McINNES COOPER

Stephen Kingston
Direct +1 (902) 444 8569
stephen.kingston@mcinnescooper.com

1969 Upper Water Street
Suite 1300
McInnes Cooper Tower - Purdy's Wharf
Halifax NS
Canada B3J 2V1
Tel +1 (902) 425 6500 | Fax +1 (902) 425 6350

Our File: 243262

April 5, 2024

The Honourable Justice Presiding
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord/My Lady:

Re: Business Development Bank of Canada v. Atlantic Oriental Wholesale (AOW) Inc.

532179

We are counsel to the Applicant, Business Development Bank of Canada (the **"Bank"**),in connection with this matter. The Respondent, Atlantic Oriental Wholesale (AOW) Inc. (**"AOW"**) is unrepresented to date.

The Bank has scheduled an Application to be heard in Chambers in Halifax on **Thursday, April 11, 2024** at **2:00 pm**.

The Bank is seeking an Order (the **"Receivership Order"**):

(i) Abridging the time for service of the Notice of Application in Chambers and associated pleadings herein (if required) pursuant to Rule 6 of the ***Bankruptcy and Insolvency General Rules***, C.C.R. 1976, c. 368 (the "**BIA Rules**"), and dispensing with further service thereof; and

(ii) Appointing Deloitte Restructuring Inc. (**"Deloitte"** or the **"Proposed Receiver"**) as Receiver of all of AOW's assets, properties, and undertaking pursuant to s. 243(1) of the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c. B-3 (the **"BIA"**) and s. 43(9) of the ***Judicature Act,*** R.S.N.S. 1989, c. 240.

If the Receivership Order is granted, the Bank will also be seeking:

(i) An Order (the **"Sale Process Order"**) approving the Sale Process as set out in the Proposed Receiver's First Report dated April 1, 2024 (the **" First Report"**) and authorizing and directing the Proposed Receiver to proceed accordingly.

The Affidavits of Liam Wilson and Stephen Kingston have been filed in support.

Please accept the following as the Bank's Pre-Hearing Memorandum.

I. Facts

1. AOW was incorporated pursuant to the laws of Nova Scotia on April 24, 2013.

2. Up until 2023, AOW engaged in the business of buying and selling live lobsters and operated from a facility at 121 Seal Point Rd., Upper Port La Tour, Shelburne County, which consisted of various lobster storage buildings, offices, and a warehouse. In addition, AOW owns a residential property at 70 Seal Point Rd., Upper Port La Tour, which was used to house workers.

3. AOW's operations were heavily impacted by the Barrington Lake wildfire which burned uncontrolled from May 26 to June 4, 2023 (and was finally extinguished on July 26, 2023). AOW's facilities did not sustain physical damage by fire, but the lobster pound lost electrical power and fuel for stand-by generators could not be delivered.

4. As a result, water circulation and filtration systems shut down, and AOW sustained a total loss of its inventory.

5. AOW has not operated since the fire, and all employees have been dismissed. The AOW facilities are currently vacant.

6. AOW's President, Jun Tak Kim, made a personal assignment in bankruptcy in December 2023.

Business Development Bank

7. On January 12, 2022 the Bank issued a Letter of Offer to AOW, which was accepted by AOW on January 13, 2022. The Letter of Offer was subsequently amended by mutual consent by letters dated March 3, March 29, and April 18, 2022 and January 25, 2023 (collectively, with the Letter of Offer, the **"Loan Agreement"**). Copies of the Letter of Offer and each of the amending letters appear as Exhibit "B" to the Wilson Affidavit.

8. AOW's obligations to the Bank pursuant to the Loan Agreement are secured by:

   (i) A mortgage (the **"Mortgage"**) granted dated March 2, 2022 and recorded at the Land Registration Office for Shelburne County on April 26, 2022 as Doc. No. 120485090.

   The Mortgage, by its terms, secures a principal debt of $1,700,000 as against AOW's facilities at Upper Port La Tour (PID No. 82540097).

   The Mortgage does not, however, encumber AOWs property at 70 Seal Point Road, Upper Port La Tour (PID No. 80058449); and

   (ii) A General Security Agreement (the **"GSA"**) dated March 2, 2022, a Financing Statement for which was recorded pursuant to the ***Personal Property Security Act*** as Reg. No. 36126654.

9. Copies of the Mortgage and the GSA appear as Exhibits "C" and "D" respectively to the Wilson Affidavit.

AOW Debt and Default

10. As of March 4, 2024 AOW was indebted to the Bank in the amount of $1,193,108.69, as shown on the Account Statement appended as Exhibit "F" to the Wilson Affidavit.

11. AOW has defaulted in its obligations to the Bank pursuant to the Loan Agreement and this account is currently five months in arrears. In addition, AOW has ceased operations and is no longer carrying on business.

Private Receivership

12. On December 19, 2023 the Bank retained Deloitte to act as its financial consultant to review the operations and financial position of AOW.

13. On January 2, 2024 the Bank's legal counsel made demand for payment upon AOW and issued a Notice of Intention to Enforce Security ("**NITES**"), copies of which appear as Exhibit "G" to the Wilson Affidavit.

14. On January 17, 2024 the Bank appointed Deloitte as Receiver and Manager (the **"Private Receivership"**) pursuant to the Bank's security. The Private Receivership remains ongoing, and the activities of the Private Receivership are described in the First Report.

15. The Bank wishes to proceed with the realization of its security and accordingly now seeks an Order appointing Deloitte has Receiver of all of the property, assets and undertaking of AOW.

16. In addition, if the Receiver is appointed by the Court, the Bank seeks an Order approving the Sale Process as described and defined in the First Report, and authorizing and directing the Receiver to proceed accordingly.

II. Issues

1. Should the Court exercise its discretion so as to abridge the time requirements for the hearing of this Application?

2. Should the Court exercise its discretion so as to appoint Deloitte as Receiver?

3. Should the Receiver be authorized to voluntarily assign AOW into bankruptcy if the Receiver considers it appropriate to do so?

4. If the Receiver is appointed, should the Court approve the Sale Process as defined and described in the First Report and authorize and direct the Receiver to proceed accordingly?

III. Law and Argument

1. Service and Notice

17. Service of the Application pleadings herein will be effected electronically upon AOW and secured creditors pursuant to the BIA and, in particular, s. 6 of the BIA Rules.

18. Rule 6 states:

> **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, 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) ...
>
> (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.

19. The Bank shall serve copies of the Application pleadings on all parties who hold a recorded security interest against AOW. In addition, the Bank shall serve the Canada Revenue Agency and the Office of the Superintendent of Bankruptcy.

20. An Affidavit of Service will be filed on behalf of the Bank in advance of the hearing of the Application by the Court.

21. It is not anticipated that any party will seek to contest or oppose the Application or the request for abridgement of time.

2. The Receivership Application

(a) Statutory Power to appoint a Receiver

22. The Court possesses a broad discretionary jurisdiction as regards the appointment of a Receiver.

23. BIA s.243(1) provides for the appointment of a Receiver as regards an insolvent person or a bankrupt where the Court considers it to be "***just or convenient to do so***":

> "**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."

24. "Insolvent person" is defined in BIA s.2 as:

> *insolvent person* means 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 one thousand dollars, and
>
> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> **(c)** 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

25. A Receiver may also be appointed by the Court pursuant to provincial law. Section 43(9) of the ***Judicature Act*** states:

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

(b) Nature of the Receivership Sought

26. Justice Gabriel considered an Application for the appointment of a Receiver pursuant to BIA s.243(1) in ***Royal Bank of Canada v. Eastern Infrastructure Inc. and Allcrete Restoration Limited*** (2019 Carswell NS 540). He stated (at paras 39-41):

> "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 (N.S. S.C.),* 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 he 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."

27. It is respectfully submitted that these comments are directly applicable to the present case:

(i) Paragraph 15.1 of the GSA empowers the Bank to appoint a Receiver and/or Manager as regards all property, assets, and undertaking of AOW as charged by the Bank's security;

(ii) The appointment of a Receiver would allow for the sale of assets to be conducted in a transparent manner subject to the supervision of the Court, either "en bloc" or separately, as the Receiver may deem most beneficial;

(iii) AOW's assets include real property, which cannot be sold or conveyed by a private receiver;

(iv) The sale of assets by the Receiver would be facilitated by the potential availability of a Vesting Order, which would be of considerable benefit to the successful purchaser(s); and

(v) A Court-appointed Receiver would be acting in a fiduciary capacity and would be accountable to the Court and all interested parties.

28. It is submitted that these factors favour a Court-appointed Receiver in the present case.

(c) "Just or Convenient"

29. The Court in ***Eastern Infrastructure*** also considered the application of the "just or convenient" standard, and stated (at paras 46 – 47):

> "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.
>
> <u>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.</u>

[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."

30. The Court concluded that it was appropriate for the Court to appoint a Receiver and stated (at paras 53 – 55):

> "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."

31. The "just or convenient" standard was also addressed by the Ontario Superior Court of Justice in ***Bank of Montreal v. Carnival National Leasing Limited et al.*** 2011 ONSC 1007 (Ont. S.C.J.) at paras. 23 to 25, as follows:

> [23] 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.
>
> [24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* 1996 CanLII 8258 (ON SC), (1996), 40 C.B.R. (3d) 274, 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. He summarized the legal principles involved 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.

[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."

(emphasis added)

3. Present Case

32. It is submitted that the circumstances of the present case make the Court appointment of a Receiver both just and convenient:

(i) AOW is insolvent and has ceased operations;

(ii) The Bank has the right to appoint a receiver pursuant to its security (and has done so);

(iii) AOW's assets include real property, which cannot be sold or conveyed by a "private receiver";

(iv) The appointment of a Receiver and the authority inherent in a Court Order will assist in the orderly and transparent realization of assets, as would the potential availability of a Vesting Order; and

(v) A Court-appointed Receiver would be acting in a fiduciary capacity and would be accountable to the Court and all interested parties, and not just the Bank.

4. Form of Receivership Order

33. The draft Receivership Order tracks the language of the Model Order, subject to the following exceptions:

(i) Paragraph 3(m)(i) – allows the Receiver to sell assets out of the ordinary course of business without the approval of the Court as regards any transaction not exceeding **$50,000**, provided that the aggregate consideration for all such transactions does not exceed **$200,000**;

(ii) Paragraph 3(s) – empowers the Receiver to execute a voluntary assignment in bankruptcy as regards AOW, if the Receiver considers it to be appropriate.

The rationale for this proposed enhanced power is set out at pages 11-12 of the First Report, which includes:

(a) a bankruptcy would allow for the further investigation of transactions which may be deemed to be reviewable transactions pursuant to BIA s. 95(1);

(b) a bankruptcy would allow for the efficient and orderly wind-down of the restructuring process; and

(c) a bankruptcy will allow for the alignment of priority claims and the crystallizing of various creditor claims.

(iii) Paragraph 20 – provides for an Administrative Charge of **$100,000**; and

(iv) Paragraph 28 – provides for a Borrowing Charge of **$200,000**.

IV. Sale Process

1. Receiver's Mandate

34. The Proposed Receiver's mandate, as set out in paragraph 3 of the draft Receivership Order, includes:

"3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without limiting the generality of the foregoing, the Receiver is hereby empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) ...

(l) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or in part or parts thereof in negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(m) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court, in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $250,000, and

(ii) with the approval of this Court in respect of any transaction which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case under Section 60 of the *Personal Property Security Act* shall not be required.

(n) to sell the right, title, interest, property, and demand of the Respondent in and to the Property at the time the Respondent granted a security interest or at any time since, free of all claims including the claims of subsequent encumbrances bound as named respondents, bound as parties joined as unnamed

respondents, or bound under Rule 35.12;

...

(t) to take such steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps it shall be authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Respondent, and without interference from any other Person.

2. Proposed Sale Process

35. As described in greater detail in the First Report, the Proposed Receiver intends to broadly market the Property (as defined in the Receivership Order) to potentially interested parties involved in the Atlantic Canada seafood industry.

36. The Proposed Receiver considers that the Property is suitable for marketing by way of the proposed Sale Process, which would include:

(i) Publishing notices in the Chronicle Herald newspaper, and online in Insolvency Insider (insolvencyinsider.ca) and All Atlantic (allatlanticcanada.com);

(ii) Contacting industry participants and other potentially interested parties across Atlantic Canada to generate broad visibility for the tender process and the proposed sale of the Property;

(iii) Providing copies of the Tender Package (the "**SISP**") (First Report, Appendix "C") to parties expressing an interest in the Property;

(iv) Facilitation of inspections of the Property, upon request;

(v) Offers to Purchase the Property (en bloc or otherwise) in the stipulated form to be received on or before the Offer Deadline (as established by the Receiver), subject to customary terms and conditions used in receivership sales, including a 15% deposit;

(vi) Communication of acceptance to the successful offeror (the "**Purchaser**") (subject to the Approval of this Honourable Court); and

(vii) Applying to this Honourable Court for a Sale Approval and Vesting Order approving of the proposed sale to the Purchaser and conveying and vesting title to the Property in the Purchaser.

37. The SISP contemplates an approximately eight week process for the marketing of the Property to prospective buyers. The Proposed Receiver considers that this timeline is sufficient to allow interested parties the time to perform adequate due diligence and to submit an offer.

38. The SISP also includes a certain amount of flexibility which will allow the Proposed Receiver to extend timelines should that be required.

39. The Proposed Receiver is of the opinion that the proposed SISP provides for transparent process and is a fair and effective method to market the Property and to maximize realizations for the benefit of stakeholders.

40. The Proposed Receiver respectfully submits that the proposed SISP merits the authorization and approval of this Honourable Court.

4. Governing Principles

41. In ***Bank of Montreal v. Sportsclick Inc.*** (2009) CarswellNS 649, Justice Duncan referenced the factors to be considered by the Court in evaluating the sale of assets by a Receiver.

Justice Duncan stated (at paras 32-33):

> "In *Royal Bank 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.
>
> 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 the 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 Co. v. Rosenberg*, (1986), 60 O.R. (2d) (Ont. H. C.), 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 is bargained at some expense in time and money to achieve a 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 should be consistent with commercially 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. Best 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.

- The 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*."

42. It is respectfully submitted that the proposed Sale Process as set out in the First Report satisfies the "***Soundair*** criteria" and that it merits the authourization and approval of this Honourable Court.

V. Relief Requested

43. The Bank respectfully requests the issuance of the Receivership Order in the form submitted.

44. In the event that a Receivership Order is granted, the Bank seeks the issuance of the Sale Process Order in the form submitted.

All of which is respectfully submitted.

Yours very truly,

McINNES COOPER

SL

Stephen Kingston

cc: Service List
Deloitte Restructuring Inc.

2019 NSSC 243
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 540, 2019 NSSC 243, 308 A.C.W.S. (3d) 469, 72 C.B.R. (6th) 118

Royal Bank of Canada (Plaintiff) v. Eastern Infrastructure Inc. and Allcrete Restoration Limited (Defendants)

D. Timothy Gabriel J.

Heard: June 7, 2019
Judgment: June 7, 2019
Docket: Hfx No. 483616

Counsel: Gavin D.F. MacDonald, for Plaintiff
Kevin A. MacDonald, for Defendants
Stephen J. Kingston, Colin J. Boyd (summer student), for Ernst and Young (Receiver-Monitor)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Receiver-monitor was appointed over assets of defendant companies on consent, but scope of order limited powers compared to those that would ordinarily be contained in receivership order under s. 243(1) of Bankruptcy and Insolvency Act (BIA) — Plaintiff brought motion for order appointing receiver of property of companies, which would discharge receiver-monitor of its obligations under prior order and substitute expanded powers and responsibilities of traditional receivership order — Motion granted — It was clear companies were indebted to plaintiff — Both general security agreement and collateral mortgage provided plaintiff with ability to appoint receiver — There were other creditors beside plaintiff which favoured court-appointed receiver, accountable to court, who would be able to offer protection to all of various interests involved, as opposed to one appointed privately by plaintiff pursuant to its security documents — Companies were clearly insolvent within meaning of s. 243(1) of BIA — Based on uncontradicted evidence of receiver-monitor, companies were indebted to and/or could not meet their obligations as they generally became due with respect to creditors — It was not necessary for plaintiff to demonstrate irrevocable harm in order to succeed — There was significant risk to plaintiff and other creditors as companies' capital positions had inexorably and precipitously declined — Powers provided under first order had proven inadequate to job with which receiver-monitor had been tasked — Companies provided court with no plan to repay or pay down their obligations — Order for court-appointed receiver would not necessarily dictate financial end of companies — Totality of relevant factors, as well as significant efforts made by plaintiff to accommodate companies, demonstrated that decision to seek relief was not made precipitously — Current limited receivership/monitoring powers contained in first order, which were anticipated to culminate in mutually acceptable sales process, instead saw companies' fortunes continuously decline while operations continued — At best, companies were presently stagnant, and if order sought by plaintiff was not granted, companies would soon hit wall and prejudice to existing creditors would be exacerbated — Status quo was untenable, order sought was necessary, and it was just and convenient given present factual matrix.

Table of Authorities

Cases considered by *D. Timothy Gabriel J.*:

Bank of Montreal v. Linden Leas Limited (2018), 2018 NSSC 82, 2018 CarswellNS 497, 61 C.B.R. (6th) 322 (N.S. S.C.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 128, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 1084 A.P.R. 108, 343 N.S.R. (2d) 108 (N.S. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "insolvent person" — considered

s. 14 — considered

s. 243(1) — considered

s. 243(1)(a) — considered

s. 244 — considered
Builders' Lien Act, R.S.N.S. 1989, c. 277
Generally — referred to

MOTION by plaintiff for order appointing receiver of property of defendant companies.

***D. Timothy Gabriel J.* (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:

> **HST Filings and Obligation**
>
> 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 (N.S. S.C.), 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 (N.S. S.C.), 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.

Motion granted.

2019 NSSC 243
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 540, 2019 NSSC 243, 308 A.C.W.S. (3d) 469, 72 C.B.R. (6th) 118

Royal Bank of Canada (Plaintiff) v. Eastern Infrastructure Inc. and Allcrete Restoration Limited (Defendants)

D. Timothy Gabriel J.

Heard: June 7, 2019
Judgment: June 7, 2019
Docket: Hfx No. 483616

Counsel: Gavin D.F. MacDonald, for Plaintiff
Kevin A. MacDonald, for Defendants
Stephen J. Kingston, Colin J. Boyd (summer student), for Ernst and Young (Receiver-Monitor)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Receiver-monitor was appointed over assets of defendant companies on consent, but scope of order limited powers compared to those that would ordinarily be contained in receivership order under s. 243(1) of Bankruptcy and Insolvency Act (BIA) — Plaintiff brought motion for order appointing receiver of property of companies, which would discharge receiver-monitor of its obligations under prior order and substitute expanded powers and responsibilities of traditional receivership order — Motion granted — It was clear companies were indebted to plaintiff — Both general security agreement and collateral mortgage provided plaintiff with ability to appoint receiver — There were other creditors beside plaintiff which favoured court-appointed receiver, accountable to court, who would be able to offer protection to all of various interests involved, as opposed to one appointed privately by plaintiff pursuant to its security documents — Companies were clearly insolvent within meaning of s. 243(1) of BIA — Based on uncontradicted evidence of receiver-monitor, companies were indebted to and/or could not meet their obligations as they generally became due with respect to creditors — It was not necessary for plaintiff to demonstrate irrevocable harm in order to succeed — There was significant risk to plaintiff and other creditors as companies' capital positions had inexorably and precipitously declined — Powers provided under first order had proven inadequate to job with which receiver-monitor had been tasked — Companies provided court with no plan to repay or pay down their obligations — Order for court-appointed receiver would not necessarily dictate financial end of companies — Totality of relevant factors, as well as significant efforts made by plaintiff to accommodate companies, demonstrated that decision to seek relief was not made precipitously — Current limited receivership/monitoring powers contained in first order, which were anticipated to culminate in mutually acceptable sales process, instead saw companies' fortunes continuously decline while operations continued — At best, companies were presently stagnant, and if order sought by plaintiff was not granted, companies would soon hit wall and prejudice to existing creditors would be exacerbated — Status quo was untenable, order sought was necessary, and it was just and convenient given present factual matrix.

Table of Authorities

Cases considered by *D. Timothy Gabriel J.*:

Bank of Montreal v. Linden Leas Limited (2018), 2018 NSSC 82, 2018 CarswellNS 497, 61 C.B.R. (6th) 322 (N.S. S.C.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 128, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 1084 A.P.R. 108, 343 N.S.R. (2d) 108 (N.S. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "insolvent person" — considered

s. 14 — considered

s. 243(1) — considered

s. 243(1)(a) — considered

s. 244 — considered
Builders' Lien Act, R.S.N.S. 1989, c. 277
Generally — referred to

MOTION by plaintiff for order appointing receiver of property of defendant companies.

***D. Timothy Gabriel J.* (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:

> **HST Filings and Obligation**
>
> 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 (N.S. S.C.), 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 (N.S. S.C.), 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.

Motion granted.

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Debtor was in business of leasing motor vehicles — Debtor was indebted to creditor bank; vehicles guaranteed indebtedness to $1.5 million — Creditor held security over assets of debtor including general security agreement under which it had right to appoint receiver of debtor or to apply to court for appointment of receiver — Under terms of wholesale leasing facility, total advances for used vehicle financing were not to exceed 30 percent of approved lease portfolio credit line — Creditor's account manager was informed that used car lease portfolio was 60 percent of leases financed by creditor, well in excess of 30 percent condition of loan — Creditor delivered demands for payment — Creditor applied for appointment of receiver — Application granted — Debtor relied on decision in which judge was critical of actions of bank in overstating its case and making unsupportable allegations of fraud — In case at bar there was no basis to refuse order sought because of alleged misconduct on part of creditor or its counsel — If anything, shoe was on other foot as factum filed on behalf of debtor was replete with allegations of false assertions on behalf of creditor, none of which were established — Cited case was relied upon in which it was held that where security instrument permits appointment of private receiver, extraordinary nature of remedy sought is less essential to inquiry — It was preferable to have court appointed receiver rather than privately appointed one as debtor stated that if private appointment was made it would litigate its right to do so.

Table of Authorities

Cases considered by *Newbould J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. D.G. Jewelry Inc. (2002), 2002 CarswellOnt 3443, 38 C.B.R. (4th) 7 (Ont. S.C.J.) — considered

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]) — followed

Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 35 O.A.C. 305, 62 D.L.R. (4th) 277, 1989 CarswellOnt 191 (Ont. C.A.) — referred to

Royal Bank v. Boussoulas (2010), 2010 ONSC 4650, 2010 CarswellOnt 6332 (Ont. S.C.J.) — considered

Royal Bank v. Chongsim Investments Ltd. (1997), 1997 CarswellOnt 988, 28 O.T.C. 102, 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — distinguished

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Toronto Dominion Bank v. Pritchard (1997), 154 D.L.R. (4th) 141, 104 O.A.C. 373, 1997 CarswellOnt 4277 (Ont. Div. Ct.) — considered

1468121 Ontario Ltd. v. 663789 Ontario Ltd. (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.) — not followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — referred to

s. 243(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

APPLICATION by creditor for appointment of private receiver of debtor.

***Newbould J.*:**

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of

October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 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.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), 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. He summarized the legal principles involved 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.

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.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet

done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, 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, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.

. . .

On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva

injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

End of Document

2009 NSSC 354
Nova Scotia Supreme Court

Bank of Montreal v. Sportsclick Inc.

2009 CarswellNS 649, 2009 NSSC 354, 183 A.C.W.S. (3d) 326

Bank of Montreal (Plaintiff) v. Sportsclick Inc. (Defendant)

Patrick Duncan J.

Heard: November 10,12, 2009
Judgment: November 12, 2009
Docket: Hfx 314220

Counsel: Stephen Kingston, Benjamin Durnford for Plaintiff
Christopher Robinson for Defendant
Dennis Pickup, Jonathan Saulnier (Articled Clerk) for Third Party, T & A Venture Properties Inc.

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous

Defendant was parent company of S Inc. and owned all of S Inc.'s shares ("shares at issue") — Plaintiff bank obtained order appointing interim receiver for defendant — Receiver proceeded with public tender of shares at issue — At tender close date there was single offer in amount of $25,000US made by non-party ("amount offered") — Amount offered barely covered cost of advertising tender — Bank brought motion to approve sale of shares at issue for amount offered — Motion granted — Sale was commercially reasonable — Decisions made by receiver were made in good faith and were cognizant of receiver's duties — No alternatives to receiver's marketing approach were shown that would have provided greater return — S Inc. had been in serious financial decline for several years at time of sale — It was speculative to suggest that shares at issue would have attracted better price if defendant had continued managing S Inc. — Tender process was carried out in transparent and fair manner, consistent with industry standards.

Table of Authorities

Cases considered by *Patrick Duncan J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — considered

Greyvest Leasing Inc. v. Merkur (1994), 8 P.P.S.A.C. (2d) 203, 1994 CarswellOnt 780 (Ont. Gen. Div.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) — referred to

MOTION by bank to approve interim receiver's sale of shares owned by bankrupt corporation.

***Patrick Duncan J.*:**

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 v. Soundair Corp.*, [1991] O.J. No. 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 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 Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), 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. No. 2465 (Ont. Gen. Div.), 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.

Motion granted.