Court File No. CV-23-00710413-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

B E T W E E N:

MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY LENDING FUND (UMINN) LP)

Applicant

and

TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS INC., TRADEXPRESS AUTO CANADA INC., TRADE X FUND GP INC., TRADE X LP FUND I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. and TX OPS CANADA CORPORATION

Respondents

BOOK OF AUTHORITIES OF THE APPLICANT

December 8, 2023

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The Proposed Receiver

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LIST OF AUTHORITIES

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CITATION: Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007
COURT FILE NO.: CV-10-9029-00CL
DATE: 20110215

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BANK OF MONTREAL, Applicant

AND:

CARNIVAL NATIONAL LEASING LIMITED and CARNIVAL AUTOMOBILES LIMITED, Respondents

BEFORE: Newbould J.

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

HEARD: February 11, 2011

ENDORSEMENT

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

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

of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

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

Events leading to demand for payment

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

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

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

[7] Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

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

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

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

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

[12] Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles

financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

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

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

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

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

justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

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

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

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

[19] In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million

on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

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

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

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

(b) Court appointed receiver

[23] Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

[24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that

permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

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

[26] *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in

Anderson v. Hunking 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd*. 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

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

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

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

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

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

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in Royal Bank v. Zutphen Brothers, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
> …
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

[30] This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997) 32 O.R. (3d0 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create

a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

[31] Carnival relies on a decision in *Royal Bank of Canada v. Boussoulas* [2010] O.J. No. 3611, in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

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

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

[34] It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold

out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

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

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

consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

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

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

_____

Newbould J.

DATE: February 15, 2011

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.
2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:	)	
	)	
BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for the Applicants
Applicants	)	
– and –	)	
THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP	)	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	
AND BEWTWEEN	)	
BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for BCIMC Construction Fund Corporation
Applicants	)	*Virginie Gauthier, Allan Merskey and Peter Tae-Min Choi* counsel for Otera Capital Inc.
- **and** -	)	

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP	)))	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	See Schedule A for complete list of counsel

Heard: March 27, 2020

KOEHNEN J.

Overview

[1] This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

[3] At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

[4] In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact

on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

[5] The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

[6] The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

[7] The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

[8] The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

[9] The Debtors are special-purpose, project-level entities for the development of each of the three projects.

[10] Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

[11] Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

[12] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

[13] The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of $172,616,007 and $37,450,668 and a non-revolving letter of credit facility of up to $3,000,000.

[14] As of March 2, 2020, the Receivership Applicants had advanced $107,668,017.82 under the Clover Facilities. In addition, $3,000,000 in letters of credit have been extended. The

Receivership Applicants also extended a mezzanine mortgage on Clover, with $34,035,878.69 in principal outstanding.

[15] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[16] There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

(b) The Halo Project

[17] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

[18] The Halo Commitment Letter provides for two non-revolving construction loans in amounts of $156,850,7747 and $29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to $2,000,000.

[19] As of March 2, 2020, the Receivership Applicants have advanced $47,429,211.83 in principal. In addition, $1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with $25,725,159.27 in principal outstanding.

[20] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[21] There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

(c) The Yorkville Project

[22] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

[23] The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to $571,300,000 and $83,000,000, respectively.

[24] As of March 2, 2020, the Receivership Applicants had advanced $122,432,764.85 under the Facilities. In addition, $79,592,744.24 in letters of credit have been extended.

[25] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

[26] There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

[27] There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately $38,000,000 registered against the properties.

B. Deterioration of the Relationship

[28] In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

[29] First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

[30] Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately $10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

[31] Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately $ X of increased costs were hidden in this manner.

[32] In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was

recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

[33] Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over $ X in discounted sales fall into this category.

[34] The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

[35] Cost overruns on the three projects come to more than $ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately $ X were construction costs that were hidden from the lenders. The amount hidden on Clover was $ X; on Halo $ X and on 33 Yorkville, $ X.

[36] Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is $ X over budget. The Debtors say PWC's number is overstated by $ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by $ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

[37] In addition to the foregoing breaches, approximately $3.5 million in interest payments to the Receivership Applicants are overdue.

[38] On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

[39] The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

[40] Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the

allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

[41] In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

[42] A receiver may be appointed where it is just and convenient equitable to do so.

[43] Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27.

[44] The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J.(Commercial List) at para. 20.

[45] In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

(a) The lenders' security is at risk of deteriorating;

(b) There is a need to stabilize and preserve the debtors' business;

(c) Loss of confidence in the debtors' management;

(d) Positions and interests of other creditors.

[46] All four factors apply here.

[47] **Security at risk of deteriorating**: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The

lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

[48] **The need to stabilize the business**: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

[49] **Loss of confidence in management**: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

[50] **Position and interests of other creditors**: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

[51] In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

[52] The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

[53] The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

[54] The share sale to Concord would close on payment of one dollar. An additional $38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

(a) Court approval of CCAA protection for Clover and Halo.

(b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo

(c) Completion of construction financing either with the existing lenders or new lenders.

[55] As part of the CCAA process Concord states that it will

(a) provide $20,000,000 of debtor-in-possession financing at a rate of 5%. $7,000,000 would be advanced during the first 10 days.

(b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

[56] The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

[57] With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

[58] Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

[59] I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

[60] In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc*., 2014 ONSC 2781 at para. 61.

[61] The factors addressed in argument relevant to this exercise were as follows:

(a) Payment of the Receivership Applicants

(b) Reputational damage

(c) Preservation of employment

(d) Speed of the process

(e) Protection of all stakeholders

(f) Cost

(g) Nature of the business

(a) Payment of the Receivership Applicants

[62] During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

[63] It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

[64] Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the CCAA proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

[65] Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

[66] The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

> We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

[67] As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants.

Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

[68] Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

[69] From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

[70] I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

[71] At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

[72] The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

[73] One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

[74] This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

[75] In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

[76] The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

[77] The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

[78] There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

[79] The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

[80] The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

[81] As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

[82] The Debtors submit that the CCAA is faster than a receivership.

[83] During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

[84] In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financer would probably want to see a certain percentage of units sold before committing to financing.

[85] It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

[86] If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

[87] The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive $38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive $38,000,000 in cash.

[88] There has been no explanation in the materials before me to justify the receipt of $38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

[89] In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

[90] Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of "discount" and of "current market value" are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

(f) Costs

[91] The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC's fees. Regardless of whether Concord does or does not charge fees, the risk of PWC's fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

[92] The costs of financing a receivership or a CCAA proceeding are similar. Concord has offered a DIP loan of $20,000,000 at 5% interest. The Receivership Applicants have offered a loan of $29,000,000 at 5% interest.

[93] CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

[94] Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put $38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

[95] During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

[96] In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

[97] More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

[98] In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., 2008 BCCA 327 the British Columbia Court of Appeal stated at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[99] Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

[100] The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61*; Dondeb Inc., Re*, 2012 ONSC 6087 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), at para. 17.

[101] The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to

compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

[102] As Justice Kent pointed out in *Octagon*, as para 17,

> …if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[103] Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

[104] Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

[105] In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

[106] The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

[107] By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

[108] In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier.

Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

[109] More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

[110] The Debtors also point to *Re 2607380 Ontario Inc.,* a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that *260* is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

[111] In my view *Re 2607380 Ontario Inc*. does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.,* two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

[112] With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

[113] For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

[114] For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

_____

Koehnen J.

Released: March 30, 2020

SCHEDULE A – COUNSEL SLIP

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation

Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.

Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents

Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.

Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Haddon Murray for Tarion Warranty Corporation

David Gruber for Concord Group

Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc,, Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION

Applicants

– and –

THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP

Respondents

AND BEWTWEEN

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.

Applicants

- and -

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

REASONS FOR JUDGMENT

Koehnen, J.

Released: March 30, 2020

CITATION: Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, 2022 ONSC 6186
COURT FILE NO.: CV-22-678808-00CL
DATE: 20221028

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Canadian Equipment Finance and Leasing Inc., Applicant

AND:

The Hypoint Company Limited, 2618905 Ontario Limited, 1618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, Respondents

BEFORE: Osborne J.

COUNSEL: *R. Brendan Bissell and Joel Turgeon*, for the Applicant

Jonathan Rosenstein, for the Mortgagees
Domenico Magisano, for the Proposed Receiver, Albert Gelman Inc.

HEARD: September 2, 2022

ENDORSEMENT

The Issue

[1] What happens when rights under the *Mortgages Act* and the *Personal Property Security Act* intersect? As is often the case, a business is carried on through two related entities. One owns the real estate and one operates the business. One creditor finances the purchase of equipment and has a security interest. Another creditor finances the purchase of the real property and has conventional mortgage security. The security of each is over a different asset, and the result is generally straightforward. However, when the purchased equipment is affixed to the property, and there is a dispute about whether and how it can be removed and whether such removal will cause a diminution in the value of both the equipment and the real property, the question is more complex: who has rights of enforcement, and over what assets?

[2] The Applicant, Canadian Equipment Finance and Leasing Inc. ["CEF"] brings this Application for a receivership order, judgment and interest. On this motion within the Application, it seeks only the appointment of a receiver as more particularly described below.

[3] CEF seeks the appointment of Albert Gelman Inc. as receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* ["CJA"], over all of the assets and property of the Respondents, The Hypoint Company Limited ["Hypoint"] and 2618909 Ontario Limited ["909"] that was used in relation to a business carried on by either or both of them.

[4] The Mortgagees [as defined below] do not oppose the appointment of a receiver over the assets of Hypoint pledged as collateral for CEF's equipment loan, but oppose the appointment of a receiver over the assets of 909, the related entity that owns the real estate against title to which they hold mortgage security.

[5] The mortgagees do however concede that this Court has the discretion to appoint a receiver over the assets of both entities pursuant to section 101 of the CJA and submit in the alternative that if a receiver is appointed, that receiver be the firm nominated by them, MSI Spergel Inc. Each proposed receiver has filed a consent to act in that court-appointed capacity.

[6] Having reviewed all of the evidence filed by the parties and having heard the submissions of their counsel, I have concluded that it is just and convenient to appoint a receiver over all of the assets of both related debtors, being Hypoint and 909 pursuant to section 101 of the CJA. I appoint the firm nominated by the mortgagees, MSI Spergel Inc., as that Court-appointed receiver.

The Business, The Loans and The Security

[7] The assets and property of Hypoint include HVAC equipment installed at the premises from which the business of the Respondents was conducted at 25 Morrow Ave., Toronto [the "Premises"]. The Premises was essentially a custom-built cannabis production facility.

[8] CEF and the Respondent, Hypoint, entered into a loan and security agreement [the "Agreement"] made as of June 1, 2020. There is no dispute that CEF has first ranking security over that HVAC equipment [the "Collateral"] and, in the circumstances, is entitled to the appointment of a receiver over same.

[9] There is, however, a corollary dispute between the parties over whether the equipment pledged as Collateral includes, in addition to the physical HVAC units affixed to the exterior of the building on the Premises, electronic control units located within the building.

[10] The main dispute arises because CEF is seeking the appointment over the Premises as well as the Collateral, with the intent to sell the Premises with the HVAC equipment still installed, through a single sales process approved and overseen by a receiver under the direction of this Court.

[11] While all parties are in agreement that the Premises ought to be sold, the mortgagees who hold registered mortgage security against title to the Premises argue that the real estate itself is owned by the Respondent 909. Those mortgagees, including the first mortgagee Bruce Lubelsky and the second mortgagees Delrin Investments Inc. and three other individuals, [collectively, the "Mortgagees"] hold registered mortgage interests against title to the Premises.

[12] Those Mortgagees argue that, while 909 is a related entity to Hypoint, it is not a party to the loan and security agreement with CEF, and that only the HVAC equipment was pledged as Collateral, all with the result that CEF has no legal right to the appointment of a receiver of property owned by any party other than that belonging to the debtor, Hypoint.

[13] The Mortgagees do not oppose the appointment of a receiver over the HVAC equipment only, nor do they oppose CEF or a receiver acting on its behalf entering onto the premises to remove the HVAC equipment [in accordance with section 35 of the PPSA], subject to determination or resolution of the ancillary dispute referred to above about whether the control units inside the Premises are properly considered to be part of the Collateral.

[14] I observe that 909 guaranteed the debt of Hypoint to CEF, although CEF does not seek in its Notice of Application judgment on that guarantee. Accordingly, for the purposes of this motion, that guarantee is of less relevance since judgment based on that guarantee is not the basis relied upon for the appointment of a receiver.

[15] While Hypoint defaulted on the equipment loan in respect of the HVAC to CEF, 909 defaulted on the mortgages. The equipment loan was in the approximate amount of $780,000. The mortgages were in the approximate amount of $5.3 million.

[16] CEF argues that the practical effect of the position of the Mortgagees is that if CEF enforces its rights only as against the Collateral, it will have to remove and sell separately that Collateral which will devalue both the Collateral itself as well as the Premises, to the detriment of all stakeholders, since proceeds and recovery will be maximized for all only if the Premises are sold as a turnkey cannabis production facility, with the HVAC still installed.

[17] CEF argues that a receiver can then resolve disputes over competing priorities and/or entitlement to proceeds of sale, with the later assistance of this Court if necessary, none of which needs to be decided on this motion. CEF notes that the Mortgagees originally cooperated with the Applicant regarding a potential sale transaction, but have now advised that that potential sale was not completed, and the Mortgagees are not prepared to cooperate in an *en masse* sale now.

[18] The Mortgagees take the position that they are entitled, by the terms of their mortgage security and the *Mortgages Act*, to enforce their mortgages by selling the premises under power of sale. That is precisely the fragmented sales process to which CEF objects.

[19] This matter was before the Court on June 29, 2022, on which date Justice Gilmore authorized the appointment of a receiver over the HVAC equipment, although CEF has not proceeded to have a receiver appointed pursuant to that order. The Mortgagees have now delivered notices of sale following on the mortgage defaults. There were discussions and, for a time, some level of cooperation between and among the parties with respect to a potential sale of the Premises, including the affixed Collateral.

[20] When that potential sales transaction collapsed, however, the Mortgagees decided to proceed with a more conventional sale by way of obtaining fair market value appraisals and

retaining a commercial real estate brokerage to market the properties. They have begun that process.

[21] While they maintain their primary position that no receiver should be appointed over the property of 909, the Mortgagees do concede that the Court has the discretionary ability to appoint such a receiver pursuant to section 101 of the *Courts of Justice Act*. If the Court determines to exercise that discretion in appoint a receiver, the Mortgagees take the position that the receiver should be the firm nominated by them.

Analysis

[22] The test for appointing a receiver, whether under the BIA or the CJA, is whether it is just and convenient to do so. The overarching objective is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors.

[23] In making a determination about whether it is, in the circumstances of a particular case, just and convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258).

[24] Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 7101 at para. 27).

[25] In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

(a) whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

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

(c) the nature of the property;

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

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

(f) the balance of convenience to the parties;

(g) the fact that the creditor has a right to appointment under the loan documentation;

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

(i) the principle that the appointment of a receiver should be granted cautiously;

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

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

(l) the conduct of the parties;

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

(n) the cost to the parties;

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

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

[26] It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted. [See *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras. 28-29].

[27] In the present case, CEF's submission that this Court should appoint its proposed receiver over the assets of 909 pursuant to section 243 of the BIA fails, in my view, for the simple fact that, as submitted by the Mortgagees, 909 is not a party to the CEF credit agreement and nor is CEF a creditor of 909, contingent or otherwise.

[28] CEF is not a secured creditor of 909. CEF has no contractual right to the appointment of a receiver over the assets of 909 pursuant to any agreement as it does with respect to Hypoint. As noted above, it similarly lacks any rights as a judgment creditor of 909, since it has not commenced any claim to recover under the guarantee, let alone obtained a judgment.

[29] I am satisfied, however, that it is just and convenient to appoint a receiver under section 101 of the CJA.

[30] 909 and Hypoint are related entities operating the same business out of the same Premises. The Premises, including the Collateral, was custom-built for the operation of a cannabis production facility.

[31] Both CEF and the Mortgagees agree that the Premises and the Collateral should be sold. There is a dispute about whether the Collateral is technically a “fixture” to the Premises, and the factual dispute about the cost of removing the Collateral and the extent of any consequent physical damage to, or diminution in the value of, either or both of the Premises and the Collateral itself. Those issues are for another day. Whether, how, and on what terms [i.e., together or separately] those assets should be sold can and should be determined by this Court following on a report from the receiver with respect to a proposed sales process and if the process gets that far, a sale approval motion.

[32] However, in circumstances where all parties agreed that all of the assets of both Hypoint and 909 should be sold to maximize recovery for all creditors, but cannot agree on the process pursuant to which that should be undertaken with the result that the entire process is stalled, I am satisfied that this represents a classic example of a situation in which it is just and convenient to appoint a receiver.

[33] The receiver is a court-appointed officer. It has the obligation to design and run a process with a view to monetizing the assets of the debtor for the benefit of all creditors. Further delay is in the interest of no one. There is no activity at the Premises, electricity has been cut off for a significant period of time, and winter is coming. Proof of insurance was requested by CEF and has not been provided.

[34] I am concerned about the real and immediate risk of dissipation of assets and diminution in value of those assets, with the result that I am satisfied that it is important and beneficial to all creditors to accelerate the process. The fair and transparent way to do that is to have a court-appointed receiver run the process. Order needs to be brought to the chaos, and the status quo of competing processes cannot continue unsupervised.

[35] To do otherwise would be to permit CEF to enforce against the Collateral only and the Mortgagees to enforce as against the real property. This has the potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value.

[36] Moreover, nothing in the appointment of a receiver now, over the assets of Hypoint and 909 together, affects or diminishes the ability of the receiver appointed to consider whether in fact recovery will be maximized by a sale of the Collateral and the Premises separately as opposed to together. Even if that were to occur, however, it can occur under a Court-supervised process, by a court-appointed receiver with obligations to all stakeholders, in an orderly and efficient manner.

[37] I should be clear that in appointing a receiver, I am not concluding that the rights of CEF defeat or somehow rank in priority to the rights of the Mortgagees. Rather, I am expressly reserving those rights for another day. In my view, that is the time for a determination if necessary of the relative priority of the competing interests here and whether, for example, the interests of CEF as a secured party of the Collateral are subordinated to the rights of the Mortgagees as a result of the Collateral having become a Fixture to real property [i.e., the Premises].

[38] As the Mortgagees concede in their factum [see paragraph 86], these conflicting interests will be academic in the event that the proceeds of sale of the "Premises" - whenever and however that occurs - are sufficient to satisfy both the Mortgagees and CEF.

[39] I also observe that there are other unsecured creditors whose rights may be affected by the manner in which a sale is undertaken. I am satisfied that their interests also, are best protected by a fair and transparent process run by a court-appointed receiver rather than any one party individually.

[40] The objective of the appointment of the receiver is to maximize proceeds. If, as all parties agree should occur, the assets of Hypoint and 909 are sold, Court approval of that sale as well, presumably, as the relative rights and priorities over the net proceeds, can be determined. All other issues, including costs of the receivership and who should bear those costs or any proportion thereof, can also be determined.

[41] As to who the court-appointed receiver should be, both firms nominated here are well-known to this Court, and are respected in this area. There is no reason that either would not be appropriate. On balance, however, and given all of the circumstances, including the practical fact that the appointment of a receiver will deprive the Mortgagees of their right to power of sale, as well as the relative debts owed to the Mortgagees and CEF, I appoint MSI Spergel as nominated by the Mortgagees.

[42] Counsel for the Mortgagees is directed to provide to the Court a form of receivership order consistent with these Reasons. If the parties cannot agree on the form of that order, they may schedule a brief attendance before me to settle the terms of that order.

[43] Costs of this motion are reserved to the judge ultimately determining, if necessary, the relative priority to net proceeds of sale of the assets.

_____

Osborne J.

Date: October 28, 2022

See para. 18

CITATION: **Canadian Tire Corporation, Ltd v Mark Healy et al**, 2011 ONSC 4616
COURT FILE NO.: CV-119250-00CL
DATE: 20110729

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN TIRE CORPORATION, LIMITED

Applicant

- and -

MARK HEALY and MARK V. HEALY SALES & DISTRIBUTION INC.

Respondents

BEFORE: Newbould J.

COUNSEL: William J. Burden and John N. Birch, for the Applicant
William C. McDowell and Trent Morris, for the Respondents
Daniel Murdoch, for Franchise Trust and CIBC
Kenneth Rosenberg, for Ernst & Young Inc.

HEARD: July 28, 2011

Newbould J.

[1] In this application, Canadian Tire Corporation, Limited ("Canadian Tire") seeks the appointment of Ernst & Young Inc. as a fully-empowered receiver of Mark V. Healy Sales & Distribution Inc. ("Healy Inc.") for the purpose of taking control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. Franchise Trust and CIBC, creditors of Healy Inc., support the application.

[2] The application was heard on July 38, 2011, and at the conclusion of the hearing I ordered the appointment of Ernst & Young Inc. as receiver of Healy Inc. for reasons to follow. These are my reasons.

[3] Healy Inc. is an Associate Dealer of Canadian Tire and operates Canadian Tire Store 152 located in Mississauga, Ontario. The relationship between Healy Inc. and Canada is the subject of a Dealer Contract, initially signed by Mr. Healy and then assigned to Healy Inc.

[4] Canadian Tire acts as the primary supplier of inventory to dealers. It also leases store sites to dealers. Canadian Tire's relationship with dealers is governed by a Dealer Contract which each dealer executes in favour of Canadian Tire.

[5] Mark Healy has been a Canadian Tire dealer since October 4, 1992. He executed various Dealer Contracts, each of which was assigned to Healy Inc., the corporation that operates Store 152. In or around, July 1995, Mr. Healy commenced operating the Canadian Tire store in Alliston, Ontario where he remained until July 13, 2000. In July 2000, Mr. Healy then became the dealer at Store 429 in Oakville, Ontario. He remained at Store 429 until August 2, 2006. On August 10, 2006, Mr. Healy became the dealer at Store 152 in Mississauga and he remains the dealer of Store 152 today, although Canadian Tire delivered a notice on June 1, 2011 terminating the Dealer Contract. Healy Inc. has delivered a notice of arbitration to have the termination declared invalid.

[6] In December 2007, Healy Inc. commenced an arbitral proceeding in accordance with the Dealer Contract. The arbitral proceeding related only to alleged damages suffered by Healy Inc. in relation to Store 429, the Oakville store that Healy Inc. operated from 2000 to 2006. No claim was made in respect of Healy Inc.'s current Store 152. The trial of that proceeding before the arbitrator, Graeme Mew, began on May 26, 2010 and ran for 42 days to December 17, 2010. Healy Inc. claimed damages of $40 million. The arbitrator released his award on March 23, 2011 in which he dismissed all of the claims except one claim in which he held Canadian Tire liable for $250,000 for breach of a duty of good faith. Mr. Healy and Healy Inc. have appealed the

award, which is to be heard on September 15 and 16, 2011. Mr. McDowell says that if entirely successful, Healy Inc. could realistically be entitled to an award of between $3 and $5 million.

[7] On October 22, 2010, during the course of the arbitration, the arbitrator appointed Ernst & Young Inc. as receiver of Healy Inc., with the power to, inter alia,

(i) attend at the store premises;

(ii) review receipts, disbursements, revenue and expenses;

(iii) exercise control over certain financial transactions such as manual sales and returns and inventory adjustments;

(iv) complete a store inventory count; and

(v) otherwise monitor the business.

[8] In his reasons appointing E&Y as a monitoring receiver, the arbitrator noted that "CTC's proposal is for a soft receivership to review, assess, monitor and preserve the assets of the store pending the outcome of the arbitral trial".

[9] Canadian Tire now says that since the appointment of E&Y as a monitoring receiver on October 22, 2010, there has been a significant change in circumstances which now require a receiver with full powers to take control of the business and assets of Healy Inc. and to operate the store.

[10] In order to run his business, Healy Inc., like other dealers, obtains credit from the following three main lenders, all of which are secured creditors, and each of which provides credit to Healy Inc. for different purposes:

(i) Franchise Trust, guaranteed by Canadian Tire;

(ii) CIBC as the operating lender, guaranteed by Canadian Tire; and

(iii) Canadian Tire.

[11] Canadian Tire holds security from Healy Inc., including a general security agreement, which gives it the right to demand payment upon a default.

[12] Because of the losses suffered at Store 152, Healy Inc. has, since 2006, had a bulge facility in place with CIBC over and above the CIBC operating credit line. That bulge facility is currently $3.9 million. Canadian Tire has guaranteed this bulge facility.

[13] Healy Inc. generates more than $23 million in annual retail sales. It has had substantial losses over the past 10 years, both at Healy Inc.'s previous store in Oakville and at its current Store 152. Overall, from the time that Healy Inc. assumed Store 429 until August 31, 2006, shortly after moving to Store 152, it experienced total net losses of $1,702,198. Since the time that Healy Inc. took over its current Store 152, operational losses have been $3,363,775. This sustained history of losses has caused Healy Inc. to accumulate an ever-increasing dealer equity deficit (i.e., negative retained earnings).

[14] On April 20, 2011, Canadian Tire demanded payment by May 2, 2011 of $1,692,218.68 for outstanding flex payments owed by Healy Inc. for inventory purchases which were in default. Payment has not been made. That outstanding amount for overdue inventory payments owed to Canadian Tire is now $2.3 million.

[15] The letter also demanded that $741,442 be re-injected into Healy Inc by May 2, 2011. These amounts represented a cumulative overdraw by Mr. Healy from the business as of the end of fiscal 2010 over and above the amounts permitted under the Dealer Contract. That money has not been injected into Healy Inc.

[16] As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over $12.9 million, consisting of the following items:

(a) Canadian Tire's guarantee of the current CIBC $3.9 million bulge excess credit facility, which is not supported by inventory, fixed assets, or any other security;

(b) Healy's defaulted debt (as of July 12) to Canadian Tire for inventory, rent, and other flex charges in the amount of $3,228,629; and

(c) Canadian Tire's exposure of $5,831,331 in respect of the Franchise Trust Loan, which Canadian Tire is required to purchase from the Franchise Trust if such loan becomes a Defaulted Loan.

[17] The GSA held by Canadian Tire entitles it upon the occurrence of a demand that has not been cured to appoint a receiver or to apply to a court for the appointment of a receiver. Although more than three months have passed since demand was made, Healy Inc. has not cured the defaults and has committed four further payment defaults. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments totalling $612,769.92 when its bank dishonoured payment because of insufficient funds.

[18] The appointment of a receiver under section 101 of the *Courts of Justice Act* or section 243 of the *BIA* is a matter of discretion. This is not a case such as *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 or *Anderson v. Hunking*, 2010 ONSC 4008 in which an applicant for an interim receiving order had no security to enforce and was effectively seeking execution before any right to any payment was established. I discussed this in *Bank of Montreal v. Carnival National Leasing Limited* (2011), 74 C.B.R. (5th) 300 and distinguished such a situation from *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274. In that case Blair J., as he then was, stated:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

[19] Healy Inc.'s primary argument is that if it is successful on the appeal from the arbitrator's award, it stands to collect somewhere between $3 and $5 million. It is said that this would be sufficient to pay off what had been demanded and Mr. Healy would be in a better position to

build up the business and improve its balance sheet. Mr. McDowell put it that the prospect of the appeal being successful was not remote.

[20] It is not for me to determine whether the appeal will succeed. It is to be noted, however, that the arbitration agreement provides for an appeal on a question of law only. There are two bows to the quiver of Healy Inc. The first is an allegation that a finding that Canadian Tire was not liable for negligent misrepresentation was made on an incorrect test, and an allegation that the amount of damages that the arbitrator said he would have awarded had he found liability for misrepresentation, being $1.6 million, was based on a misapprehension of the evidence.

[21] Normally, when a demand for payment has not been made, some reasonable time for payment is permitted before a receiver will be appointed by a court, and hopes of future financing falling into place will not be sufficient beyond what that reasonable time is. I dealt with this in *Bank of Montreal v. Carnival National Leasing Limited, supra,*:

> 13. On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd*. (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. Ct.) per Farley J.:
>
> > 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

[22] If difficulties in obtaining replacement financing do not permit an open ended time for repayment beyond days, not weeks, I fail to see how the hopes of winning an arbitration appeal can put a debtor on any stronger basis. The amounts demanded have been outstanding for 3 months.

[23] As things now stand, Healy Inc. has been unable to pay inventory, defaulting on payments when its bank dishonoured cheques because of insufficient funds. On his cross-

examination, Mr. Healy said that if the bank would not let him draw on his credit line, he would not be ordering any more inventory but would operate his business until he ran out of inventory. This is not a satisfactory situation. In spite of the $2.3 million owed to Canadian Tire for inventory which is in default, there is a further $1.5 that will become due for inventory based on May 30, 2011 figures.

[24] Canadian Tire contends that if Healy Inc. is unable to pay for inventory when due, Canadian Tire will face the untenable choice between continuing to ship inventory to the store without any reasonable likelihood of payment and insisting on C.O.D. terms for inventory. In the first case, Canadian Tire would be significantly increasing its financial exposure. In the second case, Healy Inc. would likely stop ordering inventory, stock would be depleted, customer needs for products would go unfulfilled, and the Canadian Tire brand and reputation would suffer. I accept the concern of Canadian Tire as valid.

[25] For a number of reasons, I do not view Mr. Healy as a strong candidate for equitable consideration.

[26] Pursuant to an agreement dated February 8, 2010 between Mr. Healy, Healy Inc. and Canadian Tire, it was agreed that Canadian Tire would pre-approve and co-sign all cheques or other bank disbursement of any kind. The purpose of such control was to ensure that Healy Inc.'s funds were used only for proper business purposes relating to the store and to prevent further unauthorized transactions, including dealer over-draws. In April 2010, Mr. Healy breached the February 8 agreement by transferring $82,425.83 from the Healy Inc. business account to the personal credit card accounts of Mr. Healy and his family members. He circumvented the February 8 agreement by making such payments through internet banking, rather than issuing a cheque which Canadian Tire would have to review and sign. This was raised in the arbitration and Mr. Healy replaced the funds. Mr. Healy also undertook transactions involving his family trust during fiscal 2010 when he made payments from Store 152 in the amount of $178,215 allegedly on account of his children's educational expenses.

[27] It appears that in 2011 Mr. Healy again breached the February 8 agreement when he took $60,000 of money collected from daily sales for Store 152 on April 21 and 23, 2011 and used them to pay for legal fees, which required the approval of Canadian Tire. This came to light when Store 152 provided Canadian Tire with daily sales reports and bank deposit receipts. The missing $60,000 appeared in Healy Inc.'s bank account on April 27, 2011 after Canadian Tire's counsel wrote to Healy's counsel to seek a full explanation about the $60,000 cash diversion.

[28] It appears that Mr. Healy has breached the Dealer Contract by the intentional overstatement of invested equity through a temporary injection of funds. In his award, the arbitrator made the following findings of fact:

> (a) "Healy repeatedly breached his contractual obligations under Policy 26.";
>
> (b) "Pursuant to Policy 26, the intentional overstatement of invested equity by a dealer through temporary injection is considered to be a non-curable event of default under section 20.1 of the Dealer Contract. Healy not only breached this obligation on several occasions, but also took excessive draws out of his business, when the business could ill afford for him to do so. As submitted by CTC, during his career as a dealer, Mr. Healy has been consistently overdrawn throughout the year";
>
> (c) In 2009, Healy obtained loans totalling $554,990 so that he could re-inject into the business the amount of his overdraws prior to year end, and then draw out the same money after year end to re-pay to loans.

[29] Actions such as these leave little confidence that Mr. Healy can be trusted to run the business properly. It is quite apparent that the relationship between Canadian Tire and Mr. Healy has broken down. The instances outlined in Mr. Lamanna's affidavit of Mr. Healy's behaviour during and after the arbitration are of obvious concern.

[30] One reason that the business is losing money may be a lack of planning. In the first report of the receiver appointed by the arbitrator, the receiver reported that it asked Mr. Healy to provide copies of any and all cash flow statements with which to determine Healy Inc.'s ability to pay existing and accruing debts over the coming months. Mr. Healy advised the receiver that Healy Inc. does not prepare cash flow projections.

[31] Mr. Healy has resisted attempts by Canadian Tire to assist him with store operations and to work out a viable plan to deal with the ongoing losses and substantial outstanding debts. In August 2009, Canadian Tire offered to put Mr. Healy into a Performance Support Initiative Program which is designed to help dealers improve their financial performance, and financial and operations experts were sent to the store to help. Mr. Healy ordered them out of the store and said he did not want help. On April 4, 2011, following the arbitral award, Canadian Tire encouraged Mr. Healy to provide two senior executives with a plan to resolve his financial situation on an urgent basis. Mr. Healy's response was that he would meet with one of them at a bar in Port Credit at 6 p.m. In spite of further requests that he meet with the executives to discuss plans to resolve his financial situation, Mr. Healy has refused to meet with them.

[32] Canadian Tire has prepared a series of realistic and optimistic projections to determine whether Healy Inc. will be able to pay off its indebtedness over a matter of years. No matter which scenario Canadian Tire chose, the conclusion reached was that Healy would still have substantial negative equity even at the end of fiscal 2015. The negative equity ranges from $9.4 million to $3.3 million, the latter being the most optimistic with the store ranking in the top quartile of Canadian Tire dealers (it is in the bottom quartile at present). All of these projections assume that Healy Inc. will not expend any amount on legal fees, which appears unlikely as Mr. Healy and Healy Inc. have started at least four new arbitration proceedings apart from the appeal of the award of arbitrator Mew.

[33] In all of the circumstances, I ordered that Ernst & Young Inc. be appointed receiver of Healy Inc. with the usual powers of a receiver, including the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator is successful, it will be open to Healy Inc. to apply to vary or rescind the order.

_____

Newbould J.

Released: July 29, 2011

CITATION: Canadian Tire Corporation, Ltd v Mark Healy et al, 2011 ONSC 4616
COURT FILE NO.: CV-119250-00CL
DATE: 20110729

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN TIRE CORPORATION, LIMITED

Applicant

- and -

MARK HEALY and MARK V. HEALY SALES & DISTRIBUTION INC.

Respondents

REASONS FOR JUDGMENT

Newbould J.

Released: July 29, 2011

See para. 27

CITATION: Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131127

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.COM) AND 7500106 CANADA INC., Respondents

BEFORE: **MORAWETZ J.**

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

John N. Birch, for the Respondents

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

HEARD & ENDORSED: **NOVEMBER 4, 2013**

REASONS: **NOVEMBER 27, 2013**

ENDORSEMENT

[1] At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

[2] Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"),

without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

[3] The application was not opposed.

[4] The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of £17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[5] Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

[6] Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately £3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

[7] Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

[8] Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

[9] It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

[10] Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

[11] itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

[12] The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

[13] Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

[14] The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

[15] Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

[16] Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the

"Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

[17] Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

[18] Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

[19] Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

[20] If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

[21] The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

[22] The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

[23] This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

[24] Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

[25] Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

[26] In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. 5088 at para. 10 (Gen. Div.)

[27] Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

[28] Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

[29] Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

[30] It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

(a) the potential costs of the receivership will be borne by Elleway;

(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;

(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;

(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and

(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

[31] It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[32] Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

[33] Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

[34] Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

Morawetz J.

Date: November 27, 2013

1992 CarswellOnt 4933
Ontario Court of Justice (General Division)

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.

1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283, 3 W.D.C.P. (2d) 191

Farallon Investments Limited, Plaintiff and Bruce Pallett Fruit Farms Limited, Defendant

Davidson J.

Judgment: February 17, 1992
Docket: 91-CQ-9985

Counsel: None given

***Davidson J.*, (Orally):**

1 This motion is for the appointment of a receiver and manager.

2 The parties in the charge entered into between them specifically contracted for the right of the plaintiff, the chargee, to appoint a receiver/manager when there was default under the charge. Default occurred as at September 1, 1991 when the mortgages fell due and no monies were paid. The plaintiff appointed a receiver/manager September 23, 1991, the said receiver/manager twice attending to take possession of the property in question but possession and entry was refused by the chargor, the defendant.

3 Default under the mortgages being twelve in number continues to date on $5,000,000 in principal, and interest is accumulating at the rate of $85,000 per month and which has continued since the 1st of September, 1991. The default is not denied nor is the quantum. Indeed it is admitted. The charge in question further provided for the consent of the chargor to a court order for appointment of a receiver if the chargee in its discretion chooses to obtain such order.

4 In my view in the motion before me the chargees are simply seeking enforcement of one of the agreed terms in the charge. Can it be said in these circumstances that the moving party is seeking an extraordinary equitable order? Specifically, I think not. Rather, it seeks I believe, to enforce one of the contractual terms in the charge. It is apparent as well on the material that the various charges were entered into and signed by representatives of the defendant in all cases with independent legal counsel acting on behalf of the defendant.

5 There is no suggestion on the material that there was any misunderstanding on the part of the defendant's representatives in signing this documentation. As such it appears to me that there should be some onus, at least modest, to show why, the appointment of the receiver ought not to be made. The chargor objects primarily on the basis that the appointment would be of no advantage to the chargee, that there is a potential prejudice to the chargor who is seeking to refinance the property and that if postponed at least until about the 1st of May it would be just and convenient as no monies would be coming in until approximately that time, the subject property being a golf course and orchard in which any cash flow would not be generated during the present months. In addition, the chargor submits that the property being worth approximately $10,000,000 as at the last appraisal in July of 1991, the chargee's security is not in jeopardy let alone in serious jeopardy.

6 I have reference to the decision in the *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 which was referred in one of the decisions put to me by the defendant's counsel in submissions, namely *Ryder Truck Rental Canada Ltd. et al. v. Thorne Ernest et al.* (1987), 16 C.P.C. (2d) 130. In my view the *Bank of Montreal* decision is of some assistance. In that case Justice Anderson considered the meaning of just and convenient in s.19 of the *Judicature Act* (presently s.114 of the *Courts of Justice Act*) and he expressed the view that one should have in the mind the existence of a debenture conferring by contract certain

rights on a debenture holder, in that case the right to appoint a receiver. Although security was not commented on at length in that case it does not appear to have been in serious jeopardy yet the receiver was appointed.

7 In the case before me there is no evidence of mismanagement by the chargor in the conduct of the business, nor any suggested intent to impair the security and indeed the property appears to be not a wasting asset. Although attempts at refinancing have been made, particulars in the material are sparse in the extreme and there is no date whatsoever where one can infer that one can reasonably anticipate that there might or will be a refinancing. On the other hand, the chargee seeks only what he was entitled to by contract. I am not persuaded on the material that there is prejudice to the chargor if the appointment is made or at least not prejudice in the sense of an impairment of the rights that he might have and wishes to exercise to refinance.

8 It seems to me that the fact of nonpayment of the mortgage of over $5,000,000 when due in September, 1991, the interest that is accumulating, outstanding debts in respect to the property amounting to well over $300,000 to some of the trades and overdue loans and bearing in mind the absence of any funds apparently available to the defendant to conduct the business, that all of this would be self evident to any proposed lender in any refinancing negotiations and I do not feel that the appointment of a receiver/manager would be prejudicial in that context. Additionally it seems to me that at least the chargee would benefit by an orderly management of the business pending any refinancing that might be negotiated and at the same time safeguarding the security and its ongoing liability and the conduct of the business of the business carried on on the property.

9 In the result the order will go appointing Mintz and Partners Inc. receiver and manager of the subject property. Having said that its seems to me that there should be some containment upon the rights to be exercised by the receiver/manager and I invite counsel to make whatever submissions you think are appropriate or alternatively if you agree on what the terms ought to be that would of course be of great assistance as well. I leave that aspect open at the present time and as well submissions in regard to costs.

10 Submissions were made.

11 Endorsement on the Record:

> For oral reasons dictated this day order appointing Mintz and Partners as Receiver Manager of defendant in respect to the subject lands with right of defendant officers to full and unfettered access to the Books and Records of defendant at all reasonable times.
>
> Terms of appointment to be agreed upon by the parties, in the alternative to be subject of submissions at a date to be arranged.
>
> Costs of the motion to plaintiff on solicitor and client basis fixed at $2,000 inclusive of disbursements + G.S.T. but not including cost of transcript of cross-examination of defendant representative which shall also be paid by defendant.

1979 CarswellOnt 248
Ontario Supreme Court, In Bankruptcy

Flax Investment Ltd., Re

1979 CarswellOnt 248, [1979] 3 A.C.W.S. 807, 14 C.P.C. 184, 32 C.B.R. (N.S.) 65

Re FLAX INVESTMENTS LIMITED

Saunders J.

Heard: November 23, 1979
Judgment: November 26, 1979
Docket: No. 15194

Counsel: *C. H. Morawetz, Q.C.*, for petitioning creditor.
T. G. Gain, for debtor.

Saunders J. **(orally):**

1 Murray Hunter petitions this court that Flax Investments Limited ("the company") be adjudged bankrupt and that a receiving order be made in respect of its property.

2 In the dispute filed on behalf of the company it was admitted that there was a debt owing to Mr. Hunter, and the evidence established that such debt was in excess of $1,000 and was due and unpaid at the date of the petition. Evidence was presented of debts owing to other creditors. Mrs. Streeter, the president and sole owner of Streeter Power Sales and Services Limited, gave evidence as to debts owing to that company for the rental of equipment and the sale of parts. Mr. Tikal, a solicitor in the city of Toronto, gave evidence as to rentals owing to lessors of premises leased to the company, including rentals owing to him personally as a lessor. Mr. Fisher, a chartered accountant, gave evidence as to overdue payment of accounts rendered by him, and finally the petitioning creditor, Mr. Hunter, gave evidence as to the indebtedness of the company to him. Mr. Streeter did not have copies of his invoices, but his testimony was uncontradicted that the equipment and parts that he provided were for the account of the company and not for any other customer. Certain of the evidence of Mr. Tikal was based on information supplied to him by others. Mr. Fisher's invoices were submitted to the company and discussed with both principals of the company. No evidence was called on behalf of the company to contradict the evidence given by its creditors. On the basis of the evidence I am satisfied that the petitioning creditor has established that the company had at the date of the petition ceased to meet its liabilities generally as they become due.

3 The company submits that the petition has been filed in the wrong court. Section 25(5) of the Bankruptcy Act, R.S.C. 1970, c. B-3, provides as follows:

> (5) The petition shall be filed in the court having jurisdiction in the locality of the debtor.

4 And s. 2 contains the following definition of "locality of a debtor":

> 'locality of a debtor' means the principal place
>
> (*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,
>
> (*b*) where the debtor has resided during the year immediately preceding his bankruptcy,
>
> (*c*) in cases not coming within paragraph (*a*) or (*b*) where the greater portion of the property of such debtor is situated.

5 The company was incorporated under the Ontario Business Corporations Act, R.S.O. 1970, c. 53, on 27th January 1978. The articles of incorporation state that the head office of the company is at the city of Toronto in the municipality of Metropolitan Toronto. The address of the head office is stated as suite 2702, 390 Bay Street, which was the then address of the solicitors who incorporated the company.

6 There was produced a minute book of the company which contained draft by-laws and resolutions. None had been signed, and no entries had been made on the registers or ledgers. Under its incorporating statute the head office of the company must be in Ontario, and there was no evidence that the location in Toronto had ever been changed. In fact, the address in that city was not changed even though the solicitors who incorporated the company no longer occupied the premises.

7 The only beneficial shareholders of the company at any time appear to have been Murray Hunter, the petitioning creditor, and Square One Commodities Incorporated ("Square One"). It would appear, but was not established, that Square One is a corporation which is owned by either Milton Procter or by members of his family or by both Mr. Procter and members of his family. As previously indicated, there is no resolution allotting or transferring shares to Mr. Hunter or to Square One and no evidence that share certificates were ever issued to them. There was also no evidence that officers of the company were ever formally appointed or directors formally elected. There was an agreement, filed as Ex. 18, which was executed by Mr. Hunter, Square One, Mr. Procter and the company and in which the shareholdings of Mr. Hunter and Square One are confirmed by them with the share interest of Square One being held for it in trust by Mr. Cummings, a Manitoba solicitor. It is agreed by the parties that the directors of the company are Mr. Hunter and Mr. Procter, with Mr. Hunter holding the office of president and Mr. Procter holding the office of secretary.

8 The purposes for the incorporation of the company as set out in its articles are, first, of a real estate or land trading nature and, second, of a farming nature. As described by Mr. Hunter, the enterprise was a joint venture entered into by Mr. Hunter and Mr. Procter through the vehicle of the company. It was proposed to earn income from farming in Manitoba and also to engage in land transactions in that province. Hunter was to provide the initial capital and contracts with potential investors, and Square One was to provide the services of Procter, who knew the farming business and the people in the area and could assist both aspects of the proposed operation. The farm operation commenced in the 1978 season, and Mr. Hunter made advances of funds in the spring and early summer of that year. It would also appear from the evidence that sometime in the year 1978 a transaction or transactions of a land trading nature were completed which resulted in an income to the company of approximately $26,000. In the fall of 1978 Mr. Hunter accompanied by Mr. Fisher went out to Manitoba to obtain information as to the farm operations and returned following that meeting with the books and accounts of the company, which they obtained from Square One. Sometime following the commencement of 1979 there was a falling-out between the principals, as according to Mr. Hunter the manager had failed to properly account for the proceeds of the sale of the farm products. The differences between the parties could not be resolved, and the bankruptcy petition was instituted on 28th August.

9 It would appear that during the year preceding the petition the farm operations were continued in Manitoba. In the fall of 1978 Hunter made efforts to negotiate land transactions which involved correspondence and meetings with potential investors, trips to Manitoba and some showing of properties. No transactions were completed, and after his falling-out with the manager it is clear that Hunter discontinued his efforts. It would be fair to say that, on the evidence, in the last year the farming operations engaged substantially more of the time of the principals than the real estate operations.

10 Mr. Hunter resides and has an office in Toronto but spends a good deal of his time each year in Florida. It would appear that Mr. Procter lives and works in Manitoba, and there is no evidence of his ever having been in Ontario.

11 Against this background it is necessary to consider the issue as to whether the Ontario court has jurisdiction to hear this petition. The definition of the "locality of a debtor" presents some interpretative difficulty. The references to the "locality of the debtor" in s. 25(5) and "the principal place" in the definition suggest that a debtor may have but one locality. On the other hand, the principal place described in para. (*a*) of the definition may and often is different from the principal place as described in para. (*b*). In the case of *Re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433 (Ont.), the then assistant master, in considering a slightly different definition of the section, held in effect that primary consideration should be given to para. (*a*) and, if that is not

conclusive, the residence of the debtor may provide jurisdiction. With respect, I do not agree. There is nothing in the language of the definition which gives a primary position to para. (*a*) over para. (*b*). To achieve such primary position, words could have been inserted in para. (*b*) such as "in cases not coming within paragraph (*a*)", as was done in drafting para. (*c*).

12 In my opinion the petitioning creditor in considering where to bring his petition can choose to bring it on the basis of either para. (*a*) or para. (*b*), and only if there is no principal place as described in either of such paragraphs may para. (*c*) be resorted to. In other words, it is my view that it is possible in certain cases to bring a petition in either one of two courts.

13 During the year preceding the filing of the petition the company conducted farming operations in Manitoba and certain activities concerning proposed real estate operations in both Manitoba and outside of Manitoba. I am not certain in the context of carrying on business what is meant by the word "place", but I am satisfied on the evidence that the principal place where the company carried on business in the year preceding the petition was not in the province of Ontario.

14 The residence of the company presents some difficulty. A corporation is resident where its seat of management is located, and a corporation may be resident in more than one place. In this case the head office of the company was at all times in Toronto. The accounting books and records were moved to Toronto in the fall of 1978. Mr. Hunter, the president of the company and one of its two beneficial shareholders, resided in Toronto, had his office in Toronto and did business in Toronto on behalf of the company, although he also spent a substantial part of the year in Florida and some time in Manitoba. Mr. Procter, the other director and the secretary of the company, resided in Manitoba, and, as I have said, there is no evidence that he was ever in Toronto during the year. The company was registered to do business in Manitoba, and it leased land and equipment in Manitoba for its farming operations which were managed by Square One.

15 It is to be noted that the issue of locality is not concerned with a tax or other liability of the company, it is a procedural matter under the Bankruptcy Act which must be considered by a petitioner in ascertaining the court in which to launch his petition. In such a context certainty is a desirable factor. It is difficult for a petitioning creditor, although perhaps not this particular petitioning creditor, before bringing his petition to embark on a fruitful inquiry as to the business, residence and property of the debtor. In this case the head office, books of account and the president were all located in Toronto. The remaining officer and director resided in Manitoba, but there is no evidence that the directors' or shareholders' meetings were ever held in Manitoba or in fact at any place at any time. There were two meetings in Manitoba during the year which principally concerned the farm operations, but they would appear to have been between Hunter on behalf of the company and Procter on behalf of Square One, the manager of the company. The farm inventory and leasehold property were located in Manitoba and managed by a third party, but it is to be noted that the definition of "locality" draws a distinction between residence and the location of property.

16 I find on the evidence that the principal place where the debtor resided during the year immediately preceding the date of the petition was the city of Toronto. Such a finding is consistent with the tests applied in *Re Malartic Hygrade Gold Mines Ltd.; Lionel Berube Inc. v. Minaco Equip. Ltd.* (1966), 10 C.B.R. (N.S.) 34 (Ont.).

17 The receiving order will accordingly issue, and the Clarkson Company Limited will be the trustee.

18 In have endorsed the record as follows.

> For reasons given, receiving order to issue. The Clarkson Company is appointed as trustee. Costs of the petitioning creditor and interim receiver to be paid out of bankrupt estate forthwith, after taxation.

Petition granted.

1966 CarswellOnt 30
Ontario Supreme Court, In Bankruptcy

Malartic Hygrade Gold Mines Ltd., Re

1966 CarswellOnt 30, 10 C.B.R. (N.S.) 34

Re Malartic Hygrade Gold Mines Limited; Lionel Berube Inc. v. Minaco Equipment Limited

McDermott J.

Judgment: October 27, 1966

Counsel: *F. E. Armstrong*, for applicant.
R. R. Kennedy, for respondent.

***McDermott J.*:**

1 This is an application heard on 4th October 1966, with respect to which the decision was reserved, which application was originally launched on behalf of Lionel Berube Inc., a creditor, under ss. 138(1) and 144(5) of the Bankruptcy Act, on 24th March 1966 to be heard on 31st March 1966 for an order rescinding the receiving order herein dated 1st March 1966 made by McDermott J. and for an order annulling the bankruptcy and for such further or other order as to this honourable court may seem just, the said Lionel Berube Inc. having earlier filed a petition in the Province of Quebec, dated 21st August 1964.

2 On the return of the application, counsel for the applicant asked for an adjournment until September 1966, to learn whether, by that date, the Court of Appeal for the Province of Ontario would have dealt with the appeal launched by the bankrupt debtor on 10th March 1966, with respect to the receiving order granted by this court on 1st March 1966. The court refused an adjournment of such length and adjourned the application to 9th June following, and then to 16th June 1966. At such date, since the Court of Appeal had not heard the Ontario appeal, it was further adjourned on consent to 8th September 1966. At 8th September 1966, it was further adjourned to 22nd September 1966, by consent, and at that date again adjourned on consent but made peremptory for 4th October 1966, on which date, as aforesaid, the application came on for hearing.

3 I mention these dates specifically to indicate the delays leading up to this application being dealt with.

4 In effect, what I am now being asked to do, since the Court of Appeal for the Province of Ontario confirmed on 21st June 1966 the receiving order of 1st March 1966 granted on the petition of Minaco Equipment Limited, and, at the request of another creditor, namely Lionel Berube Inc. to rescind, set aside or annul the receiving order granted to Minaco Equipment Limited, already confirmed by the Court of Appeal for the Province of Ontario.

5 Perhaps some history of this bankruptcy which has resulted in a receiving order being given in the Province of Ontario and a trustee appointed here and a further receiving order being given in the Province of Quebec and a trustee being appointed there, might be helpful, as there would appear to be a tug-of-war going on as to which trustee should have custody of the assets of the Malartic Hygrade Gold Mines Limited in order to enable a trustee to liquidate such assets and distribute for the benefit of all the creditors.

6 From the material filed in this Court, and other material delivered to me on the hearing of this application, and from admissions made by counsel for both the applicant creditor and the respondent successful creditor I believe I am dealing with facts, with respect to which there appears to be no dispute, unless so specifically referred to, in these reasons for judgment.

7 I set out herewith a timetable for clarification, knowing that there may be certain gaps in the timetable, or minor differences in dates when certain steps were taken, but these reasons are prepared from material available in this Court, and any differences I trust will be minor:

8 19th June 1964 — Proposal filed by debtor, Malartic Hygrade Gold Mines Limited, at the city of Montreal, Province of Quebec, under the Bankruptcy Act.

9 12th August 1964 — Chairman of first meeting of creditors made decisions which were appealed from, at which meeting of creditors, proposal was rejected.

10 21st August 1964 — Lionel Berube Inc. filed petition by Claude Allard on behalf of Lionel Berube Inc. at Val d'Or, Quebec.

11 3rd September 1964 — Hannen J. of the Quebec Superior Court made an order staying all proceedings, pending the disposition of the appeal from the decision of the chairman of the meeting of creditors arising from their proposal.

12 4th September 1964 — Counsel for Lionel Berube Inc., objected to Quebec tribunal rendering judgment on application for receiving order of Lionel Berube Inc., and asked decision be suspended until the proposal rejected should be dealt with by the Quebec Court, and the tribunal then adjourned its decision to 15th September.

13 15th September 1964 — Hannen J. of Quebec Court gave judgment, rejecting the appeal by debtor from decision of registrar, and because decision by way of appeal was being carried to Court of Queen's Bench of Quebec, Hannen J. made an order staying all proceedings pending result of appeal.

14 19th July 1965 — Minaco Equipment Limited, a creditor, filed petition, in Bankruptcy Court in Ontario, dated 15th July 1965.

15 26th July 1965 — Notice of dispute by debtor, Malartic Hygrade Gold Mines Limited, filed, objecting to petition of Minaco on grounds that in June 1964 Malartic filed at Montreal, a pro posal under the Bankruptcy Act, and further objecting on the ground that another petition for a receiving order (from Lionel Berube Inc.) was filed at Val d'Or on 21st August 1964, and that by order of a judge of the Superior Court in Bankruptcy in Quebec, the proceedings were suspended.

16 14th September 1965 — On this date a letter was sent from J. J. Bussin, solicitor at Toronto for Minaco Equipment Limited, to Claude Allard, solicitor for Lionel Berube Inc., outlining the fact of petition filed on 15th July 1965 on behalf of Minaco, and asking status of petition filed by Allard, and status of appeal lodged by Malartic Hygrade.

17 19th January 1966 — Appeal in Quebec by Malartic Hygrade from decisions made under proposal of 19th June 1964, now dismissed unanimously by three justices of the Quebec Court of Queen's Bench.

18 7th February 1966 — New proposal by debtor Malartic Hygrade Gold Mines Limited filed in Quebec, appointing 2nd March 1966 for meeting of creditors; (creditors rejected this believing it was filed for the purpose of delay and to prevent appointment of a trustee).

19 28th February 1966 — Affidavit of William S. Miller of Toronto, secretary-treasurer of Minaco Equipment Limited is filed, swearing under date of 28th February 1966, in para. 11, that Lionel Berube Inc. is aware of the petition of Minaco Equipment Limited filed in the Bankruptcy Court in Ontario.

20 1st March 1966 — Receiving order granted in Ontario against debtor by McDermott J. on petition of Minaco Equipment Limited, appointing the Clarkson Company Limited, of Toronto, as trustee.

21 9th March 1966 — Receiving order granted in Province of Quebec against debtor, on petition of Lionel Berube Inc., by Drouin J. appointing Jacques Angers, C.A. of Rouyn, as trustee.

22 10th March 1966 — Hygrade Malartic Gold Mines Limited appealed to Ontario Court of Appeal, the judgment of McDermott J. dated 1st March 1966, granting receiving order on petition of Minaco.

23 17th March 1966 — The debtor, Malartic Hygrade Gold Mines Limited, gives notice of appeal to the Court of Queen's Bench of the Province of Quebec against receiving order granted 9th March 1966 in the Province of Quebec on petition of Lionel Berube, Inc.

24 23th March 1966 — Lionel Berube Inc. by affidavit of Claude Allard sworn 23rd March 1966, launches motion for 31st March 1966, in Ontario Bankruptcy Court, to rescind the receiving order of 1st March 1966 granted by McDermott J.

25 21st June 1966 — Receiving order of McDermott J. dated 1st March 1966, granted in Ontario, upheld and confirmed by Court of Appeal for the Province of Ontario.

26 4th October 1966 — Current application by Lionel Berube Inc. for rescinding the receiving order of McDermott J. of 1st March 1966, argued and decision reserved.

27 When the petition for a receiving order was heard before me, at the instance of Minaco Equipment Limited, on 1st March 1966, I was much impressed with the inordinate length of the delay, which had ensued from the time the petition was first filed by Lionel Berube Inc. on 21st August 1964, following the first proposal filed in June 1964 by the debtor. It seemed quite clear that every possible obstacle was being raised by the debtor to prevent the actual hearing of a petition in bankruptcy, and that one step after another had been taken with respect to the decisions made, while the first proposal was impeding progress, and it seemed impossible to have matters brought to a finality in the Province of Quebec, by reason of all the applications for stay of proceedings or by way of appeal. It had finally come to the point where the tribunal of three judges in the Province of Quebec threw out, on 19th January 1966, the appeal respecting the debtor's proposal of June 1964. Such appeal was dismissed unanimously.

28 There then appeared to have been a gap from 19th January 1966, to the date of 7th February 1966, when the debtor filed a further proposal and would seem to start on another journey of placing obstacles to a petition in bankruptcy being granted. To me it appeared quite clear that something had to be done to bring these proceedings to a finality, as the mine was said to be filled with water and under the circumstances no progress whatsoever could be made toward any realization for the creditors.

29 The receiving order made by Drouin J. on 9th March 1966 had not yet been made, this court was convinced that the course of activity pursued by Mr. Claude Allard on behalf of Lionel Berube Inc. was most unsatisfactory to the creditors and it is most enlightening to read the judgment of Drouin J. of 9th March 1966, in which many of the salient facts in connection with this proposed bankruptcy were reviewed, and dates given, but there is absolutely nothing embodied in it to make it clear that counsel for the applicant, Lionel Berube Inc., indicated to the court that a receiving order had already been made in Ontario on 1st March 1966. The judgment is silent in that respect. I would be inclined to think that that would be a most important factor to bring before the court which was about to deal with a petition, originally filed on 21st August 1964, upon which the court was now being asked to act, since surely the presiding justice would have given much consideration to the fact that another court of competent jurisdiction under the Bankruptcy Act had made a receiving order against the debtor in the Province of Ontario, eight days earlier.

30 There apparently was no reason whatsoever why, in the gap from 19th January 1966, to the filing of the new proposal by the debtor on 7th February 1966, the application on the petition of 21st August 1964, could not have been resumed before the proper tribunal in the Province of Quebec. In his affidavit of 28th February 1966, filed, William S. Miller, secretary-treasurer of Minaco Equipment Limited, swears, in para. 11, that Lionel Berube Inc. was then aware of the petition of Minaco Equipment Limited, which had already been filed in the Bankruptcy Court in Ontario on 19th July 1965. It is further evident from the original letter of John J. Bussin to Mr. Claude Allard dated 14th September 1965, which is filed in this court as Ex. B to the affidavit of Claude Allard sworn 23rd March 1966, that Mr. Claude Allard was fully aware of the fact that the petition had been filed here on 15th July 1965. The debtor, Malartic Hygrade Gold Mines Limited was represented by counsel, in the Bankruptcy Court in Ontario, when the receiving order by such court was made on 1st March 1966, and from then on should definitely have

been aware of the receiving order having been granted and it must be assumed that it would report to its principal counsel in Quebec that such receiving order had been made. Surely it would be represented in the Quebec Court at the time the receiving order was granted there on 9th March 1966 on the petition of Lionel Berube Inc.

31 With respect to the present application before me to rescind the receiving order of 1st March 1966, and annul the bankruptcy, I have to conclude that this was launched soon after Malartic Hygrade Gold Mines Limited appealed the receiving order in Ontario, and, in view of the receiving order being upheld in On tario on appeal, I am surprised that this application was not withdrawn, unless of course the creditor Lionel Berube Inc. found itself in the peculiar position of facing one receiving order against the debtor made in Ontario shortly before one was made in Quebec against the said debtor and wanted it clarified by the court now as to which trustee should carry on the administration of the estate, this being, of course, a practical problem.

32 In my opinion based on the considerations hereinafter set out, it is now possible for the applicant, which appealed in Quebec, to move before the Court of Queen's Bench in Quebec to allow the appeal against the receiving order granted in Quebec and to dismiss the petition, or to withdraw the appeal and ask the Bankruptcy Court in Quebec to rescind its receiving order because of the prior granting in Ontario of a receiving order, where the conditions as to the locality of the debtor appear to be more thoroughly satisfied.

33 Further, in my opinion the guiding factor in connection with where this bankruptcy administration should be carried out is s. 21(5) of the Bankruptcy Act, which reads as follows: —

> (5) The petition shall be filed in the court having jurisdiction in the locality of the debtor.

34 Section 2(*k*) of the Act, defines the locality of a debtor as follows:

> (*k*) 'locality of a debtor' means the principal place
>
> (i) where the debtor has carried on business during the year immediately preceding his bankruptcy;
>
> (ii) where the debtor has resided during the year immediately preceding his bankruptcy;
>
> (iii) in cases not coming within subparagraph (i) or (ii), where the greater portion of the property of such debtor is situate.

35 The facts as disclosed by the material before me indicate that the head office of the debtor company is in Toronto, Ontario; the company was incorporated under the laws of the Province of Ontario; the books of the company are located in Toronto, in the Province of Ontario; the auditors of the company are located in the said city of Toronto; the questionnaire signed and sworn the 18th March 1966, by Paul Henderson, the president, and in the examination before the official receiver, held on 21st March 1966 the president, Paul Henderson, swears that he is personally a resident of Toronto, that the debtor has one property only located at Val d'Or in the Province of Quebec, that the share register of the company is held at the Guaranty Trust Company of Canada, of which the head office is located at Toronto, Ontario, and the questionnaire indicates that the last audited statement of the company was drawn up on 30th September 1964. All of these papers were filed at Toronto, partly on 3rd March 1966, and the balance on 6th April 1966. The affidavit of Claude Allard, para. 8, sworn 24th March 1966, indicates that the debtor discontinued operations in the year 1964.

36 In his affidavit of 28th February 1966, William S. Miller, the secretary-treasurer of Minaco Equipment Limited, swears that the debtor has carried on business, during the year immediately preceding its bankruptcy, in the said city of Toronto, and that the majority of the creditors in value reside or carry on business in the Province of Ontario. In para. 8 of his affidavit, he swears that it is his belief "that it would be to the best interest of the creditors herein to place the administration of the estate of the debtor in the hands of a trustee appointed by This Honourable Court".

37 The Clarkson Company Limited of the city of Toronto was, by the receiving order of 1st March 1966, appointed trustee of the estate of the said bankrupt and has already had a meeting of creditors on Thursday 24th March 1966. This company has offices both in the Province of Ontario and the Province of Quebec and would seem to be the most suitable trustee, under all

the circumstances, rather than having the affairs of the bankrupt company carried on from Rouyn, Quebec, where the trustee appointed under the order of Drouin J. of 9th March 1966 is located.

38 Looking at the list of creditors attached to the notice of the Clarkson Company Limited, as trustee, sent out on 9th March 1966, it is indicated that the secured creditor is the Guaranty Trust Company of Canada at 366 Bay Street, Toronto 1, Ontario, for $200,000; the preferred creditors, totalling $9,536.60, are mostly from the Province of Quebec, but are taxing authorities, namely city of Toronto business tax; Workmen's Compensation Board for the Province of Quebec; Debuisson School Commission, Abitibi East in the Province of Quebec; and Department of National Resources, City Hall, city of Quebec. As to the unsecured creditors on the list totalling $136,636.40, $67,068.02 are Ontario creditors and the balance those carrying on business in Quebec, and, in the aggregate, these appear to be almost evenly divided.

39 The "locality" of the debtor seems to be fully satisfied by the administration of the bankrupt estate being carried out in Ontario, so far as s. 2(*k*)(i) and (ii) are concerned; and as to subpara. (iii), this refers only to cases which do *not* come within subparas. (i) and (ii), so that, in any event, if the actual physical asset of the company, being the mine in Val d'Or, comes under subpara. (iii), then this applies *only* to cases which do *not* come within subparas. (i) and (ii), and would not be the guiding factor, under all the circumstances.

40 Counsel for the applicant submits that all the delays resulting from Quebec applications were those of the bankrupt debtor, and were not caused by Lionel Berube Inc. I cannot fail to find that Lionel Berube Inc. was responsible for part of the delay, particularly at a time when it was most important that they should act promptly.

41 My attention is also drawn by counsel for the applicant to s. 145 of the Bankruptcy Act which provides that any order made by the Bankruptcy Court shall be enforced in courts elsewhere in Canada, having bankruptcy jurisdiction, and of this I am quite aware, and would urge this as a reason why the court acting in bankruptcy jurisdiction in the Province of Quebec, on 9th March 1966, would likely have made reference to this section, when making a second receiving order, if the first receiving order of 1st March 1966 made in Ontario were drawn to its attention.

42 Counsel for the applicant also endeavoured to persuade me that the bankruptcy jurisdiction, in the provincial courts in Quebec, was seized with the petition of his client since 1964, and therefore should be permitted to proceed with the bankruptcy under the order of Drouin J. of 9th March 1966, but the reading of that order is a recital of the constant delays there were and obstacles raised to delay the conclusion of the original proposal, filed by the debtor, and the original petition filed by the creditor whom he represents. The court seemed pleased, after all the delays involved, to give their judgment on the merits. Unfortunately the petition of Lionel Berube Inc. should have been applied for, in my opinion, some time after 19th January 1966 when the Quebec Court was free to deal with it; and prior to 1st March 1966, when this court granted a receiving order by the petitioning creditor, Minaco Equipment Limited, which debtor had been pressing hard for a disposition of its petition since it was filed in July 1965.

43 Counsel for the applicant cited the case of *Re Rotenberg* (*Janet Frocks*) (1941), 22 C.B.R. 433, 3 Can. Abr. (2nd) 473, a decision of O. E. Lennox, assistant master in the Supreme Court of Ontario, acting registrar in bankruptcy, where at p. 436 after referring to the weight to be given to "locality of a debtor" he continues to indicate that, in that case, he was not dealing with a technical question, but a practical question of expediency, and each particular case must be considered in the light of its own particular facts. This was an application to rescind a receiving order made on 29th July 1941 at Toronto, in favour of a receiving order made on 29th July 1941 at Montreal. The application was dismissed for the reasons given, with the respondents being given costs out of the assets of the estate, forthwith after taxation. This case is most enlightening and, in my opinion, supports the decision this court has come to on the present application.

44 Counsel for the applicant referred me also to the case of *Re Bryant, Isard and Co.; Trustee v. Mann*, 25 O.W.N. 382, 4 C.B.R. 317, [1924] 1 D.L.R. 217, 3 Can. Abr. (2nd) 2272, a judgment of Fisher J. wherein the [C.B.R.] headnote reads:

> The Court in which the bankruptcy proceedings are properly pending, by reason of its original jurisdiction in the bankruptcy district in which an authorized assignment was made and filed, will treat as a nullity, proceedings taken without its leave

in another province of Canada before the Court ordinarily having bankruptcy jurisdiction there which would infringe upon the control of the bankruptcy by the Court having original jurisdiction.

45 This heading summarizes the words used by Fisher J. on p. 321 and appears quite applicable to the case in point, but it does not apply to a situation, such as the instant application, where the petition for the receiving order on behalf of Minaco Equipment Limited was filed in Ontario, and carried all the way through to the making of a receiving order, granted in favour of that petitioning creditor, before any receiving order was granted in the Province of Quebec against the debtor, by an original different petitioning creditor in that province. In my opinion that decision had little if any bearing upon the present application.

46 Counsel for the respondent, in reply, referred to the case of *Re Trenwith*, [1933] O.W.N. 639, 15 C.B.R. 107, 3 Can. Abr. (2nd) 470, which was a motion to annul or stay proceedings under a receiving order, or to stay proceedings or alternatively to remove the trustee. The facts of the application were in no way whatsoever on the same footing as is the instant application, and, in the result, the application was dismissed by the late Armour J. with costs, but it was interesting to read the remarks of Armour J. on p. 111 made as follows:

> In applications to review, rescind or vary orders made, the Court should not be asked to rehear on the same material or on evidence merely corroborative of that given at the hearing. Any application under this section should be brought on new evidence of a substantial nature.

47 This was a motion under ss. 151 and 164 of the Bankruptcy Act, R.S.C. 1927, c. 11 (now ss. 138 and 144(5)), and under R. 108 (now R. 93).

48 While counsel for the applicant contends that there is new evidence of a substantial nature in the instant application, and that all of the material contained in the affidavit of Claude Allard supporting the application is new, it is not so substantially different from the material which has previously been before the court, to indicate to me that it is a proper basis for asking that a receiving order, made by this court on 1st March 1966 at the instance of a creditor in Ontario and later confirmed by the Court of Appeal for the Province of Ontario on 21st June 1966, ought to be interfered with.

49 Counsel for the applicant also urged upon me that, having regard to the date of petition in Quebec, namely 21st August 1964, as compared to the petition filed in Ontario on 19th July 1965, s. 50(1) of the Bankruptcy Act, and s. 41(4) along with s. 60(1) providing for the dates applicable prior to filing of petition, might have very serious consequences, in favour of the creditors, if the first petition were upheld, when a receiving order on it was granted, as compared to the date of the second petition. However, with respect to the period between 21st August 1964 and 19th July 1965, there is no material whatsoever, filed in support of this application, to indicate that creditors of any kind would be prejudiced or are purporting to claim that they would be prejudiced if the receiving order granted on 1st March 1966 prevented their rights from extending back to the time when rights under the petition of 21st August 1964 would accrue to creditors. I have nothing, therefore, of substance on that point in this application to indicate prejudice to any creditors, nor any evidence of any kind of offences, conveyances, settlements or preferences. I cannot base a decision on suspicions or suggestions as to possible activities of the kind mentioned.

50 If this mining property is flooded, and if attempts are to be made by a trustee to dispose of it or the mining equipment at that location now being guarded, it is imperative that the trustee who is to look after it should be put in a position of carrying out his duties as promptly as possible. To me it seems that there would be greater convenience to all the creditors to deal with a widespread organization carried on by the trustee named in the receiving order made in Ontario, which has offices in the main cities of both Toronto and Montreal, and I can see no prejudice to creditors, in confirming the receiving order appointing such trustee, and in refusing to rescind or annul it.

51 It is most unfortunate that these two creditors, namely Minaco Equipment Limited and Lionel Berube Inc., could not have co-operated in the early efforts to have a receiving order made in one jurisdiction or another, after Mr. J. J. Bussin of Toronto on behalf of Minaco Equipment wrote to Mr. Claude Allard on 14th September 1965, apprizing him of having learned of a petition filed on behalf of Lionel Berube Inc. by Mr. Allard, of which Mr. Bussin had no knowledge until after the petition of Minaco Equipment Limited was filed, and offering to co-operate in every way, even to the point of being agreeable to withdraw

the petition filed on behalf of Minaco Equipment Limited, if Mr. Allard insisted on continuing with the petition filed on behalf of Lionel Berube Inc. This generous offer appeared to have brought no satisfactory response whatsoever and Mr. Bussin was therefore obliged to continue, in the interest of his client, to see that some receiving order was made to protect the creditors.

52 Actually, the motion boils down to whether one court or the other is wrongly seized with the matter and should be given precedence over the other. It appears that the creditor, Minaco Equipment Limited, has expended money both in Ontario and Quebec, and that the trustee appointed in the Ontario jurisdiction has proceeded to have his meeting of creditors, and there could well be a substantial loss to Minaco Equipment Limited if it should be penalized by not having the order made by the Ontario Court of Bankruptcy jurisdiction upheld.

53 It might also be that it is critical now to have some appointed trustee consider the condition of the machinery, before the mining property is again frozen up for the winter, or if it is better sold and removed from the property during the winter months, now is the time for a trustee to take steps to salvage what can be gained for the creditors, who have been waiting since before June 1964 for payment, in which month the bankrupt debtor filed its first proposal, in the Province of Quebec.

54 For these reasons, the application to rescind the receiving order of this court dated 1st March 1966, and for an order annulling the bankruptcy, is dismissed with costs payable by the applicant to the respondent, forthwith after taxation thereof. In the event of any failure to collect such costs within a reasonable period of time, the costs will be to the respondent, out of the estate, forthwith after taxation thereof.

See para. 21

CITATION: Meridian v. Okje Cho & Family Enterprise Ltd., 2021 ONSC 3755
COURT FILE NO.: CV-21-00660390-00CL
DATE: 20210525

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: MERIDIAN CREDIT UNION LIMITED, Applicant

AND:

OKJE CHO & FAMILY ENTERPRISE LTD. and 2341567 ONTARIO LTD., Respondents

BEFORE: L.A. Pattillo J.

COUNSEL: *Ian Klaiman* and *Jason Spetter*, for the Applicant

Robert Choi and *Adam Beyhum*, for the Respondents

HEARD: May 21, 2021

ENDORSEMENT

[1] The applicant, Meridian Credit Union Limited ("Meridian") seeks an order pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) and s. 10 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), appointing BDO Canada Limited ("BDO") as receiver and manager over all property, assets and undertaking of the respondents, Okje Cho & Family Enterprise Ltd. ("Okje") and 2341567 Ontario Ltd. ("234").

[2] 234 operates as franchisee a Hampton Inn by Hilton at 40 McPherson Drive in Napanee, Ontario (the "Property") which is owned by Okje. Paul OJ Cho and his wife Choon Bum Cho are the principals and the officers and directors of both Okje and 234.

[3] Pursuant to a Credit Agreement dated September 20, 2018, Meridian authorized a non-revolving loan to Okje to a maximum of $7,200,000, payable on demand. That agreement was superseded by a Credit Agreement dated November 4, 2019 pursuant to which Meridian authorized the following credit facilities, payable on demand:

a) A non-revolving loan to a maximum of $6,995,000 (Credit Facility 1); and

b) An installment loan to a maximum of $700,000 (Credit Facility 2).

[4] In the spring of 2020, as a result COVID-19 and the government restrictions, Okje requested payment relief from its obligations under the 2019 Credit Agreement. Pursuant to amending agreements dated April 8, 2020 and July 14, 2020, Meridian agreed to defer Okje's monthly principal and interest payments for three months and then a further two months. The July 14, 2020 amending agreement also authorized a further credit facility to Okje, payable on demand, to a maximum of $102,000 to capitalize the interest accrued pursuant to the April 8, 2020 amending agreement (Credit Facility 3).

[5] Okje's indebtedness under the Credit Facilities is secured by:

a) Personal guarantees and postponement of claims from the Chos of the loans under Credit Facilities 1 & 2;

b) Guarantee and postponement of claim of Okje's liabilities by 234;

c) General Security Agreements from both Okje and 234, registered under the *Personal Property Security Act*;

d) A collateral mortgage granted by Okje in favour of Meridian for $8,000,000 registered against the Property (the "Mortgage");

[6] Okje is in default under the Credit Facilities. It has made no payments under Credit Facility 1 since December 1, 2020; made no payments on Credit Facility 2 since January 1, 2021 and failed to repay Credit Facility 3 by its maturity date, October 31, 2020.

[7] In addition, Okje and 234 were also in default under the Credit Agreement in respect of the following arrears: property taxes for the Property totaling $135,350.18 as at October 6, 2020; non-resident tax of $102,386.14 as of July 29, 2020; GST/HST arrears for Okje of $8,904.29 as at June 30, 2020; GST/HST arrears for 234 of $115,183.91 as at December 31, 2019.

[8] In October 2020, Okje made an application for a $1.4 million loan under the EDC Business Credit Availability Program ("BCAP Loan") through Meridian. The application was declined by Meridian on December 8, 2020. Subsequently, Meridian and Okje attempted to address the respondents' defaults.

[9] On February 26, 2021, after a payment by Okje of past due amounts under Credit Facility 2 was returned due to "insufficient funds", Meridian made a demand for payment upon Okje, 234 and the personal guarantors of the entire amount of the indebtedness under the Credit Facilities, which at that date was $7,770,121.39. The indebtedness remains outstanding.

[10] The application was commenced on April 13, 2021 and returnable April 22, 2021 at which time it was put over to May 11, 2021 to permit the respondents to file responding materials. On May 11, 2021 it came before me. As part of their responding material, the respondents filed an affidavit from Mr. Maneet Singh Gadhok (also known as Monty Singh), in which he deposed that he had entered into an Agreement of Purchase and Sale with Okje dated April 8, 2021, amended April 16, 2021, to purchase the Property for $8,000,000.00 (the "Agreement"). The Agreement was conditional on, among other things, the approval of the

terms of the Agreement by Mr. Singh's solicitor and assumption by him of the Mortgage. As a result of the amendment, the date for satisfying the conditions was May 17, 2021 and the closing date was June 1, 2021.

[11] Meridian's position was that it was not prepared to consent to Mr. Singh assuming the Mortgage. Further, and even if the Agreement as produced was completed, there would likely still be money owing to it and to Okje and 234's other creditors, some of whom have priority over the Mortgage. In response, Okje and 234 took issue with the statement Meridian would not assume the Mortgage and stated the Chos' including their son, have indicated that they were prepared to or have already listed their homes in Toronto for sale and there is sufficient equity to pay off both Meridian and the outstanding creditors.

[12] In the circumstances, I granted a short adjournment to May 21, 2021 to enable Okje and 234 to firm up their plan to resolve their obligations. In so doing, I stated that prior to the return date, the respondents must provide evidence concerning the status of the Agreement and specifically whether the conditions in the Agreement had been fulfilled or waived such that the Agreement was firm as well as evidence of the status of both the Chos and their son's proposed sales of their Toronto properties including whether the properties have been listed; the listing price; the total amount of mortgages and other encumbrances on the properties and the expected "net" proceeds that will be available.

[13] I further advised the parties that if I was satisfied on the return date that based on the evidence, there was a realistic possibility that the respondents and the Chos could resolve their obligations to Meridian and their other creditors, I would further adjourn the application for a reasonable period to let that happen. For that to happen, however, the respondents must have a concrete plan including a firm agreement of purchase and sale.

[14] Prior to the return on May 21, 2021, both parties filed further evidence concerning events subsequent to May 11, 2021. Mr. Cho advised that the Agreement was "alive" and that it had been further amended to reduce the purchase price of the Property to $7 million. The amended Agreement contained a clause that the buyer agreed to lend $2 million to the seller for closing the deal. Both parties agreed to "register this money" on the Chos' personal residence. The amended Agreement still contained the buyer's lawyer's approval condition but not the assumption of the Mortgage. Finally, the time to satisfy conditions was extended to June 15, 2021 and the closing date to June 30, 2021.

[15] Mr. Cho further deposed that the $9 million (the new purchase price together with the $2 million loan) would be sufficient to pay off all the respondents' liabilities. He further stated that Okje had become aware of and submitted a loan application for $1 million to the Regional Relief and Recovery Fund, a Federal programme to help small businesses and he anticipated that funding would be distributed in 6 to 9 weeks-time. Finally, he provided evidence of listings of both his personal residence ($6,990,000) and his son's residence ($3.289 million).

[16] Meridian filed a further affidavit of Amber Waheed, a Commercial Credit Specialist and the person responsible for managing the respondents' loans. On May 18, 2021, Ms. Waheed had a telephone discussion with Mr. Singh during which he advised he had not yet retained legal

counsel; the removal of the condition requiring the assumption of Meridian's mortgage was an error and that he still required the condition to be included; although he'd been in touch with the franchisor, he had not received its approval to take over the hotel; his understanding was that Okje currently owed the franchisor between a $100,000 and $150,000 in outstanding franchise fees; in respect of the $2 million loan, he said Meridian would receive approximately $1 million and the balance would be used for priority and trade payables although he could not provide any details of the timing or the amounts owing.

[17] Following the above discussion with Mr. Singh, he retained a lawyer and discussions took place between Mr. Singh and Meridian, but no agreement was reached.

[18] Mr. Cho filed a further brief affidavit taking issue with Ms. Waheed's statement that Mr. Singh had said that the deletion of the condition requiring the assumption of the Meridian mortgage was an "error". Mr. Cho said that the condition was specifically discussed and deleted, and that Mr. Singh communicated to him that he could finance the acquisition of the hotel.

[19] Both s. 243(1) of the BIA and s. 101 of the CJA provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

[20] In determining whether it is just or convenient, the court must have regard to all of the circumstances of the case including the nature of the property, the rights and interests of the parties to the property, whether the lender's security is at risk of deteriorating, whether there is a need to stabilize and preserve the business, whether there is a loss of confidence in the debtor's management and the positions and interests of other creditors. See: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List) at para. 20; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953.

[21] Further, while the appointment of a receiver is considered an extraordinary remedy, in circumstances such as in this case, where the Credit Agreement, the Okje and 234 General Security Agreements and the Mortgage all provide that Meridian is entitled to appoint a receiver and manager in the event of a default, as Meridian's right to the appointment of a receiver is derived from a private contract, the appointment of a receiver cannot be considered an extraordinary remedy. See: *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965; *BCIMC Construction Fund*, at para. 43.

[22] Meridian submits that is just and convenient to appoint a receiver in this case. The respondents are clearly in default of the Credit Agreement. They are insolvent and have presented no clear path to resolve their obligations. There is no assurance the Agreement will be completed and even if it is, the respondents, by their actions, concede that more money will be required to pay out Meridian and the other ranking creditors, the source of which is also tenuous. Meanwhile, the longer the delay, the more its security is in jeopardy and at risk of eroding. Meridian has lost confidence in Okje's management and the appointment of a receiver will bring stability to the business and permit an orderly resolution of the issues.

[23] The respondents submit that a receivership would not be just or convenient. It would result in a substantial reduction in the value of the hotel and add substantial unnecessary expense to the process of finding a purchaser. It would also lead to the termination of 234's franchise pursuant to the franchise agreement. The respondents submit that they ought to be provided a fair opportunity to rectify any defaults and to sell their assets in an orderly manner.

[24] The respondents also raise issues of misrepresentation and bad faith conduct on the part of Meridian in relation to its handling of Okje's application for BCAP Loan in October 2020 and Meridian's subsequent decline of the application. They have commenced an action against Meridian and submit, given the factual issues in dispute, the application should be converted to an action.

[25] Finally, the respondents rely on the Agreement together with their actions in attempting to liquidate their assets to demonstrate that they have a plan which they are executing to enable them to pay off Meridian and their other creditors. They also point to their recent application for $1 million in funding to the Regional Relief and Recovery Fund.

[26] In my view, based on all the evidence, I am satisfied the appointment of a receiver is justified in this case.

[27] There is no issue that the loans are in default and have been for some time. The amount involved is substantial. The respondents essentially seek an opportunity to either bring the loans into good standing or sell the Property and business and repay Meridian and their other creditors. The evidence of how they intend to do that however does not in my view establish that to be a realistic possibility.

[28] The Agreement, which has been amended twice, is far from firm. There is also evidence that the parties may have a disagreement over whether there is a condition regarding Mr. Singh's assumption of the Mortgage. The further $2 million loan from Mr. Singh and/or the sale of the residences are also far from firm. The former is not documented and is to be secured by a mortgage on the Chos' residence which is for sale. Nor is there evidence of the encumbrances on the residences or what the net proceeds from the proposed sales would be should they occur.

[29] There is also no evidence that Okje's recent application for funding from Regional Relief and Recovery Fund will solve the respondents' issues. Even if approved, funding is still 6-9 weeks away and will not resolve their issues with Meridian or with the other creditors.

[30] There is also no evidence on the financial status of the hotel, including its recent cash flow and liabilities. As part of its disclosure for the BCAP Loan in the fall of 2020, Okje noted cash shortfalls of $622,593 for 2020 and projected $923,437 for 2021. That was before the province wide stay at home order in March of this year which has impacted all small businesses. Mr. Singh's information that there are substantial franchise fees in arrears is also troubling. In my view, in the circumstances, a receiver is required to stabilize and preserve the business.

[31] I also not satisfied that the application should be converted to an action or that Meridian's actions in respect of declining the BCAP Loan should impact on this application. The documentary evidence does not come close to establishing that Meridian made any

misrepresentations to the respondents concerning the availability of the BCAP Loan or its actions in declining it. The respondents were aware at all times that approval of the loan was subject to the approval of Meridian's credit department, which was not forthcoming for reasons which were communicated to the respondents.

[32] For the above reasons, BDO is appointed as receiver and manager over all property, assets and undertaking of Okje and 234.

[33] I am not prepared at this stage to authorize BDO to assign the respondents into bankruptcy. Such a request is premature in my view.

[34] Nor do I consider that the Agreement should be sealed. There is no evidence that it was obtained based on a formal sale process or that the proposed purchase price has any relation to the actual market value of the Property. In the circumstances, it should have no impact on the value of the Property.

[35] A receivership order, substantially in the form of the Commercial List order shall issue.

L.A. Pattillo J.

Released: May 25, 2021.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pandion Mine Finance Fund LP v. Otso Gold Corp.,* 2022 BCSC 136

Date: 20220128
Docket: S220231
Registry: Vancouver

In the Matter of the Receivership of Otso Gold Corp.

Between:

Pandion Mine Finance Fund LP, Rivermet Resource Capital LP and PFL Raahe Holdings LP

Petitioners

And

Otso Gold Corp.

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Petitioners:	M. Buttery, Q.C. J. Enns M. Burris N. Levine J. Atamian
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Counsel for Brunswick Gold Limited	J.K. McEwan, Q.C. W. Stransky
Counsel for Deloitte Restructuring Inc.	L Hiebert
Counsel for Blackrock Financial	M. Wasserman K. Esaw
Counsel for Lionsbridge Pty. Ltd. and Westech International Pty. Ltd.	V. Tickle

Place and Date of Hearing:	Vancouver, B.C. January 14, 2022
Place and Date of Judgment:	Vancouver, B.C. January 28, 2022

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Introduction

[1] Otso Gold Corp ("Otso") is a Canadian company that owns a gold mine in Finland. The ownership is indirect. Otso owns a Swedish subsidiary ("Otso AB"), which in turn owns a Finnish subsidiary ("Otso OY"). It is Otso OY that owns the mine. The mine is Otso's only substantial asset. It is an open pit mine that employs more than 130 people together with an array of consultants when it is in operation.

[2] Otso produced gold at the mine between November 2018 and March 2019, and again briefly in November and December 2021. Both times it was obliged to cease operations and put the mine into care and maintenance because it lacked working capital.

[3] Otso is also beset by a dispute between the company and its former managers (collectively, "Lionsbridge"). Lionsbridge withdrew from management at the end of November 2021. Consultants brought in to replace Lionsbridge are critical of the plans made and the steps taken under Lionsbridge's management. Lionsbridge defends its work. This dispute clouds projections of the mine's potential productivity upon which valuations of the mine depend.

[4] The petitioners ("Pandion") collectively constitute Otso's only secured creditor. There is a dispute as to how much Pandion is owed. It may be in the vicinity of US$26 million or exceed US$95 million. Whatever the amount owing, there is no dispute that Otso is in default and is not in a position to pay.

[5] Otso's majority shareholder ("Brunswick") maintains that it was induced by fraudulent misrepresentations and other wrongful conduct on the part of Pandion and Lionsbridge into investing US$27 million in Otso in exchange for shares. Brunswick is advancing these claims in actions recently commenced in Connecticut and in this Court. Pandion and Lionsbridge vigorously deny Brunswick's claims.

[6] Accordingly, Otso is insolvent because it is at present unable to pay its debts as they come due. Otso's financial predicament is compounded by the following:

a) The value of the mine is uncertain;

b) The amount owing to Pandion is uncertain; and

c) Brunswick is suing Pandion and Lionsbridge, and there may be claims by or against Otso arising from or in connection with this litigation;

[7] In early December 2021, Otso sought court protection for the purpose of preparing a proposal to its creditors in three jurisdictions: British Columbia, Sweden, and Finland. It obtained the necessary court orders staying all proceedings against the Otso companies in all three jurisdictions. In this Court, I granted Otso, Otso AB and Otso OY relief under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 [*CCAA*]. I appointed Deloitte Restructuring Inc. ("Deloitte") as Monitor. In a decision indexed as *Otso Gold Corp. (Re),* 2021 BCSC 2531 I extended the duration of the stay to January 14, 2022.

[8] Because Otso's insolvency is the subject of proceedings in three jurisdictions, there is a risk that one court's attempt to manage the insolvency risks being viewed as an interference in matters falling within another court's purview.

[9] On January 7, 2022, Pandion filed an application in the *CCAA* proceeding seeking to terminate the stay of proceedings against Otso and to appoint Deloitte as a receiver of Otso, Otso AB and Otso OY. The application was returnable on January 14. On January 13, Otso conceded that it was unable to obtain the financing required to pay its expenses while it prepared a proposal to its creditors. It abandoned its claim to further court protection in this Court.

[10] The stay of proceedings under the *CCAA* therefore lapsed on January 14. For the time being, court orders staying proceedings against Otso AB and Otso OY in Sweden and Finland remain in effect.

[11] On January 14, 2022, Pandion's application for appointment of a receiver came on for hearing before me. Pandion restated the application as one advanced in a fresh proceeding, and confined it to an application for the appointment of a

receiver of Otso's assets and undertaking (excluding Otso AB and Otso OY). This is the application addressed in these reasons.

[12] Otso does not oppose Pandion's application, but it says that the appointment of a receiver should include certain terms. Brunswick opposes the application.

[13] Having heard Pandion's application on January 14, 2022, I reserved judgment and made an interim order appointing Deloitte as receiver of Otso until my decision on the application could be delivered in these reasons for judgment.

Issues

[14] Having regard to the arguments advanced, Pandion's application raises the following issues:

1. Is Pandion limited on this application to obtaining an interim receivership order?

2. Is it just or convenient that a receiver of Otso be appointed?

3. If so, what are the appropriate terms of a receivership order?

Background

[15] The parties filed more than 2,500 pages of evidence. In their submissions, counsel went into considerable detail with a view to explaining why their respective clients' actions were reasonable, and those of their adversaries were careless and wrongful. Each side accuses the other of bad faith.

[16] There are material conflicts in the evidence. Faced with extensive affidavit evidence untested by cross-examination, and having heard just three days of argument in chambers (counting a hearing without notice on December 3, 2021 and a contested hearing on December 15, 2021, both in the *CCAA* proceeding), I am not in a position to resolve the conflicts. However, to provide context for this decision, it is important that I outline three important disputes.

The issue concerning the mine's prospects

[17] In these reasons, "Lionsbridge" encompasses Lionsbridge Capital Pty. Ltd., its subsidiary, Westech International Pty. Ltd., and their principals, Brian Wesson and Clyde Wesson. The two companies were contracted to provide management services to Otso from 2019 until November 30, 2021. The Wessons were directors of Otso.

[18] In the summer and fall of 2021, Otso was approaching the point of reopening the mine. In the run-up to production, it needed more cash. Brunswick advanced US$27 million in exchange for shares. Brunswick ended up with 67% of the common shares and a majority of the seats on the Otso's board.

[19] It became apparent that Otso would not be in a position to make a substantial payment to Pandion when it became due on December 7, 2021. Brunswick and the directors it had nominated to Otso's board came to suspect that they had been misled as to Otso's financial circumstances and the mine's prospects. They decided that Otso should retain Alvarez & Marsal Europe LLP ("A&M"), to investigate, advise on the restructuring of the company, and effectively assume control of the mining operations. In light of that decision, on November 30, 2021, the Wessons abruptly resigned from the board and Lionsbridge abandoned its management services agreement with Otso.

[20] Otso made its application under the *CCAA* three days later, on December 3, 2021. Following the appointment, A&M determined that a long term mine plan was required. In the *CCAA* proceeding, based on evidence from A&M's managing director, Thomas Dillenseger, I found that a long term mine plan is a prerequisite to the development of a reliable financial projection of the revenues to be expected from the mine; *Otso Gold Corp. (Re)* at paras. 25-26. A reliable financial projection is required to value the mine.

[21] As of January 12, 2022, the long term mine plan was complete. It featured larger gold reserves and higher costs than were anticipated under Lionsbridge's management. A&M expected that the preparation of mine cash flow projections

would require further funding and take another month, until February 14. A&M noted that significant capital expenditures would be required for the purchase of spare parts and essential maintenance would be required in the short term, if the mine was to remain in operation. Mr. Dillenseger described Otso's accounting records as disorganized and decentralized.

[22] The value of the mine is therefore uncertain, because the mine's prospects are uncertain. Resolving the uncertainties to the extent that may be possible will require time and money.

The dispute as to the amount owing to Pandion

[23] At the commencement of the *CCAA* proceeding, Otso acknowledged that it owed Pandion US$25.875 million and advised the Court that the amount might be much larger.

[24] Pandion loaned money to Otso and its subsidiaries beginning in late 2017. From the beginning, the loans were secured and extensively documented. The documentation took various forms, including two Pre-Paid Gold Forward Purchase Agreements, a Net Smelter Returns Royalty Agreement (the "Royalty Agreement"), and a Maintenance Loan Agreement.

[25] In October 2019, Otso and its subsidiaries agreed with Pandion to restructure the loans in an agreement entitled Consent and Agreement to Pre-Paid Forward Gold Purchase Agreement and Maintenance Loan Agreement (the "Consent Agreement"). It consolidated the indebtedness to Pandion into a single US$23 million obligation to be paid in two instalments no later than the "Deferment Termination Date". Clause 2.1 set out the following consequence if the US$23 million payment was not made on time:

> The deferment and consolidation granted pursuant to this Section 2.1 shall automatically terminate on the Deferment Termination Date and the Deferred Payment Amounts, <u>together with all other amounts due on such date under this Agreement and the Transaction Documents</u>, shall be immediately due and payable on such date.
>
> [Emphasis added.]

[26] On December 13, 2020, Otso and its subsidiaries agreed with Pandion to amend the Consent Agreement to provide that the Deferred Payment Amounts would be paid in one lump sum on December 7, 2021, which became the last possible Deferment Termination Date.

[27] The interpretation and legal consequences of clause 2.1 of the Consent Agreement are in issue. By clause 6.2(a), the Consent Agreement is governed by the laws of the State of New York. The balance of clause 6.2 contemplates litigation in the District Court of Helsinki or the U.S. Federal Courts sitting in the City of New York.

[28] Pandion says that the amount owing by Otso pursuant to clause 2.1 is US$95 million. Otso says that Pandion has both understated and overstated its claim. Understated, because the total of the amounts payable by virtue of the words I have emphasized is approximately US$118 million. Overstated, because, under New York law, the emphasized words amount to a penalty that is legally unenforceable as a matter of public policy. Otso has obtained an apparently credible expert opinion from a retired Justice of New York State's Appellate Division providing support for its legal argument. Referring to the sentence quoted above from clause 2.1 as the Fixed-Damages Clause, the expert, James McGuire, states:

> In sum, the Fixed-Damages Clause of the Consent Agreement is an unenforceable penalty provision under New York law. While I am not being asked to opine on whether it is an unenforceable penalty provisions (*sic*), I believe my obligation to the Court requires that I do. …

[29] Mr. McGuire's expert report was delivered to Brunswick on the eve of the hearing of this application. Counsel for Brunswick advises that, while time did not permit a response, she expects to obtain a credible report to the contrary. For present purposes, I assume that the issue is fully arguable on both sides.

[30] Accordingly, the amount owing to Pandion under its security cannot be determined on this application. It will require judicial determination by a court applying the law of New York State.

Brunswick's claims against Pandion and Lionsbridge

[31] On December 23, 2021, Brunswick commenced an action in the Superior Court in Connecticut, naming Pandion and two of its officers as defendants. On January 5, 2022, Brunswick commenced action No. 220017 in the Vancouver Registry of this Court naming the same defendants together with Lionsbridge defendants (the two companies and the Wessons).

[32] The claims advanced by Brunswick in the two actions are essentially the same. According to the Complaint filed in Connecticut:

> … this action concerns a brazen scheme in which Defendant PFL, the largest creditor and major shareholder of a struggling mining company, together with the other Pandion Defendants, sought to secure a favorable return, and potential exit, on their investment by hand-picking new management for the company that would be beholden to them and then colluding with management to fraudulent lure and exploit a new investor, Plaintiff BGL. To induce BGL to invest in Otso Gold Corp. (the "Company"), the Pandion Defendants and Lionsbridge Capital Pty. Ltd., the management services company selected and appointed by the Pandion Defendants, concealed both PFL's security interest in the Company's primary asset, a gold mine in Finland, and the extent of the Company's potential indebtedness to PFL. … After successfully luring BGL to invest, the Pandion Defendants and management then used the threat of massive escalating debt to PFL to extract additional investments from BGL. In less than one year, the Pandion Defendants and their management improperly extracted $27,000,000 in investments from BGL, without disclosing to BGL that the Company's contingent liabilities to the Pandion Defendants were more than three times that amount.

[33] Pandion and Lionsgate deny that there was collusion between them. They maintain that the matters which Brunswick alleges were concealed – Pandion's interest under the Royalty Agreement, and the extent of Otso's indebtedness to Pandion – were disclosed to Brunswick before it invested. They say that, if Brunswick misunderstood what it was getting into when it invested in Otso, it was as a result of its own failure to conduct due diligence.

[34] As already noted, I am not in a position on this application to decide whether Brunswick's claims are well-founded.

Analysis

1. Is Pandion limited on this application to obtaining an interim receivership order?

[35] Pandion seeks appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], s. 66 of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359, *Supreme Court Civil Rule* 16-1, and the inherent jurisdiction of the court. In argument, counsel focused their attention on s. 243(1) of the *BIA* and s. 39 of the *LEA.* Both statutes contemplate the appointment of a receiver where the court considers it "just or convenient".

[36] Section 244 of the *BIA* requires a secured creditor who intends to enforce security on all or substantially all of the property of an insolvent person to give the debtor notice in a prescribed form. The notice must be given 10 days in advance.

[37] Otso and Brunswick submit that recourse to s. 243 is not available in this case because Pandion has not yet given notice to Otso in the manner contemplated by s. 244 of the *BIA.* They rely on s. 243(1.1) which provides:

> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.
>
> [Emphasis added.]

[38] Otso and Brunswick submit that all that is possible at this stage, prior to delivery of the 10-day notice required under s. 244, is appointment of an interim receiver pursuant to s. 47 of the *BIA.* The difference is that the appointment of an interim-receiver is time-limited. Section 47 provides:

> 47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

> (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
>
> (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
>
> (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

[39] Pandion responds that the Court can and should permit the appointment of a receiver under s. 243(1) on the basis that it is "appropriate" in this case not to be bound by the 10-day notice requirement, as contemplated by s. 243(1.1)(b).

[40] It is not obvious that the 10-day notice requirement under s. 244 of the *BIA* is necessarily relevant if the application is viewed as one brought pursuant to s. 39 of the *LEA*; *Saskatchewan (Attorney General) v. Lamare Lake Logging Ltd.,* 2015 SCC 53 at paras. 32, 49 [*Lamare Lake*]. For the purpose of this application, I will assume against Pandion that its application is brought solely pursuant to s. 243 of the *BIA,* so that the 10-day notice requirement must be addressed.

[41] Absent consent, the 10-day notice requirement can be avoided in two ways: by making an interim order under s. 47; or by a finding that it is appropriate to appoint a receiver immediately or on shorter notice, pursuant to s. 243(1.1)(b). In effect, Otso and Brunswick argue that an interim order under s. 47 is to be preferred, at least in the circumstances of this case. Counsel did not direct me to any cases addressing the choice between an interim order under s. 47 and an immediate order under s. 243(1.1)(b).

[42] Brunswick submits that the manner in which Pandion has brought this application favours a time-limited, interim order rather than an order under s. 243. As noted above, Pandion initially brought its application as an interlocutory application in the *CCAA* proceeding. At the hearing on January 14, 2022, when it was pointed out that the *CCAA* proceeding was about to come to an end with the lifting of the stay pronounced on December 3, 2021 and Otso's abandonment of its claim for relief under the *CCAA*, Pandion undertook to immediately commence a fresh proceeding by petition seeking the relief claimed in its notice of application.

Brunswick submits that this manner of proceeding has deprived it of the opportunity to put up a full defence to the application.

[43] In my view, pursuant to s. 243(1.1)(b), it is appropriate that any receivership order I make should be made under s. 243(1), on terms addressed below.

[44] The discretion conferred under s. 243(1.1)(b) is broad. An inquiry into whether it is "appropriate" to appoint a receiver before the 10-day notice period has elapsed is necessarily a wide-ranging inquiry. There is nothing in the language of s. 243(1.1)(b) to suggest that the inquiry is confined by the possibility of an interim receiver under s. 47.

[45] Court appointment of a receiver under s. 243 (or any other statute) is a drastic and exceptional remedy; *Cascade Divide Enterprises, Inc. v. Laliberte,* 2013 BCSC 263 at para. 81. The purpose of the 10-day notice requirement is to provide a debtor company with the opportunity to negotiate and reorganize its affairs before a receiver is appointed; *Lamare Lake* at para. 53. Provision is made in subsection (1.1)(b) for the 10-day period to be abridged because there may be circumstances in which immediate appointment is appropriate. An obvious example is where there is an immediate risk of dissipation of assets. Parliament has not circumscribed the possible circumstances with limiting language. It has left it to the court's discretion.

[46] In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to Pandion resulting from the requirement, and the possibility of prejudice to Otso and Brunswick if it is waived.

[47] Otso initially applied to court for protection under the *CCAA* in the face of the looming deadline to replay its indebtedness to Pandion. Otso made the application on December 3, 2021 and the deadline was December 7, 2021. Otso anticipated that steps might be taken by Pandion and was not in a position to pay Pandion what

it was owed. The looming deadline was one of Otso's reasons for seeking court protection.

[48] On December 15, 2021, Pandion made Otso and Brunswick aware of its intention to seek appointment of a receiver on January 14, 2022, and obtained leave to bring such an application, if leave was required, notwithstanding the *CCAA* stay of proceedings. Thus, Otso has had much more than 10 days notice of Pandion's intention to seek appointment of a receiver. Pandion might have given notice under s. 244 at that time.

[49] On January 7, 2022, Pandion served its motion materials for its application returnable on January 14.

[50] Otso is not in a position to repay Pandion, and would not have been in a position to repay Pandion if Pandion had given it notice under s. 244 more than 10 days before the application was heard. In the circumstances of this case, compliance with the 10-day notice requirement would serve no practical purpose. It would just be a formality.

[51] The only reason not to make a receivership order under s. 243(1), as opposed to an interim order under s. 47, would be if Otso or Brunswick were prejudiced by the manner in which Pandion has proceeded. Brunswick says that there is prejudice because Pandion did not file the petition under which it is proceeding with the application in a timely way. While I am not able to say that Brunswick would be on firmer ground, opposing the application, had Pandion filed its petition well in advance of the hearing, it is a fair point that Pandion is seeking a remedy in this action without giving the notice required in the case of a fresh proceeding under the *Supreme Court Civil Rules.* To the extent that there is prejudice arising from the belated commencement of a fresh proceeding, it can be remedied in the terms of an order under s. 243(1).

[52] Accordingly, in my judgment, rather than making a time-limited, interim order under s. 47, it is appropriate to proceed under s. 243(1), making it a term of any

receivership order made that any interested party will be at liberty to apply to set the order aside. On that basis, there is no prejudice to Otso and Brunswick resulting from the truncation of notice. It may well be that a further application will not be required.

2. Is it just or convenient that a receiver of Otso be appointed?

[53] The purpose of a court-ordered receivership, generally, is to preserve and protect property pending the resolution of issues between the parties; *Lamare Lake* at para. 51. The cases identify a long list of considerations to be taken into account in determining whether the appointment of a receiver is just or convenient. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, Masuhara J. adopted a list of factors from a leading text, *Bennett on Receivership, 2nd ed.* (Toronto: Carswell, 1999) at p. 130. This approach was affirmed in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 at paras. 21-55. The factors are:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

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

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;
m) the length of time that a receiver may be in place;
n) the cost to the parties;
o) the likelihood of maximizing return to the parties;
p) the goal of facilitating the duties of the receiver.

[54] These factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient; *Bank of Montreal v. Gian's Business Centre Inc.,* 2016 BCSC 2348 at para. 23.

[55] The following considerations favour the appointment of a receiver in this case.

[56] A continuing expenditure of funds is necessary to preserve the value of the mine. Otherwise, it is a wasting asset. Otso does not have the funds required even to keep the mine in "care and maintenance" mode. It has been unable to find a lender in the context of the *CCAA* proceeding. Brunswick is unwilling to inject further equity. Pandion is willing to fund the necessary expenditure in the context of a receivership, but not otherwise.

[57] Appointment of a receiver will facilitate preservation and the orderly marketing of the mine for the benefit of all of Otso's creditors, and perhaps even its shareholders. Pandion is the party with the greatest economic stake. It has first call on the assets, it is not clear that there is sufficient value that it will be paid in full, and the value of its security is deteriorating. It is the fulcrum creditor. Moreover, Pandion has contracted for the right to appoint a receiver.

[58] There are only two ways out of the present predicament. If the amount owing to Pandion is resolved in Otso's favour so that Pandion can be paid out, it is conceivable that Brunswick may come up with the necessary funds or another equity investor may be found. Otherwise, the mine must be sold. Either way, the appointment of a receiver will facilitate matters by stabilizing the situation. It will prevent the assertion of lawsuits against Otso without leave of the court. The likely alternative is a free for all of litigation and a wasting asset.

[59] A court-appointed receiver is objective and neutral, characteristics of particular importance in a case involving competing claims and factual disputes. The receiver may seek assistance from the court. In the context of a receivership, the court may give directions for the resolution of contentious issues.

[60] As noted above, Otso does not oppose appointment of a receiver *per se*, although it seeks terms I will address below.

[61] Brunswick submits that appointment of a receiver must be refused because Pandion lacks good faith. It is true that good faith is required of an applicant for a receivership order under s. 243; *BIA,* s. 4.2. Brunswick submits that:

> The extant allegations of conspiracy against Pandion directly impugn Pandion's conduct in the lead up to the alleged default under its loan agreements. Pandion is alleged to have acted dishonestly [and] fraudulently in inducing or permitting the inducement of [Brunswick's] investment and thereafter in frustrating Otso gold and [Brunswick's] ability to satisfy the $23 million liability, permitting its "reinstatement" to USD$95 million as currently alleged.

[62] Brunswick's allegation that Pandion engaged in a conspiracy is disputed. I am unable to determine on this application whether it is well founded.

[63] I cannot find that Pandion is pursuing its claim against Otso and seeking appointment of a receiver in bad faith. Whether or not Pandion is liable to Brunswick, it is undisputed that Otso owes more than US$25 million to Pandion. It is undisputed that Pandion has the status of a secured creditor.

[64] I conclude that it is just and convenient that a receiver be appointed.

3. If so, what are the appropriate terms of a receivership order?

[65] The starting point is the model receivership order established pursuant to Practice Direction 47. The parties' submissions require consideration of modifications to the model order under the following heads:

a) Inclusion of choses in action in the receivership;

b) Claims against Otso;

c) Resolution of the amount owing to Pandion;

d) Marketing of assets; and

e) Other terms.

a) Inclusion of choses in action in the receivership

[66] The model order extends to "all of the assets, undertakings and property" of the debtor, including choses in action. Clause 2(j) of the model order authorizes the receiver to:

> initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of any of the Debtors, the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings.

[67] Otso initially took the position that the receiver should not be appointed over choses in action of Otso as against Pandion, Lionsbridge, or any of its former directors or officers. In oral argument, it modified its position to submit that the receiver might be appointed over the choses in action, reserving to the parties' liberty to apply.

[68] Choses in action belonging to Otso should be realized for the benefit of Otso and its creditors. The receiver should be afforded an opportunity to investigate and report on any choses in action it might discern. If the receiver chooses to pursue a claim on Otso's behalf, the model order permits it to do so. As an independent officer of the court, the receiver can be trusted to take such steps. However, it is easy to imagine that Pandion might choose not to fund pursuit of a chose in action that other interested parties might wish to pursue, and that the receiver might be impaired in its ability to pursue such claims.

[69] It will be a term of the order that, if the receiver chooses not to pursue a chose in action that an interested party believes should be pursued, that party will be afforded a reasonable opportunity to seek the court's direction. The court might

allow the interested party to pursue the claim in Otso's name, on appropriate terms such as those contemplated, in the context of a bankruptcy, by s. 38 of the *BIA*, or make such other order as seems appropriate for the realization of the claim.

b) Claims against Otso

[70] Clause 2(j) of the model order, quoted above, extends to claims against Otso. The receiver may defend, settle, or compromise such claims. Clause 8 is also important, because it stays actions against Otso without the receiver's consent or leave of the court, except for the filing of a proceeding to prevent the tolling of a limitation period.

[71] One of Brunswick's concerns, articulated in oral argument, is that Otso itself may be liable under the various agreements documenting Brunswick's investment in respect of losses flowing from defaults on the part of Lionsgate and Pandion. Brunswick says that it is not just the majority shareholder but also a contingent creditor of Otso. Accordingly, it may wish to apply to court to lift the stay of actions against Otso, perhaps in the context of its actions against Pandion and Lionsbridge.

[72] The stay afforded under clause 8 of the model order is one of the advantages of the receivership. It contemplates further applications to court, as may be necessary. No further provision is necessary.

c) Resolution of the amount owing to Pandion

[73] The amount of money owing to Pandion is disputed and the nature of the dispute is such that it will require a judicial determination. It should be a term of the receivership order that the receiver or any interested party may seek directions to facilitate early resolution of this question by this Court or another court.

d) Marketing of assets

[74] Otso and Brunswick submit that Otso's assets – ultimately, the mine itself – should not be marketed until the amount owing to Pandion is settled. Brunswick submits that there is "a serious risk that Pandion will be paid funds that it is subsequently found not to be entitled to".

[75] I disagree that the marketing of Otso's assets should be postponed. Given the amount in issue and jurisdictional uncertainties, resolution of the amount owing to Pandion may take some time. In the meantime, Pandion will be bearing the costs of the receivership. Pandion is admittedly owed more than US$23 million as a secured creditor, and has an arguable claim that it is owed US$95 million. There is a risk that Pandion is under-secured, and the mine is a wasting asset. There is a real risk of unfairness to Pandion if it is held up in its ability to recover its debt indefinitely.

[76] Brunswick's stated concern that Pandion may be paid funds that it is subsequently found not to be entitled to is without substance. Brunswick is protected by standard terms of the model order requiring court supervision of sales and distributions. Clause 2(l) of the model order requires the receiver to seek court approval of asset sales exceeding stipulated thresholds. I fix the thresholds at $100,000 for a single transaction, or $1 million in the aggregate. Clause 12 of the model order requires the receiver to hold funds received through the sale of assets and not to pay them out except by court order.

e) Other terms

[77] Clause 23 of the model order requires me to fix a borrowing limit for funding of the receivership. Based on Otso's cash flow projections, I fix the limit at $3.5 million.

Disposition

[78] For these reasons, I order that a receiver be appointed on the terms of the model receivership order with the following additional terms:

a) The receiver will establish a Service List as provided in the interim order made on January 14, 2022;

b) The receiver will inform parties on the Service List if the receiver chooses not to pursue a chose in action belonging to Otso, and if any interested

party believes the chose in action should be pursued, that party may apply to this Court for directions;

c) The receiver or any interested party may apply to this Court for directions to facilitate early resolution of the amount owing to Pandion by this Court or another court;

d) The thresholds for Court approval under clause 2(l) are set at $100,000 for a single transaction, or $1 million in the aggregate;

e) The borrowing limit under clause 23 is fixed at $3.5 million;

f) Any interested party may apply to vary or set aside this order.

[79] I am seized of future applications in connection with this receivership.

"Gomery J."

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

INDEXED AS: SAM LÉVY & ASSOCIÉS INC. *v.* AZCO MINING INC.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Courts — Jurisdiction — Trustee presenting petitigon to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia — Company bringing motion to transfer petition to British Columbia — Whether Superior Court lacked subject matter jurisdiction over petition — Whether Superior Court erred in exercising discretion against making transfer order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy

Azco Mining Inc. *Appelante*

c.

Sam Lévy & Associés Inc. *Intimée*

RÉPERTORIÉ : SAM LÉVY & ASSOCIÉS INC. *c.* AZCO MINING INC.

Référence neutre : 2001 CSC 92.

Nº du greffe : 27876.

2001 : 15 mai; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Tribunaux — Compétence — Présentation à la Cour supérieure du Québec siégeant en matière de faillite d'une requête du syndic visant à « recouvrer » des biens retenus par une société ayant un bureau en Colombie-Britannique — Présentation par la société d'une requête sollicitant le renvoi en Colombie-Britannique de la requête en recouvrement de biens — La Cour supérieure était-elle incompétente ratione materiae pour entendre la requête en recouvrement de biens? — La Cour supérieure a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire pour refuser de renvoyer l'affaire? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-1, art. 187(7).

L'appelante est une société constituée sous le régime des lois du Delaware, offrant du capital de risque à partir de son bureau en Colombie-Britannique. En 1996, l'appelante et Eagle, une société ayant des bureaux au Québec, ont conclu une opération concernant le financement d'une mine d'or africaine. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait une clause portant que le contrat était régi par les lois de la Colombie-Britannique. En septembre 1997, Eagle a été déclarée en faillite par la Cour supérieure du Québec siégeant en matière de faillite et la société intimée a été nommée syndic de la faillite. En janvier 1999, le syndic intimé a présenté une requête visant à « recouvrer » des biens de Eagle, y compris la valeur pécuniaire de nombreuses actions détenues ou contrôlées par l'appelante. L'appelante a alors présenté une requête sollicitant le renvoi de la requête en recouvrement de biens « à la Division des faillites de la Cour suprême de

Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The

la Colombie-Britannique à Vancouver ». La requête de l'appelante a été rejetée. La Cour d'appel a confirmé cette décision à l'unanimité.

Arrêt : Le pourvoi est rejeté.

La requête en faillite a été déposée à bon droit devant la Cour supérieure du Québec siégeant en matière de faillite. Le créancier doit déposer une requête de mise en faillite auprès du tribunal compétent dans le district judiciaire de la localité du débiteur. Eagle faisait affaire au Québec et son seul lien avec la Colombie-Britannique tenait au fait que les contrats entre elle et l'appelante renvoyaient aux lois de cette province. Aucun élément de preuve ne laissait croire que le tribunal de faillite du Québec n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre. Le tribunal de faillite a ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique. La *Loi sur la faillite et l'insolvabilité* établit un régime national de règlement des demandes en matière de faillite. Le paragraphe 188(1) prévoit que les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

Le tribunal de faillite ne perd pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. Bien qu'une demande du syndic qui est dirigée contre un « étranger à la faillite » ou qui n'est pas de la « nature d'une affaire de faillite » doive être présentée aux tribunaux civils ordinaires, si le litige contractuel se rapporte bel et bien à la faillite, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite. En l'espèce, loin d'être une « étrangère » à la faillite, l'appelante en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice, selon le cas. De plus, même si le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat, on ne peut qualifier la demande du syndic de simple demande en dommages-intérêts, car il s'agit plutôt d'une demande de recouvrement de biens précis du failli que l'appelante retient sans droit.

La *Loi sur la faillite et l'insolvabilité* établit à première vue un centre de commandement ou un « contrôle unique » pour la totalité des procédures liées à la faillite. Le « contrôle unique » n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant » au sens du par.

motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991]

187(7), justifiant que le syndic doive accourir dans plusieurs ressorts. Le juge des requêtes pouvait conclure que les faits ne faisaient pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique.

Les contrats pertinents auxquels l'appelante et Eagle étaient parties contenaient une clause exprimant le choix des lois applicables, et non une clause d'élection de for, et les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Par ailleurs, les art. 3148 et 3135 du *Code civil du Québec* ne s'appliqueraient dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les [. . .] règles ». Étant donné que le par. 187(7) de la Loi prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district ou « pour un autre motif suffisant », ces dispositions particulières du Code ne s'appliquent pas. Lorsqu'un défendeur, contrairement au défendeur en l'espèce, bénéficie d'une clause d'élection de for, le juge des requêtes doit examiner cette clause avec soin en application du par. 187(7), mais il n'est pas lié par elle.

Jurisprudence

Arrêts suivis : *Stewart c. LePage* (1916), 53 R.C.S. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; **distinction d'avec l'arrêt :** *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; **arrêts mentionnés :** *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87; *Boily c. McNulty*, [1928] R.C.S. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31; *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246; *Geoffrion c. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*,

R.D.J. 423; *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused [1997] 2 S.C.R. xiv; *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, aff'd (1992), 9 O.R. (3d) 755, leave to appeal refused [1992] 3 S.C.R. v; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), aff'd 240 F.3d 148 (2001); *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (1989).

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1) [am. 1997, c. 12, s. 1], 17(1), 30(1)(*d*), 43(5) [rep. & sub. 1992, c. 27, s. 15], 72(1), 183(1)(*b*), (*c*), 187(7), 188(1), (2).
Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [am. SOR/98-240], s. 3.
Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3148.
Code of Civil Procedure, R.S.Q., c. C-25.
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[1990] R.J.Q. 6; *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143, autorisation de pourvoi refusée [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, conf. par (1992), 9 O.R. (3d) 755, autorisation de pourvoi refusée [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), conf. par 240 F.3d 148 (2001); *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109; *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co c. Merrill Lynch*, 885 F.2d 1149 (1989).

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POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), rejetant l'appel interjeté par l'appelant

judgment of the Superior Court, [1999] R.J.Q. 1497. Appeal dismissed.

Yves Martineau, for the appellant.

Jean-Philippe Gervais, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. — The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties

à l'encontre d'un jugement de la Cour supérieure, [1999] R.J.Q. 1497. Pourvoi rejeté.

Yves Martineau, pour l'appelante.

Jean-Philippe Gervais, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — La Cour supérieure du Québec siégeant en matière de faillite a le bras long au point d'avoir atteint l'appelante à Vancouver (Colombie-Britannique) concernant une demande d'actions, de bons de souscription et de paiement d'autres créances auxquels le failli prétend avoir droit et que le syndic de faillite évalue à plus de 4,5 millions de dollars. L'appelante a rétorqué que le litige, qui porte sur le financement d'une mine d'or en Afrique, n'a rien à voir avec le Québec. Elle prétend que la demande du syndic de faillite intimé constitue une demande civile ordinaire, entièrement fondée sur des contrats qui doivent être interprétés en conformité avec les lois de la Colombie-Britannique. Selon elle, ce motif et d'autres raisons de commodité et d'efficacité font en sorte que la demande devrait être entendue en Colombie-Britannique. Le tribunal de faillite et la Cour d'appel du Québec ont rejeté ces arguments et je suis d'avis que le pourvoi interjeté auprès de notre Cour devrait aussi être rejeté.

I. Les faits

L'appelante Azco Mining Inc. (« Azco »), une société constituée sous le régime des lois du Delaware, offrait du capital de risque à partir de son bureau de Vancouver (Colombie-Britannique). En 1996, on l'a mise en contact avec Eagle River International Limited et Eagle River Exchange and Financial Services Inc. (ci-après appelées collectivement « Eagle »), qui avaient des bureaux à Gatineau (Québec). Eagle faisait des démarches en vue d'exploiter des mines d'or prometteuses dans une région de 500 milles carrés située au Mali (Afrique occidentale). Il a été convenu que Eagle continuerait à mettre son expertise au profit de la mise en production de

reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

June 7, 1996 financing agreement

28. The agreement shall be governed by the law of British Columbia.

June 12, 1996 management services agreement

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

West African Gold & Exploration S.A. Debenture dated August 9, 1996

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either

ces mines par l'entremise de filiales au Mali et que Azco fournirait le financement. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait l'une des dispositions suivantes que l'appelante qualifie de clauses d'élection de for, mais qui, selon l'intimée, exprimaient simplement leur choix quant aux lois applicables :

[TRADUCTION]

Contrat de financement conclu le 7 juin 1996

28. Le contrat est régi par les lois de la Colombie-Britannique.

Contrat de services de gestion conclu le 12 juin 1996

13. **Arbitrage** : Les parties conviennent de soumettre à l'arbitrage toute question litigieuse relative au présent contrat conformément à ses stipulations.

. . .

20. **Lois applicables** : Le présent contrat a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci.

Azco invoque en outre les stipulations suivantes du contrat d'emprunt sous forme de débenture qu'elle a conclu avec la filiale de Eagle au Mali (la West African Gold & Exploration S.A.) :

[TRADUCTION]

Contrat d'emprunt sous forme de débenture de West African Gold & Exploration S.A. conclu le 9 août 1996

17. Le présent contrat d'emprunt sous forme de débenture a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci. En outre, la société convient expressément de signer sans délai tous les documents nécessaires pour que le présent contrat d'emprunt sous forme de débenture devienne exécutoire et soit enregistré valablement à l'égard des biens grevés conformément aux lois en vigueur dans la province de la Colombie-Britannique et aux lois en vigueur dans la République du Mali; sans limiter la portée générale de ce qui précède, la société convient en outre de reconnaître, le cas échéant, la juridiction des tribunaux compétents de la province de la Colombie-Bri-

administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

tannique pour l'application et l'interprétation du présent contrat d'emprunt sous forme de débenture en conformité avec les lois en vigueur dans la province de la Colombie-Britannique.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

Il était prévu qu'en bout de ligne, en cas de succès du projet, Azco détiendrait une participation majoritaire dans la Sanou Mining Corporation (« Sanou »), que le syndic a qualifié de société de gestion en coentreprise et dans laquelle Eagle obtiendrait une participation minoritaire.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of US$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

Entre le 16 mai 1996 et le 1er mai 1997, Azco a versé au total à Eagle la somme de 3 844 858 $US. Pour chaque versement, Eagle a signé un billet à ordre par lequel elle s'engageait à rembourser Azco si elle manquait à ses obligations contractuelles.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

Le 12 septembre 1997, Eagle a été déclarée en faillite. La société intimée a été nommée syndic de la faillite. Malgré la faillite de Eagle, le projet du Mali s'est poursuivi et, selon Azco, il est toujours en cours. Le syndic affirme que l'appelante contrôle maintenant la société de gestion Sanou et retient illégalement les 3,5 millions d'actions et les 4 millions de bons de souscription auxquels Eagle avait droit — et auxquels elle a toujours droit.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares of Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN$337,500 and the Sanou interest at US$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

Le 18 janvier 1999, le syndic intimé a présenté à la Cour supérieure du Québec siégeant en matière de faillite (le « tribunal de faillite ») une requête visant à « recouvrer des biens » de Eagle, y compris la valeur pécuniaire de 125 000 actions de Azco même, ainsi que de 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il considère comme des biens du débiteur retenus illégalement. Le syndic intimé évalue les actions de Azco à 337 500 $CAN et la participation dans Sanou à 1 875 000 $US. Le syndic fait également valoir certaines demandes pécuniaires relativement à diverses créances alléguées.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., based principally" on the financing agreements to recover about US$3.85 million in the

Le 24 février 1999, l'appelante a présenté une requête sollicitant le renvoi de la requête en recouvrement de biens [TRADUCTION] « à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver ». À l'appui de sa requête, l'appelante a déclaré : [TRADUCTION] « Azco déposera assurément une demande reconventionnelle d'un montant de plus de 5 000 000 $CAN fondée

payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. *Quebec Superior Court*, [1999] R.J.Q. 1497

Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with

principalement » sur les contrats de financement en vue de recouvrer les versements susmentionnés d'environ 3 850 000 $US remis à Eagle, qui étaient garantis par des billets à ordre, comme je l'ai déjà expliqué. Azco a soutenu que, selon les contrats, en cas de non-respect de certaines conditions, les avances de fonds seraient considérées comme un prêt à demande. D'après elle, ces conditions n'ont pas été remplies et elle a droit au remboursement immédiat de toutes les avances de fonds. Azco a prétendu que [TRADUCTION] « [l]a division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande contractuelle contre Azco ». Elle plaide que le dossier doit être renvoyé à la Division des faillites de Vancouver.

9 Le vice-président aux Finances de Azco, Ryan Modesto, qui vit aux États-Unis, a témoigné à l'appui de la requête en renvoi que Azco est un créancier de la faillite :

[TRADUCTION]

Q. Donc, Azco Mining plaide-t-elle qu'elle est le créancier dans le cadre de cette faillite de Eagle River?

R. Oui, c'est ça.

Q. Pour quel montant?

R. Pour trois millions huit cent quarante-quatre mille huit cent cinquante-huit dollars (3 844 858 $) plus les intérêts courus.

Q. C'est en devises américaines?

R. C'est en devises américaines.

Q. Et vous mentionnez les intérêts. Faites-vous référence aux intérêts stipulés dans le billet à ordre?

R. Exactement.

10 Le juge Isabelle de la Cour supérieure du Québec a rejeté la requête de Azco le 6 mai 1999. La Cour d'appel du Québec a confirmé cette décision le 21 février 2000.

II. Historique des procédures judiciaires

A. *Cour supérieure du Québec*, [1999] R.J.Q. 1497

11 Le juge Isabelle a conclu que la Cour supérieure du Québec siégeant en matière de faillite avait

the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. *Quebec Court of Appeal*, [2000] R.J.Q. 392

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(*d*) of the Act which empow-

compétence pour entendre la requête en recouvrement de biens présentée par l'intimée. Les dispositions pertinentes de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (la « Loi »), étaient claires et il n'y avait pas lieu d'invoquer le *Code civil du Québec*, L.Q. 1991, ch. 64, ni le *Code de procédure civile* du Québec, L.R.Q., ch. C-25.

Azco n'a pas prétendu que les affaires du failli pouvaient être administrées d'une manière plus efficace en Colombie-Britannique. Il a plutôt soutenu qu'il y avait d'autres motifs « suffisants » de renvoyer l'instance dans cette province, notamment certaines clauses du contrat (reproduites précédemment) qui, selon Azco, exigeaient que le litige soit tranché en Colombie-Britannique. Le juge Isabelle a conclu qu'il s'agissait de clauses portant sur le choix des lois applicables plutôt que de clauses d'élection de for et que, de toute manière, elles n'avaient aucun caractère « impératif ».

Le juge Isabelle a reconnu qu'il pouvait renvoyer l'instance à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver en vertu du par. 187(7) de la Loi. Il n'était pas nécessaire d'appliquer les règles particulières régissant les situations de *forum non conveniens* édictées par l'art. 3135 du *Code civil du Québec*. Compte tenu de l'ensemble des circonstances, toutefois, le juge Isabelle a estimé que le renvoi de l'instance n'était pas justifié. Le législateur a conféré au syndic le pouvoir de gérer les affaires du failli de la façon la plus pratique et la plus économique possible. Vancouver pouvait être commode pour l'appelante, mais l'intérêt de l'ensemble des créanciers l'emportait sur ce qui était commode pour un seul créancier. La requête de l'appelante a donc été rejetée.

B. *Cour d'appel du Québec*, [2000] R.J.Q. 392

La Cour d'appel a rejeté à l'unanimité l'appel de Azco. Le juge Robert, avec l'appui des juges Proulx et Rousseau-Houle, a confirmé que la Cour supérieure du Québec avait compétence sur la faillite de Eagle, soulignant que la société faisait affaire au Québec lorsque la procédure de faillite a été engagée. La requête en recouvrement de biens présentée contre Azco était autorisée par l'al. 30(1)*d*) de la

ers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

Loi, qui confère au syndic le pouvoir d'intenter une procédure judiciaire se rapportant aux biens du failli avec la permission des inspecteurs.

15 Le juge Robert a convenu avec le juge des requêtes qu'il était plus efficace et équitable qu'un seul tribunal supervise l'administration de l'actif du failli malgré le fait que cette centralisation pouvait causer certaines difficultés et certains inconvénients aux parties résidant dans des provinces éloignées du lieu de la faillite. Toutefois, à l'instar du juge Isabelle, il a souligné le caractère discrétionnaire du pouvoir que le par. 187(7) confère aux tribunaux de renvoyer une affaire à une autre division lorsque la preuve établit que l'actif du failli y serait administré d'une façon plus économique ou qu'un autre motif suffisant le justifie. En l'espèce, le juge Robert a conclu que Azco n'avait pas démontré qu'il serait plus économique de s'adresser au tribunal de faillite de la Colombie-Britannique. Quant aux autres circonstances, le juge Robert s'est dit d'avis que les dispositions contractuelles que Azco avait qualifiées de clauses d'élection de for ne liaient pas le syndic de faillite, qui représente l'ensemble des créanciers et qui agit dans leur intérêt collectif. Les clauses en question ne constituaient pas des clauses attribuant une compétence exclusive. Même si tel avait été le cas, la Loi est une loi d'ordre public et ses dispositions doivent être appliquées rigoureusement compte tenu de leurs conséquences sur les droits des débiteurs et des créanciers.

III. Relevant Statutory Provisions

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

2. (1) In this Act,

. . .

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

III. Les dispositions législatives pertinentes

16 *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« localité d'un débiteur » Le lieu principal où, selon le cas :

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

b) le débiteur a résidé au cours de l'année précédant sa faillite;

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. . . .

(5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. . . .

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

30. (1) Avec la permission des inspecteurs, le syndic peut :

. . .

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

43. . . .

(5) La pétition est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

187. . . .

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

188. (1) Une ordonnance rendue par le tribunal, sous le régime de la présente loi, est exécutée dans les

bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

IV. Analysis

Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original,

tribunaux ayant juridiction en matière de faillite ailleurs au Canada, de la même manière, à tous les égards, que si l'ordonnance avait été rendue par le tribunal tenu par les présentes de l'exécuter.

(2) Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 (mod. DORS/98-240)

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

Code civil du Québec, L.Q. 1991, ch. 64

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

. . .

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :

. . .

5º Le défendeur a reconnu leur compétence.

Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

IV. Analyse

Le Parlement a conféré au tribunal de faillite la capacité et le pouvoir d'exercer « la juridiction

auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi » (par. 183(1)). Il est évident que cette disposition vise à conférer au tribunal de faillite les pouvoirs et les obligations correspondant à la compétence qui appartient au législateur fédéral en matière de « faillite » en vertu du par. 91(21) de la *Loi constitutionnelle de 1867*, sauf dans la mesure où le législateur a lui-même limité la compétence du tribunal ou l'a expressément attribuée autrement.

Bien que l'appelante ait demandé simplement dans sa requête que le litige soit renvoyé à la Division de Vancouver de la Cour suprême de la Colombie-Britannique siégeant en matière de faillite (semblant ainsi reconnaître que le litige était considéré à bon droit comme une affaire de faillite), elle a aussi allégué que les demandes du syndic étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). De plus, une bonne partie des arguments avancés oralement par l'appelante laissaient entendre que le litige devait être tranché par les tribunaux civils ordinaires. L'appelante soutient en outre que le Québec n'est pas le lieu où il convient que ce litige soit tranché et que la Cour supérieure du Québec siégeant en matière de faillite n'a pas le bras suffisamment long pour contraindre Azco à amener ses témoins dans l'Est pour débattre du litige. Elle prétend que le lieu approprié est la Colombie-Britannique, car il n'existerait absolument aucun lien important entre la présente affaire et la province de Québec.

Il convient d'examiner dans l'ordre suivant les questions de droit que l'appelante a soulevées :

1. La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?

2. Dans l'affirmative, cette cour a-t-elle ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. *Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?*

Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91 of the *Constitution Act, 1867*, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

The "locality of the debtor" is defined under s. 2(1) as the "principal place"

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

3. Dans l'affirmative, les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?

4. Dans la négative, cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?

5. Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?

1. *La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?*

20 Le Parlement a décidé d'utiliser les cours supérieures des provinces et des territoires pour exercer sa compétence en matière de faillite (art. 183). Il est établi depuis longtemps que, dans les domaines relevant des chefs de compétence énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*, [TRADUCTION] « le Parlement du Canada peut donner compétence aux cours provinciales et réglementer au maximum les procédures devant ces cours » : *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87, le juge Rinfret, p. 100. Les cours mentionnées à l'art. 183 conservent leur statut de cour supérieure de compétence inhérente, mais je les appellerai ici tribunaux de faillite, quoique cette expression soit quelque peu imprécise.

21 Le créancier qui désire obtenir une ordonnance de séquestre contre un débiteur doit déposer une requête de mise en faillite « auprès du tribunal compétent dans le district judiciaire de la localité du débiteur » (par. 43(5)).

22 Le paragraphe 2(1) définit la « localité du débiteur » comme le « lieu principal » où, selon le cas :

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved

b) le débiteur a résidé au cours de l'année précédant sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

Le paragraphe 43(5) exprime une règle de compétence qui attribue à l'un ou l'autre des tribunaux nommés au par. 183(1) le pouvoir judiciaire de statuer sur les requêtes de mise en faillite. La preuve a permis de constater que Eagle faisait affaire au Québec, même si elle n'avait pas obtenu de permis le lui permettant. Les contrats entre Azco et Eagle (ainsi que les billets à ordre fondant la demande reconventionnelle de Azco) précisent que Eagle a un bureau au 212, boulevard Labrosse, à Gatineau (Québec). Cette adresse figure dans l'en-tête de son papier à lettres. Le vice-président aux Finances de Azco a témoigné que les rencontres relatives au financement ont été tenues à ce bureau. Rien ne laisse entendre que Eagle ait quitté les lieux avant sa faillite, ni qu'elle ait eu d'autres bureaux au Canada.

Le seul lien apparent entre Eagle et la Colombie-Britannique tient au fait que les contrats susmentionnés renvoient aux lois de cette province. Il est clair que le par. 43(5) n'aurait pas permis le dépôt de la requête de mise en faillite en Colombie-Britannique pour un tel motif. J'estime qu'aucun élément de la preuve ne laisse croire que le tribunal de faillite à Hull n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre le 12 septembre 1997.

2. *Le tribunal de faillite a-t-il ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?*

La Loi établit un régime national de règlement des demandes en matière de faillite. Comme le juge Rinfret l'a souligné dans l'arrêt *Boily c. McNulty*, [1928] R.C.S. 182, p. 186 : « Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue ». C'est par l'intermédiaire du réseau d'entraide des cours supérieures des provinces et des territoires prévu par l'art.

through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be

188 que les décisions rendues par un tribunal siégeant dans une province donnée sont exécutées à l'échelle nationale : *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A. Qué.), le juge Rivard, p. 246 : « La *Loi de faillite* est fédérale, et les ordonnances de la Cour Supérieure de la province de Québec, siégeant en vertu de cette loi comme Cour de Faillite, sont exécutoires [en] Ontario ». Voir également : *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada*, *Local 1015* (1996), 39 C.B.R. (3d) 311 (C.A.N.-É.), p. 314, et *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), p. 1389.

Les syndics auront souvent (et peut-être de plus en plus) à composer avec des débiteurs et des créanciers résidant dans différentes régions du pays. Ils ne pourront pas s'acquitter efficacement de leurs fonctions, pour reprendre les mots du juge Idington dans l'arrêt *Stewart c. LePage* (1916), 53 R.C.S. 337, p. 345, [TRADUCTION] « si tous peuvent s'interposer et invoquer leurs propres perceptions de leurs droits quant à la présentation d'une demande en justice ». L'arrêt *Stewart* portait sur la liquidation d'une société de fiducie constituée sous le régime des lois fédérales en Colombie-Britannique. Par suite de la liquidation, un client de l'Île-du-Prince-Édouard a présenté devant la Cour supérieure de cette province une demande de jugement déclaratoire portant que certains des fonds détenus par la société de fiducie faillie étaient détenus en fiducie et que cette société devait être déchue de sa qualité de fiduciaire. Notre Cour a conclu qu'en dépit de son lien très étroit avec l'Île-du-Prince-Édouard, le litige ne pouvait pas être soumis à la cour de cette province sans l'autorisation de la Cour suprême de la Colombie-Britannique. Le juge Anglin a fait remarquer, à la p. 349 :

> [TRADUCTION] Il ne fait pas de doute que des inconvénients surgiront dans les cas exceptionnels où, comme en l'espèce, la liquidation de la société a lieu dans une province du Dominion très éloignée de la province de résidence des personnes intéressées en qualité de créancières ou de demanderesses. Mais le législateur a probablement jugé nécessaire dans l'intérêt d'une liquidation prudente et économique que la cour chargée de la liquidation ait le contrôle non seulement de l'actif et des biens se trouvant en la possession de la société mise en

involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remain-

liquidation, mais aussi de l'ensemble des litiges dans lesquels cette société pourrait être engagée. De façon générale, la prépondérance des inconvénients milite probablement en faveur de ce genre de contrôle unique, bien qu'il puisse comporter des désavantages dans certains cas.

Comme je l'ai mentionné, l'arrêt *Stewart* portait sur la liquidation d'une société, mais la politique législative favorisant le « contrôle unique » s'applique également en matière de faillite. Il y va du même intérêt public à la gestion expéditive, efficace et économique des retombées d'un effondrement financier. Par application du par. 188(1), les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

J'ai conclu que les créanciers qui ont demandé la mise en faillite ont fait appel à bon droit à la compétence de la Cour supérieure du Québec siégeant en matière de faillite, mais l'avocat de l'appelante affirme que sa cliente, qui a un bureau en Colombie-Britannique, échappe à la compétence de cette cour. Il plaide, notamment que, quel que soit le pouvoir du Parlement de conférer une compétence nationale à la cour supérieure d'une province, il demeure que cette cour est constituée par la province et que la loi grâce à laquelle elle a le bras long doit être respectée en ce qui concerne la signification des actes de procédure. Les faits révélés par le dossier n'indiquent pas précisément de quelle manière la requête en recouvrement présentée par le syndic a été signifiée à l'appelante, mais si Azco avait des arguments à faire valoir relativement à la validité de la signification de cette requête introductive d'une instance contre elle, elle y a renoncé en ne les soulevant pas dans la requête qu'elle a présentée à Hull. En appel, une bonne partie de l'audience a été consacrée aux arguments portant sur la question de savoir comment un tribunal québécois pouvait acquérir la compétence *ratione personae* sur une société située en Colombie-Britannique et si les règles québécoises de signification *ex juris* s'appliquaient. Je rejette la prétention selon laquelle la Cour supérieure du Québec siégeant en matière de faillite ne peut exercer la compétence *ratione personae* sur les créanciers d'une autre province en vertu de la Loi, et ce pour les motifs déjà exposés qui tiennent à la compétence nationale de la cour. Aucune objection

ing issue with respect to *in personam* jurisdiction was thereby waived.

liée à la signification des actes de procédure ne saurait subsister, étant donné que Azco a non seulement comparu au Québec, mais aussi invoqué la compétence de la Cour supérieure du Québec siégeant en matière de faillite en lui demandant de renvoyer l'instance au tribunal de faillite siégeant à Vancouver par application du par. 187(7). Elle a ainsi renoncé à soulever toute question irrésolue concernant la compétence *ratione personae*.

Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

29 Bien entendu, Azco n'a pas renoncé à contester la compétence *ratione materiae* sur l'objet du présent litige. Il s'agissait d'un élément prépondérant de sa requête. J'aborderai maintenant cette question.

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

3. *Les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?*

The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

30 Dans sa requête, l'appelante a prétendu que les demandes du syndic contre elle étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). La théorie qui sous-tend ces arguments est apparemment la suivante : comme les demandes contractuelles ont trait à « [l]a propriété et [aux] droits civils » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, ces actions en justice ne relèvent pas de la compétence du tribunal de faillite. Au paragraphe 42 de son mémoire, par exemple, l'appelante soutient que :

> [TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

> Contrairement à ce qu'affirme la Cour d'appel, le recours du syndic est donc une affaire purement contractuelle, de droit civil. Il ne s'agit pas d'un recours spécifiquement prévu par la LFI tel le recours en annulation de paiement préférentiel (voir articles 91 à 100 LFI). Le simple fait que le demandeur soit un syndic ne change pas la nature du recours et n'en fait pas un litige en matière de faillite.

Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per*

31 Bien entendu, la plupart des questions liées à la faillite concernent de près ou de loin la propriété et les droits civils. Il est cependant vrai que certains des arrêts qui nient la compétence du tribunal de faillite s'appuient sur des motifs à connotation constitutionnelle, p. ex., *In re Morris Lofsky* (1947), 28 C.B.R.

Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.), at p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (Que. Sup. Ct.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "Bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31, it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, Lord Selborne, speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne L.C.'s description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83, at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special

164 (C.A. Ont.), le juge Roach, p. 167; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (C.A.C.-B.), p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (C.S. Qué.), le juge Bernier, p. 94, et *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

Il faut donc se demander ce qu'englobe le terme « faillite » au sens du par. 91(21) de la *Loi constitutionnelle de 1867*.

Dans l'arrêt *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31, p. 46, le juge Rand a déclaré ce qui suit :

> [TRADUCTION] La faillite est une procédure bien connue par laquelle les biens d'un débiteur insolvable passent de façon coercitive sous administration judiciaire principalement dans l'intérêt des créanciers.

Ce concept-clé d'administration coercitive est apparu dès les premiers arrêts de notre jurisprudence en matière de faillite. Dans l'arrêt *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31, le lord Selborne a dit ce qui suit à la p. 36, en parlant des lois de portée générale régissant la faillite et l'insolvabilité : [TRADUCTION] « Les mots décrivent dans leur sens juridique connu les dispositions légales portant sur l'administration des biens des faillis et des personnes insolvables, conformément aux règles et aux définitions prescrites par la loi, y compris, bien sûr, les conditions d'application de la loi, sa procédure d'application et l'effet de son application ».

La description que lord chancelier Selborne a donnée de la faillite dans le contexte de la loi anglaise dans l'arrêt *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83, p. 86, est encore plus utile :

> [TRADUCTION] Ce qu'il y a à faire en cas de faillite, c'est l'administration de la faillite. Le débiteur et les créanciers, en qualité de parties à l'administration de la faillite, sont assujettis à cette juridiction. Les syndics ou les cessionnaires, en qualité de personnes chargées de l'administration, sont assujettis à cette juridiction. Les éléments d'actif qui leur sont remis et leur mode d'administration sont assujettis à cette juridiction; et il peut exister, comme je le crois, des catégories particulières

clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (Que. C.A.); *In re Martin* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246 (Ont. S.C.), and *Re Morris Lofsky*, *supra*, at p. 169.

The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in

d'opérations qui, en vertu de disposition législatives particulières, reçoivent un traitement particulier en ce qui a trait aux tiers. Mais la proposition générale selon laquelle c'est la Cour des faillites qui doit entendre les demandes que peuvent faire valoir en common law ou en equity, contre un étranger à la faillite, les cessionnaires ou syndics de faillite, ou les fiduciaires ainsi nommés par acte formaliste, me paraît dénuée de tout fondement légal et de toute trace de fondement jurisprudentiel. [Je souligne.]

36 Malgré le fait que l'Angleterre soit un État unitaire libre des restrictions constitutionnelles qu'impose notre partage des compétences, les tribunaux canadiens adhèrent généralement depuis 1874 à la division fondamentale entre les litiges liés à l'administration de l'actif du failli et les litiges impliquant des « étrangers à la faillite ». Le principe veut que si le litige a trait à une matière que même une interprétation généreuse de l'administration d'une faillite ne peut englober ou si la Loi ne prévoit pas la réparation visée, le syndic doit demander réparation aux tribunaux civils ordinaires. Ainsi, dans l'affaire québécoise *Re Ireland*, précitée, le syndic avait intenté une procédure pour faire décider qui avait droit au produit des polices d'assurance qu'il avait souscrites relativement à des biens faisant partie de l'actif du failli. Le juge Bernier a conclu que la Cour supérieure du Québec siégeant en matière de faillite n'avait pas compétence quant à l'objet du litige. Ce dernier soulevait purement des questions de droit civil et aucune disposition de la Loi ne conférait au tribunal de faillite une compétence spéciale lui permettant de trancher ces questions. Les tribunaux ont retenu des arguments similaires dans les décisions *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Qué.); *In re Martin* (1953), 33 C.B.R. 163 (C.S. Ont.), p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (C.S. Ont.), p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (C.S. Ont.); *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246 (C.S. Ont.), et *Re Morris Lofsky*, précitée, p. 169.

37 La Cour d'appel du Québec a peut-être pavé la voie à une interprétation plus large de ce qui constitue un litige relevant du droit de la faillite et ressortissant donc au tribunal de faillite : *Geof-*

the bankruptcy court: *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; and *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423. See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./ Cri-O-Bœuf Ltée*, *supra*, and *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (Que. Sup. Ct.); but the push is not confined to Quebec: *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.S.C.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (B.C.C.A.), at p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*, *supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Re Morris Lofsky*, *supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Re Galaxy Interiors*, *supra*, and *Sigurdson*, *supra*), as can claims for relief specifically granted by the Act (*Re Ireland*, *supra*, and *Re Atlas Lumber*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L. W. Houlden and G. B. Morawetz observe:

frion c. Barnett, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; et *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423. Voir aussi les motifs dissidents du juge LeBel, maintenant juge de notre Cour, dans l'arrêt *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, précité, et *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (C.S. Qué.), mais cette tendance ne se manifeste pas uniquement au Québec : *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (C.S.N.-É.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (C.A.C.-B.), p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (C.S. Ont.), p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (B.R. Man.).

La jurisprudence semble reconnaître que le mot « faillite » figurant au par. 91(21) de la *Loi constitutionnelle de 1867* doit être interprété de façon large pour réaliser son objet. Une interprétation moins libérale compliquerait et entraverait inutilement la liquidation économique et expéditive de l'actif du failli. L'établissement d'une compétence nationale en matière de faillite se révélerait inutile si une interprétation étroite et restrictive de cette compétence constitutionnelle en entravait continuellement l'exercice. Par l'adoption du par. 183(1) de la Loi, le législateur fédéral a transmis au tribunal de faillite une vaste compétence équivalente à celle qu'il a reçue.

Il y a évidemment des limites. Si la demande du syndic est dirigée contre un étranger à la faillite, c.-à-d. [TRADUCTION] « des personnes ou des questions ne relevant pas de [la] Loi » (*Re Reynolds*, précité, p. 129), ou si elle n'est pas de la [TRADUCTION] « nature d'une affaire de faillite » (*Re Morris Lofsky*, précité, p. 169), elle doit être présentée aux tribunaux civils ordinaires, et non au tribunal de faillite. En revanche, on peut manifestement saisir le tribunal de faillite d'une demande de recouvrement d'un bien particulier (*Re Galaxy Interiors*, précité, et *Sigurdson*, précité) tout comme d'une demande sollicitant une réparation prévue par la Loi (*Re Ireland*, précité, et *Re Atlas Lumber*, précité). Cela dit, il est parfois difficile de percevoir le « fil d'or » particulier qui lie les décisions. L. W. Houlden et G. B. Morawetz font remarquer que :

There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.

(*Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4)

The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. *Does This Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?*

In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns West African Gold & Exploration S.A., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly

[TRADUCTION] Il y a eu de nombreux litiges sur cette question et il n'est pas toujours facile de concilier les décisions. La difficulté découle du partage des compétences constitutionnelles au Canada, la faillite et l'insolvabilité étant de compétence fédérale et la propriété et les droits civils ainsi que l'administration de la justice étant de compétence provinciale.

(*Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), I§4)

40 En bref, toutefois, la réponse à l'argument fondé sur « la propriété et les droits civils » est que l'appelante pose la mauvaise question. La question est de savoir si le litige contractuel entre l'appelante et le syndic intimé se rapporte bel et bien à la faillite. Dans l'affirmative, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite.

4. *Cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?*

41 En l'espèce, le syndic intimé a intenté, avec la permission des inspecteurs, une « procédure judiciaire se rapportant aux biens du failli » devant le tribunal de faillite en vertu de l'al. 30(1)*d*). Le syndic prétend que, outre les actions de Azco et de Sanou, la définition de « biens » figurant à l'art. 2 inclut les « droits incorporels », ce qui, selon lui, englobe ses demandes pécuniaires.

42 Quant aux actions et aux bons de souscription, le syndic allègue au par. 108 de sa requête que Azco est [TRADUCTION] « reconnue comme la propriétaire nominale de 100 % de Sanou Mining Corporation », qui est propriétaire de West African Gold & Exploration S.A., laquelle exploite les concessions minières au Mali. En fait, le syndic prétend que Azco détient les actions et les bons de souscription de Sanou qui font partie à bon droit de l'actif du failli et que Azco est en mesure de les lui transférer si le tribunal de faillite l'exige.

43 Comme je l'ai mentionné, on ne peut pas sérieusement prétendre que le tribunal de faillite n'a pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. De façon plus étroite,

defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for US$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

la question est de savoir si le tribunal de faillite n'a pas compétence (i) parce que l'appelante est à juste titre considérée comme une « étrangère à la faillite » ou (ii) parce que le tribunal de faillite ne peut pas accorder la réparation que le syndic sollicite.

(i) L'appelante est-elle une « étrangère à la faillite »?

Si un défendeur potentiel est un « étranger » à la faillite, il se peut que le tribunal de faillite n'ait pas compétence sur l'objet du litige (parce que celui-ci ne fait pas partie de la faillite) même si l'« étranger » réside dans le ressort du tribunal.

Au moment de la requête en recouvrement présentée par le syndic, l'appelante n'avait déposé aucune preuve de réclamation dans le cadre de la faillite. Elle semble avoir adopté une « attitude attentiste », c'est-à-dire qu'elle entendait déposer une réclamation seulement si le syndic déposait une demande contre elle. Le syndic *a* finalement *déposé* une demande contre elle, dans sa requête en recouvrement du 18 janvier 1999, et l'appelante lui *a donné avis* de sa demande reconventionnelle dans sa requête du 24 février 1999, et notamment du fait qu'elle détenait des billets à ordre d'une valeur de 3 844 858 $US signés par le failli et payables sur demande, lesquels constituaient des obligations éventuelles dont le syndic avait hérité.

Dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, rendu simultanément, nous avons confirmé la décision de la Cour fédérale du Canada de statuer sur les demandes des titulaires de privilèges maritimes grevant un navire dont le propriétaire avait été déclaré failli après la saisie du navire, mais avant qu'il soit statué sur l'action réelle. Nous avons conclu que la Cour fédérale n'avait pas perdu compétence sur l'objet du litige à la suite de la faillite du propriétaire du navire. Nous avons statué que la Cour fédérale *aurait pu* surseoir à l'instance par déférence envers le tribunal de faillite, mais qu'elle n'était pas obligée d'y surseoir dans les circonstances.

The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

In *Re Morris Lofsky*, *supra*, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

See also *Re Reynolds*, *supra*, at p. 131.

On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the

47 La question en litige en l'espèce est quelque peu différente. L'appelante conteste une demande du syndic de faillite et menace de présenter contre l'actif du failli une demande reconventionnelle fondée sur la même série de contrats commerciaux. L'appelante a sollicité uniquement le renvoi de l'instance à une autre division du tribunal de faillite au Canada.

48 Dans l'arrêt *Re Morris Lofsky*, précité, la Cour d'appel de l'Ontario s'est penchée sur une affaire dans laquelle le syndic avait sollicité un jugement déclaratoire portant que la cession d'une automobile du failli à son épouse était frauduleuse et inopposable au syndic et que cette automobile faisait partie des biens du failli. L'épouse a contesté la demande en faisant valoir que l'automobile n'avait jamais appartenu au failli (même si elle était immatriculée au nom de ce dernier). À la page 169, le juge Roach a conclu que l'épouse était une étrangère à la faillite :

> [TRADUCTION] J'estime qu'on doit conclure que la question en litige entre le syndic et l'appelante n'est pas une affaire de faillite, mais bien une pure affaire de propriété et de droits civils. Elle ne comporte aucun élément susceptible d'en faire une affaire de faillite. Elle ne soulève aucune question opposant débiteur et créancier dans la répartition de l'actif du failli. L'appelante ne revendique pas le titre de l'automobile par l'entremise du failli. En effet, elle affirme que le failli n'a jamais détenu le titre et qu'elle en a toujours été la propriétaire. Je ne peux voir aucun aspect de la question qui lui conférerait la nature d'une affaire de faillite sauf, peut-être, le fait que le failli a fait immatriculer le véhicule au nom de l'appelante au cours de la faillite. Cette immatriculation ne transforme pas la question en affaire de faillite, la seule question se posant étant de savoir qui, du failli ou de l'appelante, a toujours été le véritable propriétaire.

Voir également l'arrêt *Re Reynolds*, précité, p. 131.

49 Dans le dossier qui nous est soumis, toutefois, l'appelante plaide qu'elle est la créancière la plus importante de l'actif du failli et qu'elle déposera « assurément » une demande reconventionnelle en réponse à la requête du syndic. Pour sa part, le syndic considère l'appelante comme la débitrice la plus importante de l'actif du failli. Loin d'être une

most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

50 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. In *Sigurdson*, *supra*, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Re Ireland*, *supra*.

51 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

« étrangère » à la faillite, Azco en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice.

(ii) Le tribunal de faillite a-t-il compétence pour accorder la réparation sollicitée par le syndic?

Il est bien établi que le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat. Sa compétence et son pouvoir de réparation se limitent à ce que prévoit la Loi. Dans *Sigurdson*, précité, le syndic de faillite avait poursuivi deux anciens administrateurs du failli pour fraude devant la Cour suprême de la Colombie-Britannique. Dans une partie de ses motifs portant sur un autre point, la Cour d'appel a fait remarquer que si le syndic avait intenté sa poursuite devant le tribunal de faillite, [TRADUCTION] « il se serait trouvé devant le mauvais tribunal » car « [i]l doit s'adresser aux tribunaux civils ordinaires pour engager une poursuite en dommages-intérêts » (p. 102). Voir également *Re Ireland*, précité.

Je suis toutefois d'avis qu'on ne peut pas, en l'espèce, qualifier la demande du syndic de simple demande en dommages-intérêts, même s'il a tenté de déterminer la valeur pécuniaire des actions qui, selon lui, reviennent à l'actif du failli et que l'appelante retient sans droit. Je ne pense pas qu'il soit interdit au tribunal de faillite d'envisager une ordonnance dans laquelle de l'argent serait substitué au bien revendiqué, lorsque celui-ci ne peut être remis. Il faut rappeler que le syndic réclame essentiellement 125 000 actions de Azco même, plus 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il prétend contrôlée entièrement par l'appelante. La requête du syndic dit ce qui suit, au par. 65 :

> [TRADUCTION] La société débitrice a également droit aux 3 500 000 actions et aux 4 000 000 bons de souscription de Sanou, conformément au contrat, comme l'a reconnu l'intimée elle-même dans son rapport annuel destiné à la *Securities and Exchange Commission* des États-Unis pour l'exercice financier se terminant le 30 juin 1997, déposé comme pièce R-24;

As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

[TRANSLATION] It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Re Galaxy Interiors*, *supra*, *per* Houlden J., at p. 144; *Mancini*, *supra*, *per* Catzman J., at pp. 250-51; *Re Atlas Lumber*, *supra*, *per* Rinfret J., at p. 234.

It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

52 Quant aux actions de Azco, le syndic déclare au par. 101 de sa requête qu'il réclame [TRADUCTION] « 125 000 actions de Azco Mining Corporation qui avaient une valeur de 2,70 $CAN l'action ».

53 Il est tout aussi important de noter que l'appelante reconnaît que l'action intentée contre elle vise essentiellement la remise des actions et déclare ce qui suit au par. 25 de son mémoire :

Il semble que le recours du syndic est une action réelle plutôt qu'une action personnelle puisque le syndic cherche principalement à se faire reconnaître des droits sur 125 000 actions d'Azco et 3 500 000 actions et 4 000 000 bons de souscription de la compagnie Sanou (voir notamment les paragraphes 95, 98, 99 et 102 de la requête du syndic).

54 Malgré l'emploi de termes qui laissent perplexe dans la requête du syndic, les parties semblent donc s'entendre pour dire que la demande du syndic doit essentiellement être qualifiée de demande de recouvrement de biens précis du failli que l'appelante retient sans droit. Par conséquent, le syndic a le droit de réclamer les actions et les bons de souscription (par. 17(1)) et, avec la permission des inspecteurs (qu'il a obtenue), d'intenter une procédure judiciaire se rapportant à ces biens devant le tribunal de faillite (al. 30(1)*d*)). En invoquant ces dispositions législatives et les réparations qu'elles prévoient, le syndic situe manifestement sa réclamation dans le cadre de la Loi. Voir *Re Galaxy Interiors*, précité, le juge Houlden, p. 144; *Mancini*, précité, le juge Catzman, p. 250-251; *Re Atlas Lumber*, précité, le juge Rinfret, p. 234.

55 Lorsque les faits seront connus et que la position des parties sur les questions en litige seront précisées, il incombera au tribunal de faillite de Hull d'examiner la requête en recouvrement de biens pour déterminer si un élément particulier des diverses demandes du syndic échappe à sa compétence. Pour le moment, il suffit de conclure que la demande du syndic se rapporte essentiellement à la faillite, pour les motifs que j'ai déjà exposés. Dans l'état actuel du dossier (il s'agit d'une requête préliminaire), nous ne pouvons aller plus loin.

5. *Even if Fully Clothed with Jurisdiction to Hear This Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?*

56 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

57 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, *supra*, released concurrently.

58 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (Que. Sup. Ct.), and *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (Que. Sup. Ct.).

59 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Civil Code of Québec* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040 (Sup. Ct.), and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

5. *Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?*

Le tribunal peut, (i) s'il est convaincu que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division des faillites ou (ii) pour « un autre motif suffisant », renvoyer « des procédures » en cours devant lui à l'autre district ou division de faillite (par. 187(7)).

Le paragraphe 187(7) établit une méthode pour renvoyer des procédures entre différents tribunaux de faillite au Canada. On verra plus loin que ce paragraphe soulève des questions différentes de la situation internationale particulière en cause dans *Holt Cargo Systems*, précité, rendu simultanément.

Le juge des requêtes a exercé son pouvoir discrétionnaire en refusant d'ordonner le renvoi en l'espèce. L'appelante doit donc démontrer que cette décision est entachée d'une erreur de droit ou de principe ou de l'omission de prendre en considération un élément prépondérant : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588. Les décisions *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (C.S. Qué.), et *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (C.S. Qué.), ont reconnu la portée de ce pouvoir discrétionnaire en matière de faillite.

L'appelante affirme que les cours d'instance inférieure ont commis une erreur, tant sur le plan du droit que sur celui des principes. Selon l'appelante, elles ont commis une erreur de droit parce que l'art. 3148 du *Code civil du Québec* obligeait le tribunal de faillite à se déclarer incompétent vu les clauses « d'élection de for ». Par ailleurs, elles ont commis une erreur de principe parce qu'il n'existe aucun lien important entre le litige et la province de Québec. À cet égard, l'appelante invoque les décisions *Bourque Consumer Electronics (Syndic de)*, J.E. 91-1040 (C.S.), et *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897.

(i) Choice of Forum Clause

The appellant's point is that the applicable rules are found in the *Civil Code of Québec*, and in particular art. 3148 which provides in part that:

> . . . a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold & Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec*

(i) La clause d'élection de for

60 L'appelante tente de démontrer que les règles applicables se trouvent dans le *Code civil du Québec*, notamment à l'art. 3148, qui prévoit en partie que :

> . . . les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

61 L'argument fondé sur l'élection de for est malheureusement mal fondé, tant en fait qu'en droit. Pour ce qui est des faits, les seuls contrats pertinents sont ceux auxquels Eagle était partie. La clause 28 figurant au contrat de financement du 7 juin 1996 et la clause 20 du contrat de services de gestion ne constituent rien de plus que l'expression du choix des lois applicables. Les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Le sens de la clause 17 du contrat d'emprunt sous forme de débenture de la West African Gold & Exploration S.A. conclu le 9 août 1996 est moins clair, mais, comme Azco n'y était pas partie et ne peut donc pas être poursuivie en vertu de ce contrat, ses stipulations ne sont pas pertinentes.

62 Pour ce qui est du droit, il s'agit de savoir si les art. 3148 ou 3135 du *Code civil du Québec* s'appliquent de quelque manière à la présente instance. Ces dispositions ne trouvent application dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les présentes règles » (*Règles générales sur la faillite et l'insolvabilité*, art. 3). Le paragraphe 187(7) prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district, ce que l'appelante n'a pas soutenu, ou pour « un autre motif suffisant ». L'appelante prétend qu'il faut « préciser » ces mots de portée générale au moyen des dispositions plus particulières du *Code civil du Québec*. Mais, cela est inexact. Il faut recourir aux règles provinciales seulement « [d]ans les cas non prévus ». En l'espèce, le cas est prévu. On ne peut donc pas faire appel aux dispositions particulières

applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

63 Leaving aside, then, the inapplicable directives of the *Civil Code of Québec*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), *per* Huddart J.A., at p. 153 (leave to appeal refused, [1997] 2 S.C.R. xiv); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.), aff'd (1992), 9 O.R. (3d) 755 (C.A.) (leave to appeal refused, [1992] 3 S.C.R. v); *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.).

(ii) Public Policy Considerations

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

65 In *Re Moratorium Act*, *supra*, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may

du *Code civil du Québec*. Cette interprétation de l'art. 3 est non seulement inévitable, mais souhaitable. Le *Code civil du Québec* s'applique à un vaste éventail de matières. Lorsque le par. 187(7) parle de « motif suffisant », il le fait dans le contexte particulier de la faillite.

Il faut donc laisser de côté la prescription inapplicable du *Code civil du Québec* et se poser la question de savoir si une clause d'élection de for constituerait un « motif suffisant » au sens du par. 187(7), de sorte que le juge des requêtes aurait commis une erreur de droit en ne lui donnant pas effet dans les circonstances. D'après moi, un juge des requêtes devrait examiner avec soin une clause d'élection de for (lorsqu'il en existe réellement une), mais il n'est pas lié par une telle clause : J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 262-263. Voir *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), le juge Huddart, p. 153, autorisation de pourvoi refusée, [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (C.A. Alb.), le juge Kerans, p. 381; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Div. gén.), conf. par (1992), 9 O.R. (3d) 755 (C.A.), autorisation de pourvoi refusée, [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (C.A.N.-É.).

(ii) Considérations d'intérêt public

Il serait possible de prétendre que le principe d'intérêt public favorisant le « contrôle unique » des instances en matière de faillite et s'opposant à leur fragmentation commande qu'on attribue moins de poids à une clause d'élection de for en matière de faillite que dans le contexte des litiges commerciaux ordinaires : *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), conf. par 240 F.3d 148 (2d Cir. 2001).

Dans l'arrêt *Re Moratorium Act*, précité, le juge Rand a parlé des objectifs d'« ordre public » importants des dispositions législatives en matière de faillite, à la p. 46 :

[TRADUCTION] À cette procédure peuvent se rattacher non seulement la stigmatisation de la personne mais des

result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120.

In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

[TRANSLATION] The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.

(*Faillite et insolvabilité* (1992), vol. 1, at p. 48)

The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

[P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc*., 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

contraintes restreignant sa liberté dans ses activités commerciales futures. La réparation pour le débiteur consiste à annuler ses dettes, qui pourraient autrement faire obstacle à sa réadaptation économique et sociale.

Voir aussi *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109, p. 120.

66 Dans son traité sur la faillite, le professeur Albert Bohémier dit ce qui suit au sujet de l'objectif de la Loi :

La *Loi sur la faillite* a pour but de protéger le débiteur, ses créanciers et l'intérêt public. Ces objectifs ont toujours été présents, mais avec une intensité variable. On peut affirmer sans craindre de se tromper que plus une société favorise le crédit et donc l'endettement, plus la législation aura tendance à faire primer le souci d'atténuer le sort des débiteurs honnêtes et infortunés. Un régime qui repose sur l'endettement doit comporter un système auto-régulateur de sorte que les débiteurs défaillants puissent éventuellement être réintégrés dans le système et redevenir des éléments productifs.

(*Faillite et insolvabilité* (1992), vol. 1, p. 48)

67 En cas de conflit, on pourrait s'attendre à ce que la mise en œuvre de ces principes d'intérêt public ait priorité sur les conventions privées d'élection de for, comme l'a effectivement conclu le juge Robert de la Cour d'appel du Québec. Une opinion semblable est exprimée dans I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 47, note 73 :

[TRADUCTION] [L]es arrangements contractuels privés entre les parties ne peuvent avoir préséance sur l'exercice de la compétence en matière de faillite, qui est du domaine de l'ordre public et sert une plus vaste gamme d'intérêts y compris, en bout de ligne, ceux de la société dans son ensemble.

Il existe toutefois aux États-Unis un courant jurisprudentiel contraire portant que, règle générale, un syndic de faillite qui engage un recours fondé sur une convention comportant une clause d'élection de for devrait être lié par cette clause dans la même mesure que les parties qui l'ont stipulée : voir *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), et *Hays and Co. c. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

69 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against *Amchem*, *supra*, and public interest factors within the framework of s. 187(7) of the Act.

70 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

71 The appellant, relying on *Amchem*, *supra*, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

72 Again, with respect, I do not think this position is sustainable on the law or the facts.

73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, *supra*, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

Selon moi, pour les motifs déjà exposés, la clause d'élection de for constituerait un facteur important pour l'application du par. 187(7), mais il ne serait pas déterminant dans le contexte des principes d'intérêt public exprimés dans la Loi.

Vu ma conclusion que l'appelante ne bénéficie pas d'une clause d'élection de for en l'espèce, il n'y a pas lieu que j'entreprenne l'examen de la question de savoir s'il y a ici conflit entre le choix privé et l'intérêt public et, le cas échéant, quel poids doit être accordé à l'élection de for en regard des facteurs d'intérêt public énoncés dans *Amchem*, précité, dans le cadre du par. 187(7) de la Loi.

En bout de ligne, l'appelante est incapable de démontrer que le juge des requêtes a commis une erreur de droit en refusant de renvoyer l'instance à Vancouver.

(iii) L'erreur de principe

Se fondant sur l'arrêt *Amchem*, précité, l'appelante prétend que le litige actuel a son lien le plus réel et le plus important avec la Colombie-Britannique et que le juge des requêtes a commis une erreur de principe en ne prenant pas en considération certains facteurs pertinents pour tirer la conclusion inverse.

Encore une fois, j'estime que cette position est indéfendable en fait et en droit.

En premier lieu, comme je l'ai déjà dit, il faut appliquer en l'espèce la méthode suivie dans l'arrêt *Amchem* en tenant pleinement compte du contexte de la législation canadienne en matière de faillite. Le présent pourvoi porte sur l'attribution d'une affaire de faillite particulière à un tribunal à l'intérieur d'un seul régime national de faillite créé par la Loi. Comme le démontre l'arrêt *Holt Cargo Systems*, précité, l'examen de l'attribution d'une affaire comportant différents aspects (p. ex., un aspect de droit maritime et un aspect de droit de la faillite) entre les tribunaux canadiens et les tribunaux étrangers, assujettis à des régimes fort différents, notamment sur le plan législatif, peut soulever divers problèmes.

Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, *supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

74 En deuxième lieu, l'arrêt *Amchem* et les arrêts qui l'ont suivi portaient sur des litiges privés. Le présent pourvoi, tout comme cela a été expliqué dans l'arrêt *Holt Cargo Systems*, précité, comporte l'aspect important de l'intérêt public mentionné précédemment. Notre Cour ne peut s'en tenir seulement aux facteurs énoncés dans *Amchem*; elle doit s'efforcer de donner effet à l'intention manifeste du législateur, exprimée dans la Loi, de créer un système national économique et efficace d'administration de l'actif des faillis.

It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

75 Il est dans l'intérêt public de faciliter la résolution rapide des retombées d'un effondrement financier. Comme nous l'avons souligné dans l'arrêt *Holt Cargo Systems*, on ne retrouvait pas ce facteur dans la situation factuelle en cause dans *Amchem*. En fait, il existe des considérations de principe plus fortes en l'espèce que dans l'affaire *Holt Cargo Systems*. Dans cette affaire, il fallait choisir entre, d'une part, une action de droit maritime intentée à Halifax portant sur les réclamations de créanciers *garantis* qui avaient déjà obtenu un jugement par défaut et, d'autre part, l'exercice de sa compétence par la Cour supérieure du Québec siégeant en matière de faillite à la demande du tribunal de faillite de la Belgique, dans une affaire qui en était encore à ses étapes préliminaires. Dans ces circonstances, la Cour fédérale du Canada a refusé d'ordonner la suspension de la procédure de droit maritime et la Cour d'appel fédérale ainsi que notre Cour ont confirmé sa décision discrétionnaire.

In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within

76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (*Stewart*, précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts. Le législateur a jugé que la preuve des faits visés par la définition de l'expression « localité d'un

the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

78 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual

débiteur » figurant au par. 2(1) établit un lien suffisamment important pour rattacher une instance de faillite à un district ou à une division en particulier. Le syndic de cette localité est chargé de « recouvrer » les biens, et c'est le tribunal de faillite de ce ressort qui contrôle les procédures connexes. La Loi vise l'économie de la liquidation des biens du failli, même au prix de frais additionnels pour les créanciers et les débiteurs.

Le « critère de la pondération » que l'appelante préconise en s'appuyant sur les facteurs énoncés dans *Amchem* et sur les principes généraux du droit international privé ne tient pas compte de ces importants principes d'intérêt public. La Cour supérieure du Québec siégeant en matière de faillite constitue un véritable tribunal national.

Enfin, sur le plan des faits, même si les principes du droit international privé s'appliquaient sans qu'il soit nécessaire de les adapter au contexte de la faillite, il est difficile de discerner quelque lien que ce soit entre le litige et Vancouver, sauf le fait que Eagle a signé certains contrats comportant une clause selon laquelle les lois applicables étaient celles de ce ressort. Les liens entre l'appelante et Vancouver ne sont pas particulièrement étroits. L'appelante a, parmi ses bureaux, une adresse à Vancouver, mais la plupart des activités en cause en l'espèce ont eu lieu à l'extérieur de la Colombie-Britannique. Son employé clé, M. Ryan Modesto, réside aux États-Unis. Le contrat de services de gestion du 12 juin 1996 précise que le siège social de Azco est situé en Arizona. Le communiqué de presse du 17 septembre 1996 par lequel Azco a annoncé ce projet à l'échelle mondiale émanait de l'Arizona. De plus, l'appelante n'a aucun avantage sur le plan juridique à exercer ses recours en vertu du même régime de faillite à Vancouver plutôt qu'à Hull. Dans un cas comme dans l'autre, les lois de la Colombie-Britannique peuvent être appliquées. Il serait peut-être légèrement plus commode pour l'appelante et pour certains de ses témoins que l'affaire soit entendue à Vancouver, mais c'est tout ce qu'on peut dire en faveur de ce lieu. De son côté, le syndic se plaint du fait que si le pourvoi est accueilli, il sera obligé, suivant le même raisonnement, d'intenter d'autres actions (sans lien avec Azco) à Chicoutimi,

support for his decision to retain the case in Hull.

I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, *supra*, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

I would dismiss the appeal with costs.

Toronto, Halifax, Winnipeg, Charlottetown et Calgary. De nombreux faits étayent la décision du juge de première instance de poursuivre l'instance à Hull.

79 Je ne veux toutefois pas que mes motifs soient interprétés comme rendant impossible toute application du par. 187(7). Les faits de l'espèce ne font pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique, mais il peut évidemment surgir d'autres affaires dans lesquelles le renvoi sera justifiable. Même dans l'arrêt *Stewart*, précité, qui a établi le paradigme du « contrôle unique », le juge Anglin a pris la peine de dire que l'affaire aurait probablement dû être entendue à l'Île-du-Prince-Édouard. Le problème des parties demanderesses dans cette affaire tenait au fait qu'elles n'avaient pas demandé l'autorisation du tribunal de la Colombie-Britannique avant d'introduire l'instance à l'Île-du-Prince-Édouard. Juste avant le passage sur le « contrôle unique » déjà cité, le juge Anglin a affirmé ceci (à la p. 349) :

> [TRADUCTION] Je refuse de tenir pour acquis que la Cour suprême de la Colombie-Britannique ne rendra pas d'ordonnance de renvoi, précédée ou accompagnée de l'autorisation requise par l'art. 22, s'il lui est démontré — comme cela semblerait être le cas d'après les éléments qui nous ont été soumis — qu'il est possible d'instruire plus efficacement à l'Île-du-Prince-Édouard les questions portant sur l'existence de la fiducie alléguée par la partie demanderesse et sur l'affectation de certains biens détenus par le liquidateur à titre de biens de la fiducie.

Pour sa part, le juge Brodeur a dit ce qui suit (à la p. 352) :

> [TRADUCTION] Il me semble que l'intérêt de la justice serait mieux servi en l'espèce si les tribunaux de l'Île-du-Prince-Édouard statuaient sur la question soulevée en l'instance. Toutefois, il incombait aux parties intimées d'obtenir l'autorisation de la cour de la Colombie-Britannique, et elles ne l'ont pas obtenue.

80 Le fait est que Azco devait démontrer l'existence d'un « motif suffisant » à la lumière des faits de la *présente* affaire et elle n'y est pas parvenue.

V. Conclusion

81 Je suis d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Stikeman Elliott, Montréal.

Procureurs de l'intimée : Gervais & Gervais, Montréal.

See paras. 50 and 75

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477

Date: 20100409
Docket: S100268
Registry: Vancouver

Between:

Textron Financial Canada Limited

Plaintiff

And

Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth

Defendants

Before: The Honourable Mr. Justice Willcock

Reasons for Judgment In Chambers

Counsel for the plaintiff:	W.E.J. Skelly B. La Borie
Counsel for Defendants:	A. Brown
Place and Date of Hearing:	Vancouver, B.C. February 10, 2010
Place and Date of Judgment:	Vancouver, B.C. April 9, 2010

INTRODUCTION

[1] Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

BACKGROUND

[2] Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

[3] Chetwynd and NHLP built, own and operate the Hotel.

[4] Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

(c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

[5] On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of $7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

(a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");

(b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;

(c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;

(d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");

(e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

[6] By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

[7] The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

[8] For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

[9] On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of $7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

[10] The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise

over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

[11] On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

(1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

[12] William Pomeroy describes himself as the president of a group of companies referred to as the “Pomeroy Group”. The group operates and manages hotels and

restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

[13] It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

[14] Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

[15] Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

[16] The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel

generating net operating income of $457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

[17] Chetwynd proposes to make an immediate payment to Textron in the amount of $20,000, and to pay all interest accruing to Textron on a monthly basis, approximately $20,000 per month, while the Pomeroy Group is pursuing restructuring.

[18] Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

ISSUES

[19] The following issues arise on this application:

1. whether a receiver should be appointed; and, if so
2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

[20] The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application

of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

APPLICABLE LAW

Court-Appointed Receivers

[21] Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

> 39 (1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[22] Section 66 of *The Personal Property Security Act,* in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act.*

[23] The *Rules of Court* provide the appointment may be on terms:

> 47 (1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

[24] In *Red Burrito Ltd. v. Hussain***,** 2007 BCSC 1277, D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

[25] The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

[26] This judgment was cited with approval by Burnyeat J. in *United Saving Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[27] In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it

unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

[28] The Court was of the view the English line of authorities, of which in *Re Crompton & Co.*, [1914] 1 Ch. 954; *Truman v. Redgrave* (1881), 18 Ch. 547; and *Prachett v. Drew* [1924] 1 Ch. 280 were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (S.C.), where receivers were appointed without proof of jeopardy.

[29] Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (S.C.), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

[30] Mr. Justice Burnyeat held, at paras. 15-17:

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be

> made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.
>
> A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[31] The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

> In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978),pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co*.,[1914] 1 Ch. 954).

[32] The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

[33] As Taylor J. noted in *Royal Bank of Canada v. Cal Glass Ltd. et al.* (1978), 94 D.L.R. (3d) 84 (B.C.S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

[34] The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: *Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527; *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95; and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.).

[35] As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. *Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

[36] In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd*., (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd*. (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

[37] The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

[38] The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

[39] The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly

interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

[40] In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was $5.7 million. The defendant did not dispute the default. It was prepared to make payments of $4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

[41] The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

[42] the parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

[43] the defendant owed a significant sum of money;

[44] there appeared not to be a dispute with the fact of the size of the indebtedness;

[45] the defendant was in default;

[46] the resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

[47] there were concerns with respect to the financial statements of the defendant; and

[48] the defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

[49] The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

[50] Mr. Justice Masuhara held:

> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;

l) the conduct of the parties;
m) the length of time that a receiver may be in place;
n) the cost to the parties;
o) the likelihood of maximizing return to the parties;
p) the goal of facilitating the duties of the receiver.

[51] Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

[52] The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek,* [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> ...
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*., [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always

> causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

[53] The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International,* at para. 17, the Court held:

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act,* it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[54] In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

[55] In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling

commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in *Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

[56] Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
>
> (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

[57] A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Montreal v. Mrazek* (1985), 64 B.C.L.R. 282 (C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (S.C.) and *Canlan Investments Ltd. v. Gibbons* (1983), 42 B.C.L.R. 199 (S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount

of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

[58] In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

> That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

[59] With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

[60] The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

[61] The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (S.C.).

[62] In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

> In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.

[63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

[64] The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

[65] There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank Of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.) at para. 21; *Royal Bank of Canada v. Astor Hotel* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 [*Astor Hotel*], at

para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (C.A.).

[66] There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

[67] At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

[68] Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

[69] In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes v. Taplow Financial Ltd.* (1985) 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225; and *Astor Hotel*.

[70] In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to

> prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

[71] At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

[72] In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union* [citation omitted].

[73] In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific, Vista Homes, Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank of Canada v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.). The

latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

[74] In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

DISCUSSION

Appointment of a Receiver

[75] The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

[76] The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

[77] There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

[78] There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

[79] The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

[80] If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

[81] In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

[82] The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

[83] The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.,* that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

[84] The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the

plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

[85] Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

[86] The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

[87] The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

[88] It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

[89] I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income

is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

[90] The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

[91] The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

[92] The parties have leave to apply for further directions if necessary.

"Willcock J."
The Honourable Mr. Justice Willcock

See para. 57

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

[2] The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

> purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)***,** 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

> inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> 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.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

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[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had 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).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(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.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh***,** *Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

> insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

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

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[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.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

> A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order or decision" (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

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[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”

D. GROUNDS FOR APPOINTMENT

In order for the private appointment of a receiver to be valid, there must be a default, the notification requirements must have been satisfied, and the security agreement must give the secured creditor the power to appoint a receiver. Beyond this, a secured creditor does not need to demonstrate any additional grounds for the private appointment of a receiver.

A court may appoint a receiver where it appears to the judge that it is just or convenient to do so. This traditional test has not been substantially altered by any of the statutory regimes governing receiverships. Courts have been prepared to make such orders where it is necessary for the protection or preservation of the secured creditor's security interest in the debtor's property. Courts will also appoint a receiver to preserve the property pending realization where ordinary legal remedies are defective, or to preserve property from some danger that threatens it.[42] In deciding whether or not to appoint a receiver, the court may consider such matters as the nature of the property, the likelihood of maximizing return to the parties, and the costs associated with the appointment.[43]

A number of courts have endorsed a more extensive set of factors that a court can consider in determining whether to appoint a receiver, namely:

- whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- the nature of the property;
- the apprehended or actual waste of the debtor's assets;
- the preservation and protection of the property pending judicial resolution;
- the balance of convenience to the parties;
- the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

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42 *Tim v Lai* (1984), 53 CBR (NS) 80 (BCSC).

43 *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 [*Paragon*]; *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONSC 1911.

- the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- the effect of the order upon the parties;
- the conduct of the parties;
- the length of time that a receiver may be in place;
- the cost to the parties;
- the likelihood of maximizing return to the parties;
- the goal of facilitating the duties of the receiver.[44]

Courts have also considered the fact that a secured creditor had the ability of appoint a privately appointed receiver under its security agreement, although the significance of this factor has cut both ways. Some courts have refused to make an order appointing a receiver if the secured creditor has the power to appoint a receiver under the security agreement.[45] The order will be granted only if the secured creditor can demonstrate that the powers of the privately appointed receiver are inadequate in some respect. Other courts have been more willing to grant an order appointing a receiver despite the fact that the secured creditor has the power to appoint a privately appointed receiver. It is not necessary to show that a private appointment is inadequate; it is sufficient to demonstrate that a court appointment would enable the receiver to carry out his or her duties more effectively and efficiently.[46]

The weight of authority has now firmly shifted to this latter view. Most courts have adopted the view that the "just or convenient" test is more easily satisfied where the security agreement provides that the secured creditor may appoint a receiver. The remedy is not viewed as extraordinary, and the inquiry is whether or not it is in the interests of

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44 *Paragon*, above note 43; *Enterprise Cape Breton Corporation v Crown Jewel Resort Ranch, Inc*, 2014 NSSC 128 [*Enterprise Cape Breton*]; *Maple Trade Finance Inc v CY Oriental Holdings Ltd*, 2009 BCSC 1527.

45 *Royal Bank of Canada v White Cross Properties Ltd* (1984), 53 CBR (NS) 96 (Sask QB); *Macotta Co of Canada v Condor Metal Fabricators Ltd* (1979), 35 CBR (NS) 144 (Alta QB); *Royal Bank of Canada v Cal Glass Ltd* (1978), 29 CBR (NS) 302 (BCSC).

46 *Bank of Nova Scotia v DG Jewelery Inc* (2002), 38 CBR (4th) 7 (Ont SCJ); *Re Pension Positive Inc* (2006), 19 CBR (5th) 277 (Ont SCJ).

all concerned to have the receiver appointed by the court.[47] In British Columbia, some courts have proceeded even further down this path and have held that the order should follow as a matter of course if the security agreement provides for the appointment of a receiver.[48]

E. STAY OF PROCEEDINGS

The appointment of a privately appointed receiver does not result in a stay of proceedings in respect of the actions or remedies of creditors who have claims against the debtor, or in respect of actions brought against the receiver. Despite the absence of a stay of proceedings, the unsecured creditors of the debtor are unlikely to pursue their remedies against the debtor or debtor's assets. The secured creditor ranks in priority to the claims of the unsecured creditors. The unsecured creditors therefore have no incentive to expend further funds in futile litigation or collection efforts. A claimant who has priority over the secured creditor has a superior right of enforcement and may demand that the receiver give up possession of the asset.[49]

A court order appointing a receiver usually contains a provision that stays any proceedings against the debtor or the property of the debtor.[50] The drafting of the stay provisions in the template receivership order was heavily influenced by the drafting of the stay provisions in the template *CCAA* initial orders. Alberta, British Columbia, and Saskatchewan have also produced similar template receivership orders.

The first component of the stay provisions is an order that prevents parties from bringing proceedings against the receiver without leave of the court. This is substantially similar in effect to the provision of the *BIA* that prevents parties from bringing actions against a trustee without leave of the court.[51] The threshold for obtaining leave is not high, since the provision was designed to protect the trustee against frivo-

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47 *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007; *Enterprise Cape Breton*, above note 44; *Textron Financial Canada Limited v Chetwynd Motels Ltd*, 2010 BCSC 477.

48 *United Savings Credit Union v F & R Brokers Inc*, 2003 BCSC 640; *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc*, 2012 BCSC 437.

49 See Cuming, Walsh, & Wood, *Personal Property Security Law*, above note 3 at 675–76.

50 The order will generally permit actions to be commenced if it is necessary to do so to prevent the action from being barred by a statutory limitation period.

51 *BIA*, s 215.

MBL ADMINISTRATIVE AGENT II LLC
Applicant

-and-

TRADE X GROUP OF COMPANIES INC. et al.
Respondents

Court File No. CV-23-00710413-00CL

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