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Our File: 192164

December 1, 2023

By Delivery

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

My Lady:

Re: Business Development Bank of Canada v. 11016946 Canada Inc. (Halifax No. 501252)

We are counsel to Deloitte Restructuring Inc. (the "**Receiver**") in its capacity the Court-appointed Receiver and Manager of certain assets and Property owned by the Respondent, 11016946 Canada Inc. (the "**Company**").

The Receiver has filed a Motion to be heard in Chambers on **Tuesday, December 12, 2023** at 9:30 a.m. We understand that you will be the Presiding Justice at the Motion Hearing.

On the Motion, the Receiver is seeking:

1. An Order Abridging Time (if required) pursuant to Rule 6 of the ***Bankruptcy and Insolvency General Rules***;

2. An Order for Confidentiality pursuant to Civil Procedure Rule 85.04 as regards the Confidential Supplement (the "**Confidential Supplement**") to the Second Report of the Receiver dated November 20, 2023 (the "**Second Report**");

3. A Sale Approval and Vesting Order pursuant to s. 243 (1)(c) of the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c. B-3 (the "**BIA**") approving the sale by the Receiver of Property located at 123-125 Prince William Street and 68 Water Street, Saint John, New Brunswick (PID 55176598) (the "**Property**"), and vesting title thereto in the purchaser free and clear of any claims, liens or encumbrances other than permitted encumbrances; and

4. The Court's approval of the contents of the Second Report and the Confidential Supplement and the conduct and activities of the Receiver as described therein.

The Second Report and the Confidential Supplement are being filed to assist the Court in considering whether to grant the relief requested in the Motion. The Receiver is also relying on the Affidavit of Stephen Kingston.

Please accept the following as the Receiver's pre-hearing memorandum.

Facts

1. Receiver's Mandate

The Receiver's mandate, as set out in s. 3 of the 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 $10,000, providing that the aggregate consideration for all such transactions does not exceed $100,000; and
>
> (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;
>
> and in each case notice under section 60 of the *Personal Property Security Act* shall not be required;
>
> ...
>
> (t) to take any 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.

Paragraph 30 of the Receivership Order allows the Receiver to seek the advice and directions of this Honourable Court as may be required:

> "30. The Receiver may from time to time make a Motion for advice and directions in the discharge of its powers and duties hereunder."

2. Sale Process Order

On September 6, 2023 the Court issued an Order (the "**Sale Process Order**") which, *inter alia*:

(i) Approved the sale process (the "**Sale Process**") as described in the First Report of the Receiver dated August 24, 2023; and

(ii) Authorized the Receiver to carry of the Sale Process and to take such steps and execute such documentation as may be necessary or incidental to the implementation of the Sale Process.

3. The Property

The Receive has acted pursuant to its mandate to market the Property for sale in accordance with the Receivership Order and the Sale Process Order.

Firstly, the Receiver engaged Appraisals (Fundy) Ltd. ("**Fundy**") to complete an independent "as is" appraisal of both the forced sale value and the orderly liquidation value of the Property. A copy of Fundy's Appraisal Report, which is dated October 19, 2023, is appended to the Confidential Supplement.

Secondly, the Receiver undertook the marketing of the Property pursuant to the approved Sale Process. This included:

(i) Identifying 40 parties involved in the greater Saint John area real estate market and providing each with correspondence, including a short "teaser", on September 11, 2023;

(ii) Advertising the Property for sale in the September 16 and September 30, 2023 provincial additions of the Chronicle Herald newspaper;

(iii) Advertising the Property for sale in the September 16, 2023 and September 30, 2023 editions of the Telegraph Journal newspaper;

(iv) Advertising the Property for sale with the AllAtlantic on-line newsletter for the period from September 18 to September 29, 2023; and

(v) Advertising the Property for sale with the Insolvency Insider on-line newsletter commencing on September 18, 2023.

Thirdly, the Receiver evaluated the two purchase offers which were received for the Property. One of the offers was rejected by the Receiver as being too low. Following consultation with the senior secured creditor (the Business Development Bank of Canada), the Receiver accepted the second offer (the "**Successful Offer**"), subject to the approval of this Honourable Court.

A copy of the Successful Offer is appended to the Confidential Supplement.

Issues

Should this Honourable Court:

1. Abridge the time requirements for the hearing of the Motion (if required)?

2. Grant an Order for Confidentiality as regards the Confidential Supplement?

3. Grant the Sale Approval and Vesting Order in the form submitted?

4. Approve the contents of the Second Report and the Confidential Supplement, and the conduct and activities of the Receiver as described therein?

Law and Arguments

1. Service and Notice

Service of the Motion pleadings will be effected pursuant to the BIA and, in particular, s.6 of the ***Bankruptcy and Insolvency General Rules***.

Rule 6 states:

> (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 for in these Rules, every notice or other document given or sent pursuant to the Act or 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 courier.

> (3) ...
>
> (4) The Court may, on an *ex parte* application, exempt any person from the application of subs. (2) or order any terms and conditions that the Court considers appropriate, including a change in the time limits.
>
> (emphasis added)

An Affidavit of Service will be filed in advance of the Motion hearing date.

The Receiver will make its best efforts to complete service on interested parties within the timelines stated in Rule 6, but it will seek to abridge time if required.

2. Order for Confidentiality – Confidential Supplement

Civil Procedure Rule 85.04 states (in relevant part):

> (1) A judge may order that a Court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open Courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> > (a) sealing a Court document or an exhibit in a proceeding;

The Receiver submits that this is an appropriate case for the Court to exercise its discretion so as to "seal" the Confidential Supplement.

The Receiver's Second Report has been filed with Court. It is a public document, and copies will be provided by the Receiver to all interested parties.

As identified in the Second Report, the Receiver has received an independent Appraisal as regards the Property, a copy of which is appended to the Confidential Supplement. The Confidential Supplement also contains sensitive commercial information regarding the Successful Offer, including the sale price which is being recommended by the Receiver for approval by this Honourable Court.

The Receiver is concerned that, if the Confidential Supplement were publicly available, the information therein could negatively impact any future sales efforts in the event that the pending sale does not close. The integrity of the sale process could be negatively affected as a result.

The Receiver respectfully requests that this Honourable Court issue an Order for Confidentiality as regards the Confidential Supplement, in the form submitted.

3. Sale Approval – Governing Principles

In ***Bank of Montreal v. Sportsclick Inc.*** (2009), CarswellNS 649, Duncan, J. reviewed the factors to be considered by the Court in evaluating a proposed sale of assets by a Receiver, and stated (at paras. 32-33):

> In *Royal Bank of Canada v. Soundair Corp., supra*, Galligan J.A. set out, at paragraph 16, the duties which a Court must perform when deciding whether a Receiver who has sold a Property acted properly, which duties he summarized as follows:
>
> 1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.
>
> 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) (Ont. H.C.) 87 at 112;
>
> - The primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken I 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. 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 the Receiver except in special circumstances where the necessity and propriety of doing so is plain. See, *Crown Trust Co.*, *supra*.

4. Sale Approval – Present Case

The Receiver recommends the proposed sale of the Property on the terms and conditions set out in the Successful Offer, based upon:

(a) the Successful Offer was the best Offer which was received by the Receiver following the conclusion of the Sale Process as approved by the Court;

(b) the sale price and the Successful Offer exceeds the range of forced sale value as set out in the Fundy Appraisal, and represents approximately 82% of the orderly liquidation value of the Property as set out in the funding appraisal;

(c) the length of time the Property was previously listed for sale by the Company (approximately 3 years);

(d) the capital investment required to increase the financial performance of the Property;

(e) the limited conditions precedent to closing;

(f) the ability of the prospective purchaser to close the sale transaction quickly upon Court approval being granted; and

(g) the avoidance of additional "holding costs" which would be incurred if the Property were further marketed.

The Receiver considers that the Successful Offer will maximize recovery for the Estate and its stakeholders, and it accordingly recommends that the proposed sale be approved by this Honourable Court.

4. Approval and Vesting Orders – Jurisdiction of the Court

The Receiver was appointed pursuant to BIA s. 243(1), which states:

> "Subject to ss. (1.1), on application by a secured creditor, a court may appoint a Receiver to do all or any of the following if it considers it to be just and 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 a bankrupt that was acquired for or used in relation to a business carried on by the insolvent personal or a bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent persons or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> (emphasis added)"

In ***Royal Bank of Canada v. Eastern Infrastructure Inc. et al*** (2019 NSSC 297), Rosinski, J. found that BIA s. 243 (1)(c) empowered the Court to grant an Order vesting property in a purchaser pursuant to a sale by a Receiver.

5. Draft Sale Approval and Vesting Order

The Receiver respectfully requests that this Honorable Court grant the Sale Approval and Vesting Order in the form submitted.

The draft Order confirms the authority of the Receiver to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the sale transaction.

The draft Order also vests title in the purchaser, free and clear of all liens, charges or encumbrances other than permitted encumbrances – with creditor's claims attaching to the net sale proceeds with the same priority as they had as regards the Purchased Asset immediately prior to the closing of the sale transaction.

It is submitted that the issuance of the proposed Order:

(i) will facilitate the Receiver in exercising its mandate;

(ii) is in the best interests of the general body of creditors; and

(iii) will not operate to the prejudice of any party.

All of which is respectfully submitted.

Yours very truly,

McINNES COOPER

Stephen Kingston

Cc: Service List

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.

2019 NSSC 297
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 713, 2019 NSSC 297, 11 P.P.S.A.C. (4th) 121, 311 A.C.W.S. (3d) 21, 73 C.B.R. (6th) 104

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

Peter P. Rosinski J.

Heard: September 19, 2019
Judgment: October 10, 2019
Docket: 483616

Counsel: Gavin MacDonald, for Royal Bank of Canada
Stephen **Kingston**, for Receiver

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Plaintiff creditor obtained order appointing receiver over property of defendant debtors pursuant to s. 243 of Bankruptcy and Insolvency Act — Receiver brought motion for approval and vesting order that would allow it to sell defendants' encumbered assets at auction — Motion granted — While previous decisions had suggested there was no jurisdiction to grant such orders in absence of expressly enabling legislation, more recent decisions, focusing on remedial nature of and liberal interpretation to be applied to Act, had found s. 243(1)(c) did, in fact, allow for such orders in appropriate circumstances — Considerations similar to those relevant to determining whether to approve sale by receiver, including sufficiency of effort to obtain best price, interests of all parties, efficacy and integrity of process by which offers were obtained and fairness, applied — As matter of law and in circumstances of this case, it was appropriate to grant approval and vesting order sought .

Table of Authorities

Cases considered by *Peter P. Rosinski J.*:

Bank of Montreal v. Sportsclick Inc. (2009), 2009 NSSC 354, 2009 CarswellNS 649 (N.S. S.C.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — referred to

Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — considered

Royal Bank of Canada v. 2M Farms Ltd. (2017), 2017 NSSC 105, 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151 (N.S. S.C.) — referred to

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — considered

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 243(1)(c) — considered
Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

MOTION by receiver for approval and vesting order permitting sale of debtors' assets at auction.

***Peter P. Rosinski J.*:**

Introduction

1 The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

2 Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case [1] .

The authority for vesting orders pursuant to s. 243(1)(c) BIA

3 Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.) and *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105 (N.S. S.C.)), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744 (Ont. C.A.), in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

4 As Justice Blair stated for the court in *Regal*:

> [23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).
>
> [24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:
>
> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of the parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

. . .

[31] **In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] **The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of *Sarnia Band v. Canada* (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.
>
> (Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

. . .

[45] Vesting orders properly registered on title, then — like other conveyances — are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

5 Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.) per Pepall JA:

> **(e) Section 243 of the BIA**
>
> **43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.
>
> ***The Wording and Purpose of s. 243***
>
> **44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so.** As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.
>
> **45** Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:
>
> > 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
> >
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.
>
> **46** "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:
>
> > 243(2) [I]n this Part, ***receiver*** means a person who
> >
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
> >
> > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

. . .

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. **As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain."

6 Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel.*

7 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* [2015 CarswellSask 680 (S.C.C.)] was released one year after Justice Wood made his comments in *Crown Jewel.* Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

8 Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montreal v. Sportsclick Inc.*, 2009 NSSC 354 (N.S. S.C.) at paras 32-33, which the court will eventually apply to all such sales:

Law

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

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

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

> The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
>
> the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para. 40;
>
> the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra*, at page 124, Anderson J. said:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.
>
> > a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co.*, *supra*.

Conclusion

9 As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Motion granted.

Appendix"A"

Supreme Court of Nova Scotia in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

APPROVAL AND VESTING ORDER (AUCTION)

Before the Honourable Justice *Peter P. Rosinski* Chambers:

UPON HEARING Stephen Kingston on behalf of Ernst & Young Inc. (the "Receiver") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "*Debtor*");

AND UPON appearing that appropriate Notice of this Motion has been provided to all interested parties;

AND UPON having read the First Report of the Receiver dated September 11, 2019 (the "*Receiver's First Report*") and all other materials filed in connection with this Motion;

AND UPON the Receiver having negotiated an Auction Agreement (the "*Auction Agreement*") with Mirterra Industrial Appraisers & Auctioneers (the "*Auctioneer*") as more particularly described in the Receiver's First Report;

AND UPON the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "*Alberta Assets*"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

NOW UPON MOTION:

IT IS ORDERED THAT:

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "*Transactions*") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "*Purchased Assets*").

3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "*Purchaser*") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "*Purchaser Bill of Sale*"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Claims*") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.

4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. Notwithstanding:

(a) the pendency of these proceedings;

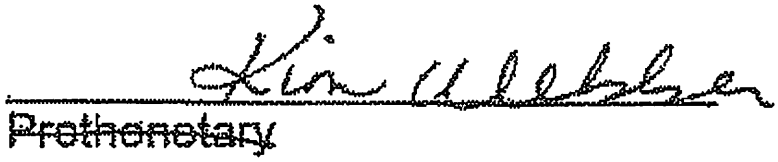
(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this *19* day of September, 2019



Graphic 1

Footnotes

1 Attached hereto as Appendix "A" is the order granted.

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