés être « des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie ».

[32] L'analyse qui précède est fondée sur la version anglaise des dispositions. On n'a pas fait valoir qu'il existe une ambiguïté entre la version anglaise et la version française, laquelle a également force de loi.

[33] Je déduis du sens grammatical et ordinaire du libellé des paragraphes 222(1) et (3) que le législateur a voulu accorder la priorité de rang à la fiducie réputée lorsque les biens sont également grevés d'une garantie, que celle-ci ait pris effet avant ou après la perception de la TPS. Cela découle du libellé « malgré tout droit en garantie le concernant » au paragraphe 222(1).

[34] En l'espèce, lorsque le débiteur a perçu le montant au titre de la TPS, il était réputé « à toutes fins utiles [...] le détenir en fiducie pour Sa Majesté [...], séparé de ses propres biens » (paragraphe 222(1)).

[35] Lorsque le débiteur n'a pas versé ou retiré le montant « selon les modalités et dans le délai prévus », les biens du débiteur « d'une valeur égale à ce montant sont réputés [...] être détenus en fiducie [...] séparés des propres biens » du débiteur fiscal, « ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu », et être « des biens dans lesquels Sa Majesté [...] a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant ».

[36] Ainsi, lorsque la Banque a prêté de l'argent au débiteur et a reçu sa garantie, les biens du débiteur, jusqu'à concurrence de la dette fiscale, étaient déjà réputés être des biens dans lesquels la Couronne a un droit de bénéficiaire (paragraphe 222(3)).

[37] Lors de la vente des biens du débiteur, « malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant [...] le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie ».

[38] It follows that when the debtor's property was sold, by operation of subsection 222(3) of the Act the Bank was under a statutory obligation to remit the proceeds it received to the Crown.

[39] This grammatical and ordinary meaning of the language used is confirmed when one looks to the purpose and the context of the deemed trust provisions.

[40] The purpose of the provision is to protect the collection of unremitted GST. This purpose is effected by granting priority to the deemed trust in respect of property that is also subject to a security interest, irrespective of when the security interest arose in relation to the time GST was collected (except in respect of a prescribed security interest). When one looks to the equivalent provisions in the *Income Tax Act* it is apparent that the purpose is to secure, to the extent possible, the collection of a significant portion of the government's tax revenues.

[41] This purpose is served by construing the deemed trust provisions to apply so as to recognize that a secured creditor is obliged to remit proceeds it receives from the disposition of a debtor's property that are impressed with a trust in favour of the Crown.

[42] The most important contextual factors are found in subsections 222(1.1) and (4) of the Act and in the evolution of the legislation.

[43] Subsection 222(1.1) provides that the deemed trust is eliminated on bankruptcy with respect to amounts that were collected "or became collectible" before the bankruptcy. Related to this, subsection 37(1) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 provides:

Deemed trusts

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision. [Underlining added.]

[38] Il s'ensuit que lorsque les biens du débiteur ont été vendus, la Banque avait l'obligation légale de verser le produit qu'elle a reçu à la Couronne en raison du paragraphe 222(3) de la Loi.

[39] L'objet et le contexte des dispositions sur la fiducie réputée confirment le sens grammatical et ordinaire du libellé.

[40] Ces dispositions visent à assurer la perception de la TPS non versée. Cet objectif est atteint en accordant une priorité à la fiducie réputée à l'égard des biens qui sont également grevés d'une garantie, que celle-ci ait pris effet avant ou après la perception de la TPS, sauf dans le cas d'un droit en garantie visé par règlement. Lorsqu'on examine les dispositions correspondantes de la *Loi de l'impôt sur le revenu*, il est évident que l'objectif est de garantir, dans la mesure du possible, la perception d'une partie importante des recettes fiscales de l'État.

[41] Pour atteindre cet objectif, il convient d'interpréter la disposition sur la fiducie réputée de manière à assurer qu'un créancier garanti soit tenu de remettre le produit de la vente d'un bien du débiteur qu'il reçoit et qui devient assujetti à une fiducie en faveur de la Couronne.

[42] Les facteurs contextuels les plus importants se trouvent aux paragraphes 222(1.1) et (4) de la Loi et dans l'évolution de la Loi.

[43] Le paragraphe 222(1.1) dispose que la fiducie disparaît au moment de la faillite à l'égard des montants perçus « ou devenus percevables » avant la faillite. À cet égard, le paragraphe 37(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36, dispose ce qui suit :

Fidcies présumées

37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition. [Non souligné dans l'original.]

[44] Subsection 37(2) of the *Companies' Creditors Arrangement Act* provides a number of exceptions to this relieving provision. One exception is for subsections 227(4) and (4.1) of the *Income Tax Act*. However, section 222 of the *Excise Tax Act* is not included in the exceptions. Accordingly, subsection 37(1) applies to the deemed trust provision under the *Excise Tax Act*. The Supreme Court has confirmed that the deemed trust under the *Excise Tax Act* does not apply under the *Companies' Creditors Arrangement Act* protection. This affords equivalent protection under the *Companies' Creditors Arrangement Act* to that provided under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379).

[45] The relevance of this is that when the post-*Sparrow* amendments were announced in the Department of Finance, Press Release, 1997-030, "Unremitted Source Deductions and Unpaid GST" (April 7, 1997) it was stated that in exchange for the "absolute priority" to be given to the collection of unremitted GST "the Crown waived all other priorities in bankruptcy." This is a relevant, extrinsic interpretive aid that adds context to the interpretation of section 222. It reflects a policy decision made by Parliament that in exchange for the super priority ordinarily given to the deemed trust provision of the *Excise Tax Act*, the priority does not survive bankruptcy under the *Bankruptcy and Insolvency Act* and does not apply to arrangements under the *Companies' Creditors Arrangement Act*.

[46] The second contextual factor flows from the fact that together subsections 222(1) and (3) explicitly override any "security interest". This general rule is, however, limited by subsection 222(4) which provides that "[f]or the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest." The term "prescribed security interest" is defined in section 2 of the *Security Interest (GST/HST) Regulations*, SOR/2011-55.

[44] Le paragraphe 37(2) de la *Loi sur les arrangements avec les créanciers des compagnies* prévoit plusieurs exceptions à cette disposition d'allégement. Une exception vise les paragraphes 227(4) et (4.1) de la *Loi de l'impôt sur le revenu*. Cependant, l'article 222 de la *Loi sur la taxe d'accise* ne fait pas partie des exceptions. Par conséquent, le paragraphe 37(1) s'applique aux fiducies réputées en application de la *Loi sur la taxe d'accise*. La Cour suprême a confirmé que la fiducie réputée en application de la *Loi sur la taxe d'accise* n'est pas visée par la *Loi sur les arrangements avec les créanciers des compagnies*. La protection offerte par la *Loi sur les arrangements avec les créanciers des compagnies* est ainsi semblable à celle prévue par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379).

[45] Cela est pertinent parce que, lorsque le ministère des Finances a annoncé les modifications postérieures au prononcé de l'arrêt *Sparrow* dans le communiqué de presse 1997-030, « Retenues à la source non versées et TPS impayée » (7 avril 1997), il a déclaré qu'en échange de la « priorité absolue » à accorder à la perception de la TPS non versée, « l'État a renoncé à toutes autres priorités dans les cas de faillite ». Il s'agit d'un outil d'interprétation extrinsèque pertinent qui ajoute un contexte à l'interprétation de l'article 222. Il indique que le législateur a pris la décision de politique générale qu'en échange de la priorité absolue habituelle des fiducies prévues par la *Loi sur la taxe d'accise*, la priorité n'existe plus en cas de faillite aux termes de la *Loi sur la faillite et l'insolvabilité* et ne s'applique pas aux arrangements en application de la *Loi sur les arrangements avec les créanciers des compagnies*.

[46] Le deuxième facteur contextuel découle du fait que les paragraphes 222(1) et (3) disposent explicitement qu'ils s'appliquent malgré tout « droit en garantie ». Cette règle générale est toutefois limitée par le paragraphe 222(4), qui dispose : « Pour l'application des paragraphes (1) et (3), n'est pas un droit en garantie celui qui est visé par règlement. » Le droit en garantie est celui visé à l'article 2 du *Règlement sur les droits en garantie (TPS/TVH)*, DORS/2011-55.

[47] Generally, a mortgage will be a "prescribed security interest" in situations where a lender registers a mortgage on a debtor's real property before a deemed trust arises. This again recognizes the potential harshness of the deemed trust provision and provides a means of protection to a secured creditor that lends money to a borrower and takes security at a time before the borrower collects, but fails to remit, GST amounts. Lenders who do advance funds and take security from a borrower who is in default of the obligation to remit collected GST are not provided with these protections. These lenders are, however, able to make inquiries of the borrower as to GST compliance and take some steps as briefly discussed below.

[48] The evolution of the legislation is part of the "entire context" in which statutes are to be read (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at paragraph 28). Here, as explained above, the legislation was amended in response to the decision of the Supreme Court in *Sparrow*. Parliament intended to enlarge the scope of the deemed trust provisions so as to ensure that unremitted source deductions and unremitted GST are to be recovered in priority to all debts.

[49] Having examined the text, context and purpose of subsections 222(1) and (3), I now turn to the specific arguments advanced by the Bank and endorsed by the intervener.

b. Did the Federal Court err by finding that the deemed trust does not require a triggering event which causes the trust to crystallize around specified assets?

[50] The Bank submits that the Federal Court erred in finding that the deemed trust does not require a triggering event to crystallize around satisfied assets. The Bank acknowledges that the deemed trust provisions grant an absolute priority to the Crown, but argues that the provisions do not amount to a statutory direction to pay at the time GST ought to have been remitted.

[47] En général, une hypothèque sera un droit en garantie visé par règlement lorsqu'un prêteur enregistre une hypothèque sur l'immeuble d'un débiteur avant la constitution d'une fiducie réputée. Cela démontre encore une fois qu'on reconnaît l'éventuelle sévérité de la disposition sur la fiducie réputée et qu'on offre un moyen par lequel le créancier garanti qui prête de l'argent à un emprunteur peut se protéger et obtenir une garantie avant que l'emprunteur omette de verser la TPS qu'il a perçue. Les prêteurs qui avancent des fonds et prennent une garantie d'un emprunteur qui ne respecte pas l'obligation de verser la TPS perçue ne bénéficient pas de ces protections. Ces prêteurs peuvent toutefois se renseigner auprès de l'emprunteur relativement à l'observation des dispositions régissant la TPS et prendre certaines mesures, qui sont brièvement abordées ci-dessous.

[48] L'évolution de la loi fait partie du « contexte global » dans lequel les lois doivent être interprétées (*Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425, au paragraphe 28). En l'espèce, comme il a été expliqué ci-dessus, la Loi a été modifiée en réponse à l'arrêt *Sparrow* de la Cour suprême. Le législateur a voulu élargir la portée des dispositions sur les fiducies réputées afin de garantir le recouvrement des retenues à la source et de la TPS non versées en priorité sur toutes les dettes.

[49] Après avoir examiné le libellé, le contexte et l'objet des paragraphes 222(1) et (3), je me penche maintenant sur les arguments précis présentés par la Banque et soutenus par l'intervenante.

b. La Cour fédérale a-t-elle commis une erreur en concluant qu'il n'est pas nécessaire qu'il y ait d'événement déclencheur pour que des biens précis soient visés par la fiducie?

[50] La Banque soutient que la Cour fédérale a commis une erreur en concluant qu'il n'est pas nécessaire qu'il y ait un événement déclencheur pour que la fiducie s'applique à des biens précis. La Banque reconnaît que les dispositions sur la fiducie réputée accordent une priorité absolue à la Couronne, mais elle fait valoir que ces dispositions n'imposent pas d'exigence légale de faire de versement au moment où la TPS aurait dû être versée.

[51] The Bank submits that inherent in the concept of priority is that priorities are to be assessed at the time competing claims come into conflict. Because the right to a priority is essentially remedial in nature, it arises upon the exercise of enforcement or bankruptcy remedies by creditors. When there is a competition between claimants, and there will be a shortfall, the Crown is able at that time to assert its priority. Here, the Bank was not a secured creditor at the time the Crown asserted its claim.

[52] This submission is tethered to the text of the deemed trust provisions by the use of the word "priority" at the end of subsection 222(3). As well, the Bank argues that in both *Sparrow* and *First Vancouver* the Supreme Court understood the deemed trust structure to be a structure to deal with priority disputes. The Bank supports this submission by reference to paragraphs 1, 7, 99, 101, 110 and 112 of *Sparrow* and the Court's implied or express reference therein to the concept of priority. The Bank also relies upon paragraph 28 of *First Vancouver* where the Court described Parliament's intent when drafting the deemed trust provisions to be "to grant priority to the deemed trust in respect of property that is also subject to a security interest" and stated that the provisions had been amended "to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property."

[53] Further, the Bank argues that in *First Vancouver* the Supreme Court likened the deemed trust to a "floating charge" (reasons, paragraph 40). The Bank submits that, as with a floating charge, a triggering event is necessary for the deemed trust to crystallize. Triggering events would include bankruptcy, the initiation of proceedings by the Crown for the recovery of unpaid taxes, and the exercise of a security interest.

[54] Finally, the Bank argues that when Parliament intends to draft a direction to pay it uses clear language. Reference is made to subsections 317(1), 317(3), 323(1) and 325(1) of the *Excise Tax Act*. As well, the Bank argues that subsections 317(3) and (7) would be redundant

[51] La Banque fait valoir qu'un principe fondamental des priorités est qu'il faut évaluer le rang au moment où des réclamations concurrentes entrent en conflit. Le droit à une priorité est essentiellement de nature réparatrice; il apparaît lorsque des créanciers prennent des mesures d'exécution ou de faillite. Lorsqu'il y a un conflit entre les réclamants et qu'il y aura insuffisance, la Couronne peut alors faire valoir sa priorité. En l'espèce, la Banque n'était pas un créancier garanti au moment où la Couronne a fait valoir sa réclamation.

[52] Cette prétention se fonde sur le fait que le mot « priorité » apparaît vers la fin des dispositions sur la fiducie réputée au paragraphe 222(3). De plus, la Banque soutient que dans les arrêts *Sparrow* et *First Vancouver*, la Cour suprême a tenu compte du fait que la fiducie réputée faisait partie d'un mécanisme destiné à résoudre les conflits de priorité. La Banque renvoie aux paragraphes 1, 7, 99, 101, 110 et 112 de l'arrêt *Sparrow* et au renvoi implicite ou explicite de la Cour à la notion de priorité. La Banque se fonde également sur le paragraphe 28 de l'arrêt *First Vancouver*, où la Cour explique que le législateur a rédigé les dispositions sur les fiducies réputées afin d'accorder « la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie » et qu'il a modifié les dispositions « de façon à accorder la priorité de rang à la fiducie réputée lorsque le ministre et des créanciers garantis font valoir concurremment un droit sur les biens du débiteur fiscal ».

[53] En outre, la Banque soutient que dans l'arrêt *First Vancouver*, la Cour suprême a comparé la fiducie réputée à une « charge flottante » (au paragraphe 40). La Banque fait valoir que, comme dans le cas d'une charge flottante, il doit y avoir un événement déclencheur pour que la fiducie réputée s'applique. L'événement déclencheur pourrait notamment être la faillite, une mesure d'exécution de la Couronne afin de recouvrer les impôts impayés ou l'exercice d'une sûreté.

[54] Enfin, la Banque affirme que lorsque le législateur entend établir une obligation de faire un versement, il utilise un libellé clair. Elle renvoie aux paragraphes 317(1), 317(3), 323(1) et 325(1) de la *Loi sur la taxe d'accise*. De plus, la Banque soutient que les paragraphes 317(3)

if subsection 222(3) imposes a mandatory obligation to pay upon a secured creditor.

[55] I respectfully disagree. In my view, for the following reasons, the deemed trust does not require a triggering event.

[56] First, as mentioned above, the word "priority" appears only once in subsections 222(1) and (3); the word is found at the end of subsection 222(3) where it is provided that property deemed to be held in trust "is property beneficially owned by Her Majesty … despite any security interest in the property or in the proceeds thereof" and that the proceeds of the property "shall be paid to the Receiver General in priority to all security interests." The Bank's submission fails to take into account the balance of the words found in subsections 222(1) and (3) and the conferral of a beneficial interest, the proceeds of which "shall be paid" to the Crown.

[57] Second, the Bank's submission fails to take into account the legislative evolution of the deemed trust provisions. As described above, [in *Sparrow*, paragraph 39] the words that spoke to the triggering events of "liquidation, assignment, receivership or bankruptcy" were found in the prior iteration of the deemed trust provisions but removed from the current version. This reflects, in my view, Parliament's intent that no triggering event was to be required to cause the trust to crystallize around specified assets. Instead, the legislation deems property of a tax debtor and property held by a secured creditor to be held in trust once GST is collected but not remitted.

[58] Third, the Bank's reliance on references to the use of the word "priority" in *Sparrow* and paragraph 28 of the reasons in *First Vancouver* is misplaced. In paragraph 28 of *First Vancouver* the Court was describing the effect of the amended provisions. The Court was not describing the mechanism used to affect to that purpose. I believe this is demonstrated at paragraph 33 of the Court's reasons in *First Vancouver*:

et (7) seraient redondants si le paragraphe 222(3) oblige un créancier garanti à faire un versement.

[55] En toute déférence, je ne suis pas d'accord. À mon avis, pour les motifs qui suivent, il ne doit pas y avoir d'événement déclencheur pour que la fiducie réputée existe.

[56] Premièrement, comme il est mentionné plus haut, le terme « priorité » n'apparaît qu'une seule fois aux paragraphes 222(1) et (3), soit à la fin du paragraphe 222(3), qui dispose que les biens réputés être détenus en fiducie « sont des biens dans lesquels Sa Majesté [...] a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant » et que « le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie ». L'observation de la Banque ne tient pas compte des autres termes des paragraphes 222(1) et (3) et de l'attribution d'un droit de bénéficiaire, dont le produit « est payé » à la Couronne.

[57] Deuxièmement, l'observation de la Banque ne tient pas compte de l'évolution des dispositions sur la fiducie réputée. Comme il est décrit ci-dessus [dans l'arrêt Sparrow, au paragraphe 39], la version antérieure des dispositions sur la fiducie réputée renvoyait à des événements déclencheurs comme la liquidation, la cession, la mise sous séquestre ou la faillite; il n'en est plus question dans la version actuelle. Cela représente, à mon avis, l'intention du législateur qu'il ne doit pas y avoir d'événement déclencheur pour que la fiducie s'applique à des biens précis. La Loi dispose plutôt que les biens d'un débiteur fiscal et les biens détenus par un créancier garanti sont réputés être détenus en fiducie une fois que la TPS est perçue, mais non versée.

[58] Troisièmement, la Banque s'appuie à tort sur l'utilisation du terme « priorité » dans l'arrêt *Sparrow* et au paragraphe 28 de l'arrêt *First Vancouver*. Au paragraphe 28 de l'arrêt *First Vancouver*, la Cour décrivait l'effet des dispositions modifiées. La Cour ne décrivait pas le mécanisme utilisé pour obtenir cet effet. Je crois que le paragraphe 33 des motifs de la Cour dans l'arrêt *First Vancouver* le démontre :

> I find additional support for this view in the fact that s. 227(4.1) deems the trust to be in effect "at any time [source deductions are] not paid to Her Majesty in the manner and at the time provided under this Act" …. Further, in the event of default, the trust extends back "from the time the amount was deducted or withheld by the person". These words indicate that the intent of the section is to allow the trust to operate in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction. The language Parliament has chosen belies the suggestion that the deemed trust only captures property of the tax debtor in existence at some particular moment in time. [Emphasis in original.]

[59] The Court's rejection of the notion that "the deemed trust only captures property of the tax debtor in existence at some particular moment in time" is inconsistent with the Bank's argument that the deemed trust requires a triggering event which causes the trust to crystallize around specified assets.

[60] Next, I reject the submission that the Supreme Court's likening of the deemed trust to a "floating charge" supports the requirement of a triggering event to crystallize the deemed trust.

[61] At paragraphs 4 and 40 of *First Vancouver* Justice Iacobucci did analogize the deemed trust to a floating charge, stating that the deemed trust is "similar in principle to a floating charge" (reasons, paragraph 4). However, I do not believe that Justice Iacobucci intended to equate the deemed trust with an equitable floating charge for all purposes. Rather, he intended his analogy to describe a tax debtor's ability to sell property subject to the deemed trust in the ordinary course of business.

[62] This is demonstrated by Justice Iacobucci's conclusion, at paragraph 28, that the deemed trust takes "priority" over both existing and future security interests. In equity, a subsequent fixed charge overrides a floating charge. It follows that the reference to being "similar in principle to a floating charge" was not intended to import all of the equitable principles that surround floating charges. Otherwise the deemed trust could not have priority over subsequent, fixed charges.

> Mon opinion s'appuie en outre sur le fait que, selon le par. 227(4.1), la fiducie est réputée s'appliquer « en cas de non-versement [de retenues à la source] à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi » (je souligne). Par ailleurs, en cas de défaut, la fiducie a un effet rétroactif « à compter du moment où le montant est déduit ou retenu ». L'emploi de ces mots révèle l'intention du législateur de faire en sorte que la fiducie s'applique de manière continue, qu'elle vise tout bien qui se retrouve en la possession du débiteur (tant que ce dernier ne remédie pas au défaut) et qu'elle ait un effet rétroactif au moment de la retenue initiale. Le libellé retenu par le législateur écarte l'hypothèse voulant que la fiducie réputée ne s'applique qu'aux biens appartenant au débiteur fiscal à un moment précis.

[59] Le fait que la Cour ait rejeté l'hypothèse voulant que « la fiducie réputée ne s'applique qu'aux biens appartenant au débiteur fiscal à un moment précis » est incompatible avec la thèse de la Banque selon laquelle il doit y avoir un événement déclencheur pour que la fiducie s'applique à des biens précis.

[60] Ensuite, je rejette l'observation selon laquelle le fait que la Cour suprême a comparé la fiducie réputée à une « charge flottante » étaye l'exigence qu'il y ait un événement déclencheur pour que la fiducie réputée s'applique.

[61] Aux paragraphes 4 et 40 de l'arrêt *First Vancouver*, le juge Iacobucci a bien comparé la fiducie réputée à une charge flottante, en déclarant que la fiducie réputée « s'apparente sur le plan des principes à une charge flottante » (au paragraphe 4). Cependant, je ne pense pas que le juge Iacobucci ait voulu assimiler la fiducie réputée à une charge flottante en *equity* dans tous les sens. Il a plutôt voulu établir une analogie pour décrire le droit d'un débiteur fiscal de vendre des biens assujettis à la fiducie réputée dans le cadre normal de ses activités.

[62] C'est ce que démontre la conclusion du juge Iacobucci, au paragraphe 28, selon laquelle la fiducie réputée a la « priorité de rang » sur les garanties actuelles et futures. En *equity*, une sûreté ultérieure l'emporte sur une charge flottante. Il s'ensuit que la mention que la fiducie réputée « s'apparente sur le plan des principes à une charge flottante » n'avait pas pour but de viser tous les attributs en *equity* des charges flottantes. Sinon, la fiducie réputée n'aurait pas priorité sur les sûretés ultérieures.

[63] In *Canada (Attorney General) v. Community Expansion Inc.* (2004), 72 O.R. (3d) 546, [2004] O.J. No. 5493 (QL) the Ontario Superior Court of Justice came to a similar conclusion at paragraphs 28 to 33. This decision was affirmed on appeal in a brief endorsement (2005 CanLII 1402, [2005] O.J. No. 186 (QL)). The [Ontario] Court of Appeal expressed "substantial agreement with the reasons … both as they relate to the relevant provisions of the *Income Tax Act* … and the interpretation of *First Vancouver Finance v. Canada*".

[64] Finally, while I accept that Parliament has drafted provisions directed to collecting tax debt from third parties, as seen in sections 317, 323 and 325 of the *Excise Tax Act*, I agree with the Federal Court that the Crown's right to the proceeds of property deemed to be held in trust is an assertion of the statutory obligation created when the tax debtor collected and failed to remit GST (reasons of the Federal Court, paragraph 64). The Crown is not imposing direct liability upon a secured creditor to pay a borrower's tax debt in the same way that sections 317, 323 and 325 make third parties liable for the tax debt of another.

[65] As to the redundancy argument, the Bank argues that pursuant to section 317 of the *Excise Tax Act* the Crown may serve a garnishment notice upon an account debtor or a secured creditor of the tax debtor requiring payment to the Crown of monies otherwise payable to the tax debtor. Subsection 317(3) provides that, upon receipt of the garnishment notice, the monies "shall be paid to the Receiver General in priority to any such security interest". Subsection 317(7) of the Act then provides:

317 …

Failure to comply

(7) Every person who fails to comply with a requirement under subsection (1), (3) or (6) is liable to pay to Her Majesty in right of Canada an amount equal to the amount that the person was required under subsection (1), (3) or (6), as the case may be, to pay to the Receiver General.

[63] Dans la décision *Canada (Attorney General) v. Community Expansion Inc.* (2004), 72 O.R. (3d) 546, [2004] O.J. nº 5493 (QL), la Cour supérieure de justice de l'Ontario est parvenue à une conclusion semblable aux paragraphes 28 à 33. Cette décision a été confirmée en appel par de bref motifs manuscrits (2005 CanLII 1402, [2005] O.J. nº 186 (QL)). La Cour d'appel [de l'Ontario] a déclaré [TRADUCTION] « être essentiellement d'accord avec les motifs [...] à la fois au sujet des dispositions pertinentes de la *Loi de l'impôt sur le revenu* [...] et de l'interprétation de l'arrêt *First Vancouver Finance c. M.R.N.* ».

[64] Enfin, même si je reconnais que le législateur a rédigé des dispositions visant à recouvrer les dettes fiscales de tiers, comme le montrent les articles 317, 323 et 325 de la *Loi sur la taxe d'accise*, je suis d'accord avec la Cour fédérale pour dire que le droit de la Couronne au produit d'un bien réputé être détenu en fiducie découle de l'obligation légale créée lorsque le débiteur fiscal a perçu la TPS et a omis de la verser (motifs de la Cour fédérale, au paragraphe 64). La Couronne n'oblige pas le créancier garanti à payer lui-même la dette fiscale d'un emprunteur de la même manière que les articles 317, 323 et 325 rendent les tiers responsables de la dette fiscale d'une autre personne.

[65] En ce qui concerne l'observation portant sur la redondance, la Banque fait valoir qu'aux termes de l'article 317 de la *Loi sur la taxe d'accise*, la Couronne peut signifier un avis de saisie-arrêt à un débiteur ou à un créancier garanti du débiteur fiscal, afin que les montants par ailleurs payables au débiteur fiscal soient versés à la Couronne. Le paragraphe 317(3) dispose que, dès réception de l'avis de saisie-arrêt, la somme « doit être versée au receveur général par priorité sur tout autre droit en garantie au titre de cette somme ». Le paragraphe 317(7) de la Loi dispose alors ce qui suit :

317 […]

Défaut de se conformer

(7) Toute personne qui ne se conforme pas à une exigence du paragraphe (1), (3) ou (6) est redevable à Sa Majesté du chef du Canada d'un montant égal à celui qu'elle était tenue de verser au receveur général en application d'un de ces paragraphes.

[66] The concluding words in subsection 317(3) are almost identical to the concluding words in subsection 222(3) of the Act. The conclusion that, properly interpreted, the words in subsection 222(3) "the proceeds … shall be paid" create a mandatory obligation to pay on the part of a secured creditor is therefore said to render subsection 317(7) superfluous and therefore meaningless.

[67] Parliament does not intend words used in legislation to be redundant. The Bank has not cited authority to support the application of the principle of redundancy in the context where Parliament has created a suite of enforcement remedies to be available in an almost limitless set of possible scenarios.

[68] In any event, the garnishment remedy requires the Minister to have knowledge of the existence of a tax debt. In the case of unremitted GST the Crown is an unwilling, often unknown creditor. In this circumstance, garnishment is not a relevant remedy. I see no unacceptable redundancy.

[69] In my view the Federal Court did not err by finding that no triggering event is required to cause the trust to crystallize around specified assets.

c. Did the Federal Court err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence?

[70] The Bank argues that it is a *bona fide* purchaser for value of the money paid to it by the debtor. Because the deemed trust provisions of the Act do not extend to *bona fide* purchasers for value the Bank submits that it is entitled to retain the funds provided in payment of the debtor's loan and mortgage. The Federal Court rejected this submission, finding that this "possibility has been foreclosed by *First Vancouver* and subsequent cases, as it would essentially render the deemed trust meaningless" (reasons, paragraph 44).

[66] Les derniers mots du paragraphe 317(3) sont presque identiques à ceux du paragraphe 222(3) de la Loi. On affirme ainsi que, s'il est juste d'interpréter le passage « le produit [...] est payé » au paragraphe 222(3) comme obligeant le créancier garanti à payer, alors le paragraphe 317(7) serait superflu et dénué de sens.

[67] Le législateur ne souhaite pas que les termes de la Loi soient redondants. La Banque n'a pas renvoyé à des décisions où on a eu recours au principe de la redondance lorsque le législateur a créé une série de mesures d'exécution qui peuvent s'appliquer dans un nombre presque illimité de situations possibles.

[68] Quoi qu'il en soit, pour avoir recours à la saisie-arrêt, le ministre doit savoir qu'il y a une dette fiscale. Dans le cas de la TPS non versée, la Couronne est créancière malgré elle et ignore souvent qu'il y a une dette. Dans ce cas, la saisie-arrêt n'est pas un recours pertinent. Je ne constate aucune redondance inacceptable.

[69] À mon avis, la Cour fédérale n'a pas commis d'erreur en concluant qu'il ne doit pas y avoir d'événement déclencheur pour que la fiducie s'applique à des biens précis.

c. La Cour fédérale a-t-elle commis une erreur en concluant que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert à l'acquéreur de bonne foi à titre onéreux?

[70] La Banque affirme qu'elle est acquéresse de bonne foi et à titre onéreux des montants reçus du débiteur. Étant donné que les dispositions de la Loi sur les fiducies réputées ne s'appliquent pas aux acquéreurs de bonne foi à titre onéreux, la Banque soutient qu'elle est en droit de conserver les fonds versés pour rembourser le prêt et l'hypothèque du débiteur. La Cour fédérale a rejeté cet argument, estimant que cette « possibilité a été écartée par l'arrêt *First Vancouver* et des affaires subséquentes, puisqu'elle ferait essentiellement perdre tout son sens à la fiducie réputée » (motifs, au paragraphe 44).

[71] The Bank argues that the Federal Court erred because "Parliament is assumed to know the concept it has implied and only if it has excluded the defence with irresistible clearness is the defence excluded." The *bona fide* purchaser for value defence is well-established in law and "Parliament has not enacted a change to the common law that eliminates a long-standing defence to an equitable (or in this case, a deemed trust) claim." The Bank also argues that this defence would not eviscerate the deemed trust as the Federal Court found.

[72] In my view, for the following reasons, the *bona fide* purchaser for value defence is not available to secured creditors such as the Bank.

[73] First, in *i Trade Finance Inc. v. Bank of Montréal*, 2011 SCC 26, [2011] 2 S.C.R. 360, at paragraph 60, the Supreme Court quoted with approval the following explanation of the *bona fide* purchaser for value defence:

> The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest.' The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

(L. Smith, *The Law of Tracing* (1997), at page 386 (footnote omitted; [underlining added]).)

[74] Seen in this light, it would be irrational for Parliament, in an effort to ensure that collected, unremitted GST was to be recovered in priority to all debts, to intend the *bona fide* purchaser defence to be available so as to undo the Crown's pre-existing beneficial interest in the property of the deemed trust. As the Federal Court found, this would eviscerate the deemed trust provisions.

[71] La Banque affirme que la Cour fédérale a commis une erreur, car [TRADUCTION] « le législateur est réputé connaître la notion qu'il invoque et ce n'est que s'il a exclu le moyen de défense de façon incontestablement claire que celui-ci est exclu ». Le moyen de défense offert à l'acquéreur de bonne foi à titre onéreux est bien établi en droit et [TRADUCTION] « le législateur n'a pas modifié la *common law* de sorte à éliminer le moyen de défense de longue date à une réclamation en *equity* (ou, en l'espèce, une réclamation fondée sur une fiducie réputée) ». La Banque soutient également que ce moyen de défense ne ferait pas perdre son sens à la fiducie réputée, comme l'a estimé la Cour fédérale.

[72] À mon avis, pour les motifs qui suivent, les créanciers garantis, comme la Banque, ne peuvent avoir recours au moyen de défense offert à l'acquéreur de bonne foi à titre onéreux.

[73] Premièrement, dans l'arrêt *i Trade Finance Inc. c. Banque de Montréal*, 2011 CSC 26, [2011] 2 R.C.S. 360, au paragraphe 60, la Cour suprême a cité et approuvé l'explication suivante du moyen de défense offert à l'acquéreur de bonne foi à titre onéreux :

> [TRADUCTION] Le nom complet du moyen de défense en equity est « acquisition de bonne foi d'un intérêt légal à titre onéreux et sans connaissance préalable d'un intérêt préexistant en equity. » Il permet au défendeur de détenir ses droits de propriété en *common law* sans qu'ils ne soient entravés par les droits de propriété en equity préexistants. En d'autres termes, lorsque ce moyen de défense est invoqué, les droits de propriété en equity préexistants s'éteignent par le biais de l'opération par laquelle le défendeur acquiert ses droits de propriété en common law.

(L. Smith, *The Law of Tracing* (1997), page 386 (note en bas de page omise; [non souligné dans l'original]).)

[74] Vu sous cet angle, il serait irrationnel que le législateur, dans le but de s'assurer que la TPS perçue et non versée soit recouvrée par priorité sur toutes les dettes, entende maintenir le moyen de défense offert à l'acquéreur de bonne foi et ainsi annuler le droit de bénéficiaire préexistant de la Couronne aux biens de la fiducie réputée. Comme l'a estimé la Cour fédérale, cela aurait pour

effet de vider de leur contenu les dispositions sur les fiducies réputées.

[75] Second, while in *First Vancouver* the question of the priority of secured creditors was not before the Court (reasons, paragraph 39) Justice Iacobucci wrote at paragraph 43:

> Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the *ITA*. It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are.

[75] Deuxièmement, bien que la Cour n'ait pas eu à examiner la question du rang des créanciers garantis dans l'arrêt *First Vancouver* (au paragraphe 39), le juge Iacobucci a écrit, au paragraphe 43 :

> Le législateur aurait pu prévoir que les biens aliénés par le débiteur fiscal continuent d'être détenus en fiducie. Or, ce n'est pas ce qui ressort du libellé de la *LIR*. À cet égard, il est révélateur que, contrairement au créancier garanti, l'acquéreur à titre onéreux ne soit pas mentionné aux par. 227(4) et (4.1).

[76] While finding that *bona fide* purchasers for value were not caught by the deemed trust, the Court noted that secured creditors were. This is consistent with the conclusion that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence.

[76] La Cour a conclu que, bien que les acquéreurs de bonne foi à titre onéreux n'étaient pas visés par la fiducie réputée, les créanciers garantis l'étaient. Cela est conforme à la conclusion selon laquelle les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert aux acquéreurs de bonne foi à titre onéreux.

[77] Finally, in *Canada (Attorney General) v. National Bank of Canada*, 2004 FCA 92, 324 N.R. 31, this Court considered whether secured lenders who had lent money secured by movable hypothecs were *bona fide* purchasers, thereby excluding from the deemed trust the property they had taken as payment, seized or obtained by surrender (reasons, paragraph 19). The debtors failed to repay the loans guaranteed by the hypothecs and failed to remit source deductions. This Court relied upon the decision of the Supreme Court in *First Vancouver* to conclude that lenders were "not comparable to third party purchasers. They are secured creditors and the property over which they asserted their security interest continued to be subject to the deemed trust and remained so at the time of its sale." (paragraph 30).

[77] Enfin, dans l'arrêt *Canada (Procureure générale) c. Banque nationale du Canada*, 2004 CAF 92, notre Cour a examiné si les banques et les caisses populaires qui avaient fait des prêts garantis par des hypothèques mobilières étaient des acquéresses de bonne foi, ce qui soustrairait les biens qu'elles ont pris en paiement, qu'elles ont saisis ou qu'elles ont obtenus par délaissement de la fiducie réputée (au paragraphe 19). Les débiteurs ont fait défaut de rembourser les prêts garantis par les hypothèques et de remettre les retenues à la source. Notre Cour s'est fondée sur la décision *First Vancouver* de la Cour suprême pour conclure que les banques et les caisses populaires ne pouvaient « être assimilées à des tiers acquéreurs. Elles sont des créancières garanties de sorte que les biens sur lesquels elles ont fait valoir leur garantie sont demeurés assujettis à la fiducie réputée, et l'étaient toujours lors de leur vente » (au paragraphe 30).

[78] No error has been demonstrated in this conclusion. It follows that the Federal Court did not err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence.

[78] On n'a pas démontré que cette conclusion était erronée. Il s'ensuit que la Cour fédérale n'a pas commis d'erreur en concluant que les créanciers garantis ne peuvent pas se prévaloir du moyen de défense offert aux acquéreurs de bonne foi à titre onéreux.

d. Did the Federal Court err by failing to consider that the security interests of the Bank were not created and granted in a transaction providing financing to the debtor's business?

[79] The Bank argues that the Federal Court ought to have distinguished between the tax debtor carrying on business as a sole proprietorship and the tax debtor transacting in his personal capacity. The Bank cites no authority for this proposition, but argues that the secured creditor is not unjustly enriched at the expense of the Crown because the creditor has not received proceeds of the tax debtor's business in priority to the Crown. This is said to be so because the secured property was not an asset of the business. Further, the Bank argues that a secured creditor who does not grant credit to a debtor's business cannot protect itself or know the obligations of the business.

[80] I see no merit in these arguments. Subsection 222(1) of the Act states that "every person who collects an amount as or on account of" GST "is deemed … to hold the amount in trust for Her Majesty". It was the Bank's debtor that collected amounts as or on account of GST and who was obliged to remit the amounts collected to the Crown.

[81] While the Bank argues that a secured creditor who does not grant credit to a debtor's business cannot protect itself or know the obligations of the business, in the present case the agreed statement of facts is silent about what the Bank knew about its debtor's source of income and what, if anything, the Bank did to inquire into the state of its debtor's compliance with his obligations under the *Excise Tax Act*. The agreed statement of facts is the sole source of evidence before the Court and so there is simply no evidence on these points.

[82] Before concluding, I will deal briefly with the policy arguments advanced by the Bank and the intervener.

d. La Cour fédérale a-t-elle commis une erreur lorsqu'elle n'a pas tenu compte du fait que les sûretés de la Banque ne découlaient pas d'un prêt accordé à l'entreprise du débiteur?

[79] La Banque fait valoir que la Cour fédérale aurait dû établir une distinction entre un débiteur fiscal exploitant une entreprise à propriétaire unique et un débiteur fiscal exécutant des opérations à titre personnel. La Banque ne renvoie à aucune jurisprudence ou doctrine à l'appui de cette thèse, mais elle affirme que le créancier garanti ne s'est pas injustement enrichi aux dépens de la Couronne, puisqu'il n'a pas reçu le produit découlant de l'entreprise du débiteur fiscal par priorité sur la Couronne. On dit qu'il en est ainsi parce que le bien garanti n'était pas un élément d'actif de l'entreprise. En outre, la Banque fait valoir qu'un créancier garanti qui n'accorde pas de crédit à l'entreprise d'un débiteur ne peut pas se protéger ni connaître les obligations de l'entreprise.

[80] À mon avis, ces observations ne sont pas fondées. Le paragraphe 222(1) de la Loi porte que la « personne qui perçoit un montant au titre de la [TPS] est réputée [...] le détenir en fiducie pour Sa Majesté ». C'est le débiteur de la Banque qui a perçu les montants au titre de la TPS et qui était tenu de verser les montants perçus à la Couronne.

[81] Alors que la Banque soutient qu'un créancier garanti qui n'accorde pas de crédit à l'entreprise d'un débiteur ne peut pas se protéger ni connaître les obligations de l'entreprise, en l'espèce, l'exposé conjoint des faits ne précise pas ce que la Banque savait de la source de revenus de son débiteur et ce qu'elle a fait, le cas échéant, pour savoir si son débiteur respectait ses obligations aux termes de la *Loi sur la taxe d'accise*. L'exposé conjoint des faits est la seule source de preuve dont je suis saisie et il n'existe donc tout simplement pas d'élément de preuve sur ces points.

[82] Avant de conclure, j'aborderai brièvement les arguments de politique générale avancés par la Banque et l'intervenante.

e. The policy arguments

[83] The Bank posits three hypothetical examples that are said to reflect the "absurdity" of the interpretation adopted by the Federal Court. The intervener makes a number of policy arguments including that:

- Unless a secured creditor is entitled to receive ordinary course payments from its borrower unencumbered by the deemed trust, a secured creditor will be unlikely to give credit for any cheques or cash deposits made by a tax debtor or to provide a discharge of its security on payment without continuous confirmation from the Canada Revenue Agency that all deemed trust amounts have been paid.

- It is anomalous and illogical that a secured creditor receiving proceeds of property of the tax debtor in the ordinary course is personally liable to pay the Crown the unpaid amount of GST when there is no such liability imposed upon a lender providing an unsecured credit facility, or any other unsecured creditor whose claim ranks subordinate to the secured creditor.

- The interpretation of the Federal Court promotes liquidation and bankruptcy over restructuring alternatives that may preserve going concern value, employment and other benefits for shareholders.

[84] In my view, the answer to these concerns is that Parliament made a considered policy choice to prioritize protection of the fisc over the interests of secured creditors. Parliament tempered the potential harshness of this choice by providing for prescribed security interests and by waiving the Crown's deemed trust rights in cases of bankruptcy and arrangements under the *Companies' Creditors Arrangement Act*.

[85] Moreover, secured lenders are not without some ability to manage the risk posed by deemed trusts. For

e. Les arguments de politique générale

[83] La Banque propose trois exemples hypothétiques qui démontreraient l'absurdité de l'interprétation adoptée par la Cour fédérale. L'intervenante présente plusieurs arguments de politique générale, notamment les suivants :

- À moins qu'un créancier garanti ne soit en droit de recevoir de son emprunteur des paiements dans le cours normal de ses activités qui ne sont pas assujettis à la fiducie réputée, il est peu probable qu'il accorde un crédit pour les chèques ou les dépôts en espèces effectués par le débiteur fiscal ou qu'il donne une mainlevée de la garantie lors du paiement si l'Agence du revenu du Canada ne confirme pas régulièrement que tous les montants de la fiducie réputée ont été payés.

- Il est anormal et illogique qu'un créancier garanti recevant le produit d'un bien du débiteur fiscal dans le cadre normal de ses activités soit personnellement tenu de payer à la Couronne le montant impayé de la TPS alors qu'aucune obligation de ce type n'est imposée à un prêteur offrant un prêt non garanti ou à tout autre créancier non garanti dont la créance est subordonnée à celle du créancier garanti.

- L'interprétation de la Cour fédérale encourage la liquidation et la faillite plutôt que les possibilités de restructuration qui peuvent préserver la valeur d'exploitation, l'emploi et d'autres avantages pour les actionnaires.

[84] À mon avis, la réponse à ces préoccupations est que le législateur a fait un choix de politique générale réfléchi en donnant la priorité au fisc par rapport aux droits des créanciers garantis. Le législateur a tempéré l'éventuelle sévérité de ce choix en prévoyant des droits en garantie visés par règlement et en écartant les droits de la Couronne en vertu de la fiducie réputée en cas de faillite et d'arrangement aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*.

[85] En outre, les prêteurs garantis peuvent, dans une certaine mesure, limiter le risque que présentent les

example, they may identify higher-risk borrowers (which might include persons operating sole proprietorships), require borrowers to give evidence of tax compliance, or require borrowers to provide authorization to allow the lender to verify with the Canada Revenue Agency whether there are outstanding GST liabilities then known to the Agency.

Conclusion

[86] In my view the Federal Court made no error that warrants intervention. I would dismiss the appeal with costs.

NEAR J.A.: I agree.

GLEASON J.A.: I agree.

APPENDIX

Trust for amounts collected

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankcruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

fiducies réputées. Par exemple, ils peuvent déterminer les emprunteurs à haut risque (les personnes exploitant des entreprises à propriétaire unique, par exemple), exiger des emprunteurs qu'ils fournissent des éléments de preuve quant au respect des obligations fiscales, ou exiger que les emprunteurs les autorisent à vérifier auprès de l'Agence du revenu du Canada s'il y a, selon l'Agence, des dettes au titre de la TPS.

Conclusion

[86] À mon avis, la Cour fédérale n'a pas commis d'erreur justifiant une intervention. Je rejetterais l'appel, avec dépens.

LE JUGE NEAR, J.C.A. : Je suis d'accord.

LA JUGE GLEASON, J.C.A. : Je suis d'accord.

ANNEXE

Montants perçus détenus en fiducie

222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

Montants perçus avant la faillite

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

Retraits de montants en fiducie

(2) La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus :

a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

Non-versement ou non-retrait

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Sens de droit en garantie

(4) Pour l'application des paragraphes (1) et (3), n'est pas un droit en garantie celui qui est visé par règlement.

TAB 16

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to May 29, 2023

Last amended on April 27, 2023

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to May 29, 2023. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of May 29, 2023 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 29 mai 2023. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 29 mai 2023 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Intellectual property — sale or disposition

246.1 (1) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition by the receiver, that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Propriété intellectuelle — disposition

246.1 (1) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans une disposition d'actifs par le séquestre, cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

Intellectual property — disclaimer or resiliation

(2) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property, the disclaimer or resiliation of that agreement by the receiver does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2018, c. 27, s. 268.

Propriété intellectuelle — résiliation

(2) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle, la résiliation de ce contrat par le séquestre n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2018, ch. 27, art. 268.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à

TAB 17

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

Current to September 15, 2025

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OFFICIAL STATUS OF CONSOLIDATIONS

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Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

LAYOUT

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MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to September 15, 2025. The last amendments came into force on March 25, 2011. Any amendments that were not in force as of September 15, 2025 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 15 septembre 2025. Les dernières modifications sont entrées en vigueur le 25 mars 2011. Toutes modifications qui n'étaient pas en vigueur au 15 septembre 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

General

2 Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the *Interpretation Act*, and must be used in proceedings under the Act.

SOR/92-579, s. 3; SOR/98-240, s. 1; SOR/2007-61, s. 2(E).

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

SOR/98-240, s. 1.

4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

5 (1) Subject to subsection (2), a notice or other document that is received by a Division Office outside of its business hours is deemed to have been received

(a) on the next business day of that Division Office, if it was received

(i) between the end of business hours and midnight, local time, on a business day, or

(ii) on a Saturday or holiday; or

(b) at the beginning of business hours of that Division Office, if it was received between midnight and the beginning of business hours, local time, on a business day.

(2) Subsection (1) does not apply to documents related to proceedings under Part III of the Act that are filed by facsimile.

SOR/78-389, s. 1; SOR/92-579, s. 4; SOR/98-240, s. 1; SOR/2005-284, s. 1.

6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served,

Dispositions générales

2 Les documents à prescrire au titre de la Loi sont en la forme prescrite, avec les adaptations nécessaires et les différences de présentation permises par l'article 32 de la *Loi d'interprétation*, et sont utilisés dans les procédures engagées sous le régime de la Loi.

DORS/92-579, art. 3; DORS/98-240, art. 1; DORS/2007-61, art. 2(A).

3 Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

DORS/98-240, art. 1.

4 Lorsqu'un délai de moins de six jours est prévu pour accomplir un acte ou intenter une procédure en vertu de la Loi ou des présentes règles, les samedis et les jours fériés n'entrent pas dans le calcul du délai.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

5 (1) Sous réserve du paragraphe (2), les avis et autres documents que le bureau de division reçoit en dehors des heures d'ouverture sont réputés reçus :

a) le premier jour ouvrable suivant de ce bureau, s'ils sont reçus :

(i) après les heures d'ouverture et avant minuit, heure locale, un jour ouvrable,

(ii) le samedi ou un jour férié;

b) au début des heures d'ouverture de ce bureau, s'ils sont reçus entre minuit et le début des heures d'ouverture, heure locale, un jour ouvrable.

(2) Le paragraphe (1) ne s'applique pas aux documents concernant les procédures fondées sur la partie III de la Loi qui sont déposés par télécopieur.

DORS/78-389, art. 1; DORS/92-579, art. 4; DORS/98-240, art. 1; DORS/2005-284, art. 1.

6 (1) Sauf disposition contraire de la Loi ou des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime de la Loi ou des présentes règles sont signifiés, remis en mains propres ou envoyés par courrier, par service de messagerie, par télécopieur ou par transmission électronique.

(2) Sauf disposition contraire des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime des présentes règles :

a) doivent être reçus par le destinataire au moins quatre jours avant l'événement auquel ils se

delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

SOR/98-240, s. 1; SOR/2007-61, ss. 3(E), 63(E).

7 An assignment, proposal or notice of intention that is respectively offered, lodged or filed pursuant to the Act must be offered, lodged or filed by service, personal delivery, mail, courier, facsimile or electronic transmission.

SOR/78-389, s. 1; SOR/98-240, s. 1.

8 An interim receiver, a trustee, an administrator of a consumer proposal, an official receiver or a representative of the Superintendent is not required to be represented by a barrister or solicitor or, in the Province of Quebec, an advocate when appearing before a registrar on any court proceeding under the Act.

SOR/98-240, s. 1; SOR/2007-61, s. 4(E).

Court Proceedings

9 (1) All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words "in Bankruptcy and Insolvency".

(2) Every document used in the filing of a bankruptcy application or used after the filing of an assignment must be entitled "In the Matter of the Bankruptcy of …".

(3) Every document used in the filing of a proposal before bankruptcy must be entitled "In the Matter of the Proposal of …".

(4) Every document used in the course of a receivership must be entitled "In the Matter of the Receivership of …".

(5) Unless the Chief Justice, Associate Chief Justice or Commissioner, as the case may be, referred to in

rapportent, s'ils sont signifiés, remis en mains propres ou envoyés par télécopieur ou par transmission électronique;

b) doivent être envoyés au destinataire au moins 10 jours avant l'événement auquel ils se rapportent, s'ils sont envoyés par courrier ou par service de messagerie.

(3) Le syndic, le séquestre ou l'administrateur qui remet ou envoie un avis ou tout autre document doit remplir un affidavit ou obtenir une preuve à cet effet, et conserver l'affidavit ou la preuve dans ses dossiers.

(4) Le tribunal peut, sur demande *ex parte*, dispenser toute personne de l'application du paragraphe (2) ou ordonner les modalités d'application qu'il juge indiquées, notamment un délai différent.

DORS/98-240, art. 1; DORS/2007-61, art. 3(A) et 63(A).

7 La cession, la proposition ou l'avis d'intention à présenter ou à déposer sous le régime de la Loi sont soit signifiés, soit remis en mains propres, soit envoyés par courrier, par service de messagerie, par télécopieur ou par transmission électronique.

DORS/78-389, art. 1; DORS/98-240, art. 1.

8 Le séquestre intérimaire, le syndic, l'administrateur d'une proposition de consommateur, le séquestre officiel ou le représentant du surintendant n'ont pas à être représentés par un avocat lorsqu'ils comparaissent devant le registraire au sujet d'une procédure judiciaire engagée sous le régime de la Loi.

DORS/98-240, art. 1; DORS/2007-61, art. 4(A).

Procédure judiciaire

9 (1) Tous les actes de procédure présentés devant le tribunal sont datés et portent en titre le nom du tribunal visé et la mention « En matière de faillite et d'insolvabilité ».

(2) Les documents utilisés lors du dépôt d'une requête en faillite ou après le dépôt d'une cession portent le titre « Dans l'affaire de la faillite de … ».

(3) Les documents utilisés lors du dépôt d'une proposition antérieure à la faillite portent le titre « Dans l'affaire de la proposition de … ».

(4) Les documents relatifs à une mise sous séquestre portent le titre « Dans l'affaire de la mise sous séquestre de … ».

(5) À moins que le juge en chef, le juge en chef adjoint ou le commissaire, selon le cas, visé à l'article 184 de la Loi

TAB 18

Judicature Act

CHAPTER 240 OF THE REVISED STATUTES, 1989

as amended by

1989, c. 20, s. 1; 1992, c. 16, ss. 30-68; 1996, c. 23, ss. 10, 11;
1997 (2nd Sess.), c. 5; 1998, c. 12, ss. 3-10; 2000, c. 28, s. 55;
2003 (2nd Sess.), c. 1, s. 26; 2008, c. 60; 2009, c. 17; 2019, c. 17

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Discontinuance of foreclosure proceeding

42 **(1)** In this Section, "mortgagor" means the original mortgagor to a mortgage document and includes any person deriving title through him.

(2) A mortgagor, who is in default of a mortgage

(a) either

(i) in failing to make a payment of principal or interest or a payment otherwise due under the mortgage, or

(ii) in failing to observe a covenant or term of the mortgage; and

(b) if, as a result of the default referred to in either subclause (i) or (ii) of clause (a) or both, the whole of the balance of the outstanding principal and interest secured by the mortgage has become due and payable,

may before the granting of an order for foreclosure or foreclosure and sale make an application to the Supreme Court to have any proceedings commenced by the mortgagee for the order for foreclosure or foreclosure and sale discontinued.

(3) The Supreme Court may grant an order of discontinuance conditional upon

(a) the payment of all arrears of principal and interest and any other payments due under the mortgage;

(b) the performance of the covenant in default;

(c) the payment of any costs and expenses incurred by the mortgagee and allowed by the Supreme Court; and

(d) the performance of the conditions of the order within such time as the Supreme Court may allow.

(4) The Supreme Court may not grant more than one order pursuant to this Section in respect of the same mortgage.

(5) Her Majesty in right of the Province is bound by this Section.
R.S., c. 240, s. 42; 1992, c. 16, s. 62.

Further rules of law

43 **(1)** No claim of a *cestui que trust* against his trustee, for any property held on any express trust or in respect of any breach of such trust, shall be held to be barred by any statute of limitation.

(2) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

(3) There shall not be any merger by operation of law only of any estate the beneficial interest in which would not prior to the first day of October, 1884, have been deemed merged or extinguished in equity.

(4) A mortgagor entitled for the time being to the possession or the receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof has been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent injury or recover damages in respect to any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue jointly with such other person.

(5) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this subsection had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

(6) In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he may if he thinks fit call upon the several persons making claim thereto to interplead concerning the same, or he may if he thinks fit pay the same into the Supreme Court, upon obtaining an order therefor, to abide the determination of the Supreme Court in respect thereof.

(7) Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays such debt or performs such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security is or is not deemed at law to be satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies and, if need be, and upon a proper indemnity, use the name of the creditor in any proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and the loss sustained by the person who has so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be a defence to such proceeding by him, provided always, that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person is justly liable.

(8) Stipulations in contracts, as to time or otherwise, which would not before the first day of October, 1884, have been deemed to be, or to have become, of the essence of such contracts in a court of equity, shall receive in the Court the same construction and effect as they would previously thereto have received in equity.

(9) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

(10) In questions relating to the custody and education of infants, the rules of equity shall prevail.

(11) Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. R.S., c. 240, s. 43; 1992, c. 16, s. 63.

Injunction in labour-management dispute

44 **(1)** In this Section,

(a) "injunction" means an injunction granted by an interlocutory order or judgment and includes an interim injunction;

(b) "labour-management dispute" means a dispute or difference affecting an employer and his employees or a trade union as defined in the *Trade Union Act*.

(2) Subject to subsection (3), no injunction to restrain a person or a trade union from any act in connection with a labour-management dispute shall be granted *ex parte*.

(3) The Supreme Court may grant an injunction *ex parte* in a labour-management dispute if it is satisfied that the case is a proper one for the granting of an injunction and that

(a) a breach of the peace, an interruption of an essential public service, injury to persons or severe damage to property has occurred or is about to occur; and