



NO. S-235306
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA

PETITIONER

AND:

1239583 B.C. LTD.

RESPONDENT

NOTICE OF APPLICATION

Name of applicant: FTI Consulting Canada, Inc. ("**FTI**") in its capacity as court-appointed receiver and receiver-manager (the "**Receiver**") of the assets, properties and undertakings of 1239583 B.C. Ltd. (the "**Debtor**")

To: The attached Service List (**Schedule "A"**)

TAKE NOTICE that an application will be made by the Applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on Tuesday the 24th day of October, 2023 at 9:45 a.m. for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. The Receiver seeks the following relief:
 - (a) an order substantially in the form of the draft order attached hereto as **Schedule "B"**, authorizing the Receiver to cause the Debtor to make a voluntary assignment for the benefit of its creditors pursuant to section 49 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**");
 - (b) authorizing FTI to act as trustee in bankruptcy (the "**Trustee**") in respect of the bankrupt estate of the Debtor; and
 - (c) such further and other relief as may be sought by the Applicant.

PART 2: FACTUAL BASIS

1. The background with respect to the Debtor is more fully set out in the First Affidavit of Erin Welte, sworn on July 24, 2023, and filed in these proceedings (the “**First Welte Affidavit**”).

2. As set out in the First Welte Affidavit, the Debtor owned and operated farm located in Port Alberni, British Columbia. National Bank of Canada (the “**Lender**”) extended various secured credit facilities to the Debtor, and is the primary secured lender to the Debtor.

Petition, filed July 26, 2023, at paras 8-9

3. Pursuant to an Order (the “**Receivership Order**”) granted on September 8, 2023 by the Honourable Justice Francis, FTI was appointed as Receiver over all of the Debtor’s assets, properties and undertakings including its predecessor prior to amalgamation, 1134759 B.C. Ltd.

4. Among other things, the Receivership Order states that:

- (a) the Receiver may, from time to time, apply to this Court for advice and directions in respect of the discharge of its powers and duties (para 35); and
- (b) nothing in the Receivership Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor (para 36).

5. As set out in the First Report of the Receiver, dated October 10, 2023 (the “**First Receiver Report**”), the Receiver’s preliminary review of the books and records of the Debtor indicates that the Debtor has engaged in transactions with related entities that may be reviewable under the BIA (the “**Potentially Reviewable Transactions**”). The Potentially Reviewable Transactions concern payments and transfers made by the Debtor to apparent non-arm’s length parties.

First Receiver Report, at para 12

6. The Receiver is in the process of investigating these payments, but may determine that the Potential Reviewable Transactions constitute, among other things, preferences or transfers at undervalue within the meaning of sections 95 and 96 of the BIA, respectively. Although additional investigations are necessary, applications or actions to set aside the Potentially Reviewable Transactions may result in substantial recoveries for the benefit of the Debtor’s estate.

7. To fully investigate and pursue the Potentially Reviewable Transactions, as well as to preserve any limitations period applicable thereto, the Receiver requires the authority of a trustee in bankruptcy under the BIA.

First Receiver Report, at para 12

PART 3: LEGAL BASIS

A Receiver May Make an Assignment in Bankruptcy

1. Section 49 of the BIA provides, *inter alia*, that an “insolvent person” may make an assignment in bankruptcy. “Insolvent person” is defined under Section 2 of the BIA as follows:

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.

BIA, ss. 49 and 2.

2. In the leading case of *Royal Bank v Sun Squeeze Juices Inc.*, Justice Farley of the Ontario Court of Justice stated there was not “any dispute that this Court has the power to authorize the Court-appointed [receiver-manager] to ... file an assignment in bankruptcy.” Justice Farley’s decision in *Sun Squeeze* was later affirmed by the Ontario Court of Appeal.

Royal Bank v Sun Squeeze Juices Inc., [1994] OJ No 567 [*Sun Squeeze*]

3. Similarly, in *Bank of Montreal v Owen Sound Golf & Country Club Ltd.*, Justice Brown, in concluding that a receiver-manager had the authority to wind-up a debtor company, confirmed that “[i]t is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order”.

Bank of Montreal v Owen Sound Golf & Country Club Ltd., 2012 ONSC 557, at para 7

4. The Alberta Court of Appeal in *Chow v Bresea Resources Ltd.* outlined certain factors to be considered when determining whether a court-appointed receiver should be authorized to cause a debtor company to make an assignment into bankruptcy. The Court specifically stated that:

Where a company is insolvent within the meaning of the *Bankruptcy and Insolvency Act*, and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy.

Chow v Bresea Resources Ltd., 1997 CarswellAlta 1092 at para 13, 209 AR 284

5. When determining whether or not a creditor was able or willing to petition a company into bankruptcy and whether such option should be pursued prior to the Court authorizing its appointee, Justice Farley in *Sun Squeeze*, cited the following from the Manitoba Court of Appeal's decision in *Re Brandon Packers Ltd.*:

Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

In this case the Court directed its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt: but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

Re Brandon Packers Ltd., 33 DLR (2d) 503, at paras 52-53, leave to appeal to SCC refused.

6. In *RBC v Gustin*, the court-appointed receiver (with the support of the debtor's major creditor) requested the authority to make the assignment in bankruptcy as it "wishe[d] to avail itself of the enhanced powers available to a trustee in bankruptcy" in order to better investigate the debtor's previous transactions and activities. The Ontario Superior Court authorized the receiver to assign the debtor into bankruptcy for this purpose, notwithstanding that the debtor's major creditor was seemingly available to petition the debtor into bankruptcy.

RBC v Gustin, 2019 ONSC 5370, at para 8

The Debtor is an Insolvent Person within the meaning of the BIA

7. The Debtor, which is not currently bankrupt, is unable to meet their obligations, such as the indebtedness owed to the Lender, as they generally become due. Furthermore, the Receiver was appointed pursuant to section 243 of the BIA which contemplates that the appointment of a receiver, under section 243, is with respect to an insolvent person.

First Receiver Report, at para 13

It is appropriate, in the current circumstances, to authorize the Receiver to cause the Debtor to make an assignment into Bankruptcy

8. It is appropriate that the Receiver be authorized to cause the Debtor to make an assignment for the benefit of their creditors and stakeholders. Such an assignment will allow for the Potentially Reviewable Transactions, which may be reviewable transactions, and/or constitute transfers at undervalue, preferences, or other impeachable conveyances in a bankruptcy, to be pursued by the trustee in bankruptcy, for the benefit of the Debtor's estate.

9. The bankruptcy of the Debtor will allow the Receiver, as Trustee, to pursue any preferences and transactions at undervalue, to investigate any impeachable transactions and the unauthorized accounts, and will crystallize any such claims as well as preserve any limitations period applicable thereto, for the benefit of the Debtor's estate.

10. The facts in the matter at hand are similar to those in *Sun Squeeze*. The Court in *Sun Squeeze* in authorizing a court-appointed receiver to cause a debtor company to make an assignment in bankruptcy, stated, in support of granting such authority, that such an assignment would allow:

the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable.

Sun Squeeze, at para 14

11. Further, the bankruptcy of the Debtor will allow for the ordinary administration and adjudication of any claims against the Debtor and facilitate the administration and resolution of any priority disputes.

Conclusion

12. In the instant case, and as detailed in the First Receiver Report, this Court should authorize the Receiver to assign the Debtor into bankruptcy because:

- (a) the Debtor is unable to meet its obligations as they generally become due, and is an “insolvent person” within the meaning of the BIA;
- (b) the Receiver requires the additional powers of a trustee under the BIA to carry-out further investigations, and any applications or actions, in respect of the Potentially Reviewable Transactions;
- (c) the investigations, and any applications or actions contemplated by the Receiver in respect of the Potentially Reviewable Transactions, are in the interests of stakeholders as a whole, as they may result in material recoveries to the estate of the Debtor;
- (d) the Debtor’s primary secured creditor, the Lender, supports the Receiver pursuing the potentially reviewable transactions through bankruptcy proceedings; and
- (e) FTI has consented to act as Trustee and there is no conflict by FTI acting both as Receiver and Trustee.

13. For these reasons, the Receiver respectfully requests that the Receiver be authorized and directed to assign the Debtor into bankruptcy in the manner sought in this Application.

PART 4: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Erin Welte, made July 23, 2023;
- 2. Petition of National Bank of Canada, filed July 26, 2023;

3. First Report of FTI Consulting Canada Inc., in its capacity as receiver-manager of 1239583 B.C. Ltd. dated October 10, 2023; and
4. such further and other materials as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take thirty (30) minutes.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an Application Response in Form 33
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

DATED: October 11, 2023



Signature of Lawyer for the Applicant
McCarthy Tétrault LLP
(H. Lance Williams and Ashley Bowron)

To be completed by the Court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

with the following variations and additional terms:

Dated:

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above

Schedule "A"

NO. S-235306
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA

PETITIONER

AND:

1239583 B.C. LTD.

RESPONDENT

SERVICE LIST

<p>Blake, Cassels & Graydon LLP Suite 2600, Three Bentall Centre 595 Burrard Street, PO Box 49314 Vancouver, BC V7X 1L3</p> <p>Attention: Peter L. Rubin Danny Uquhart</p> <p>Email: peter.rubin@blakes.com danny.urquhart@blakes.com</p> <p><i>Counsel to the Petitioner, National Bank of Canada</i></p>	<p>FTI Consulting Canada Inc. Suite 1450, P.O. Box 10089 701 West Georgia Street Vancouver, BC V7Y 1B6</p> <p>Attention: Tom Powell Huw Parks Robert Kleebaum</p> <p>Email: tom.powell@fticonsulting.com huw.parks@fticonsulting.com robert.kleebaum@fticonsulting.com</p> <p><i>Receiver</i></p>
<p>McCarthy Tétrault LLP Suite 2400, 745 Thurlow Street Vancouver, BC V6E 0C5</p> <p>Attention: H. Lance Williams Ashley Bowron</p> <p>Email: lwilliams@mccarthy.ca abowron@mccarthy.ca sdanielisz@mccarthy.ca</p> <p><i>Counsel to the Receiver</i></p>	<p>Kubota Canada Ltd. 1155 Kubota Drive Pickering, ON L1X 0H4</p> <p>Attention: Sharon Novalski Legal Credit and Recovery Specialist</p> <p>Email: sharon.novalski@kubota.com</p>

Deol Lawyers

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Schedule "B"

NO. S-235306
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA

PETITIONER

AND:

1239583 B.C. LTD.

RESPONDENT

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE

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•DAY, THE • DAY OF
OCTOBER, 2023

ON THE APPLICATION of FTI Consulting, Inc. ("**FTI**") in its capacity as the court-appointed receiver and receiver-manager (the "**Receiver**") of 1239583 B.C. Ltd. (the "**Debtor**"), coming on for hearing this day at 800 Smithe Street, Vancouver, British Columbia.

AND ON READING First Report of the Receiver, dated October 10, 2023, the Affidavit #1 of Erin Welte made July 24, 2023, AND ON HEARING Ashley Bowron, counsel for the Receiver, and no one else appearing.

THIS COURT ORDERS AND DECLARES that:

ASSIGNMENT IN BANKRUPTCY

1. The Receiver is hereby authorized and directed to file an assignment in bankruptcy on behalf of the Debtor, pursuant to Section 49 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the "**BIA**").
2. In conjunction with the Debtor's assignment in bankruptcy, FTI is hereby authorized to act as the trustee in bankruptcy (the "**Trustee**") of the Debtor in accordance with the provisions of the BIA.

MISCELLANEOUS

3. Nothing in this Order shall prevent or limit the Receiver from exercising its powers and duties as Receiver.
4. The costs of and incidental to this Application are to be paid to the Receiver out of the assets of the Debtor's estate.
5. Service of this Order shall be deemed good and sufficient by posting a copy of this Order to the Receiver's website and delivery to the service list, each maintained in accordance with the order pronounced in these proceedings on September 8, 2023 by the Honourable Justice Francis.
6. Endorsement of this Order by counsel appearing on this application other than the Petitioner is dispensed with.

THE FOLLOWING PARTIES APPROVE OF THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Lawyer for FTI Consulting, Inc.
McCarthy Tétrault LLP
(H. Lance Williams and Ashley Bowron)

BY THE COURT

DISTRICT REGISTRAR

NO. S-235306
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA
PETITIONER

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ORDER MADE AFTER APPLICATION

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****FILING AGENT: HL LITIGATION****