No. S-247764
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KINGSETT MORTGAGE CORPORATION

PETITIONER

AND:

6511 SUSSEX HEIGHTS DEVELOPMENT LTD.
and
MINORU SQUARE DEVELOPMENT LIMITED PARTNERSHIP
and
MINORU VIEW HOMES LTD.

RESPONDENTS

BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF CANADA ON BEHALF OF HIS MAJESTY THE KING IN RIGHT OF CANADA

Counsel for the Attorney General of Canada on behalf of His Majesty the King in right of Canada as represented by the Minister of National Revenue	
ATTORNEY GENERAL OF CANADA Department of Justice Canada British Columbia Regional Office 900 – 840 Howe Street Vancouver, BC V6Z 2S9 **Per: Aminollah Sabzevari / Nikhil Pandey** Tel: (587) 930-5282 / (236) 660-9270 E-mail: aminollah.sabzevari@justice.gc.ca nikhil.pandey@justice.gc.ca	Date, time, place of application: January 30, 2025, at 9:00 am 800 Smithe St., Vancouver, BC Time estimate: 90 minutes

INDEX

Ontario Court (General Division)

Citation: First Treasury Financial Inc. v. Cango Petroleums Inc.
Date: 1991-03-21

Austin J.

Counsel:
Fred M. Catzman, Q.C. and *W. Brown*, for First Treasury Financial Inc.
Paul R. Basso and *Alex MacFarlane*, for Cango Petroleums Inc. et al.
Sean Dunphy, for Lincoln Capital Funding Corp. and KKC Inc.
H. Margles, for Aectra Refining & Marketing Inc.
David J.T. Mungovan, for Petro Canada Inc.
K. McElcheran, for Canadian Imperial Bank of Commerce.
David Chaiton and *Harvey Chaiton*, for Deloitte & Touche Inc.

[1] AUSTIN J.:—This is a motion for the appointment of a receiver and manager under a debenture. The debtor moves at the same time for relief under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the Act).

[2] The debtor consists of a group of companies known collectively as Cango Petroleums. Cango operates a number of gasoline service stations in Ontario. It does not have a refinery. In the language of the petroleum industry, Cango is known as an "independent". Some 238 stations carry the Cango sign, 38 on property owned by Cango and 148 on property leased to Cango. The remaining 52 are operated under dealer agreements.

[3] Cango's major secured creditors and the amounts owing to them are approximately as follows:

CIBC	$ 3-4 million
First Treasury	11.2 million
Lincoln	3.5 million
KKC	4.4 million
Allcorp Petroleum	5.5 million
Aectra	4.6 million
Total —	$32.2-33.2 million

[4] Of this group, Allcorp is different in that it is controlled by the Allen family. The Aliens control Cango.

[5] In addition, there are said to be separate mortgages on individual properties totalling approximately $3,607,000 and capital leases for turnkey construction of stations and for equipment and leases totalling about $4,802,000. Until very recently, Cango bought most of its gasoline from Petro Canada and Sunoco. The former is said to be owed $8.7 million. There is also said to be owing $3.2 million on account of Ontario fuel tax.

[6] The motion for a receiver is brought by First Treasury and is supported by Lincoln, KKC and Petro Canada.

[7] Cango defaulted on a payment due February 15, 1991, to First Treasury for $100,000 on account of principal, plus interest. Lincoln and KKC gave notice of default under their security on September 27, 1990, and following that entered into discussions and negotiations with Cango. The notice of default was withdrawn. The payments due to Lincoln and KKC on January 15 and February 15, 1991, were not made. Again, discussions were held, but they did not resolve the problem and Lincoln and KKC gave notice on March 5, 1991, demanding payment in full of the $8,146,009.48 said to be due to them.

[8] At the end of January, 1991, Petro Canada demanded payment of $1,768,647. It was not paid, and thereafter Cango bought gasoline from Petro Canada on a c.o.d. basis. Sunoco is also effectively on a c.o.d. basis.

[9] On February 11, 1991, the CIBC called its loan and credit then outstanding in the amount of $6,222,478.22. Cango was unable to meet this demand and on February 28, 1991, the bank seized $1.8 million from Cango's account to apply to the indebtedness to the bank.

[10] Cango admits it is insolvent. It blames its condition on the war in the Persian Gulf which began in August, 1990, and ended within the past few weeks. It alleges a "dramatic increase in the world price of oil" and, at the same time, the failure of retail gasoline prices to reflect the increase in the cost of product. No specifics are provided.

[11] Cango also says that its supply contracts with Petro Canada and Sunoco were based upon credit limits determined when the price of gasoline was much lower, and as a result Cango cannot buy enough gasoline to meet its requirements. Again, no specifics are furnished, nor is any explanation given as to why new credit limits could not be negotiated with Petro Canada or Sunoco, or with other suppliers. Since these proceedings began, a new supply arrangement has been established. No details are provided.

[12] Cango also pointed to the rationing of gasoline by Petro Canada, combined with that supplier's demand that Cango maintain its payments for product at the level earlier agreed upon, as contributing to its cash flow problems. Cango admitted that it had sustained a cash loss of over $750,000 in the period from October to December, 1990, and a further loss of approximately $1,000,000 in January, 1991.

[13] Cango proposes that it be granted relief under s. 11 of the C.C.A.A. Specifically, it requires a stay of proceedings against it while it devises a plan to salvage what it can of the operation. The C.C.A.A. application is brought admittedly in response to the motion to appoint a receiver, although it should be noted that the receivership motion was not launched until March 2, 1991, and, as early as January 14, 1991, each company in the Cango group issued an "instant debenture" so as to bring itself within the requirements of s. 3 of the Act.

[14] In general terms, what Cango proposes is a 90-day stay of proceedings against it, during which time it will finalize sales of groups of its stations to Beaver Petroleum (Shell) and Canadian Tire, pay the CIBC and First Treasury in full, sell other stations where appropriate, continue to close stations with "negative cash flow", hire two additional financial consultants

and try to restructure its financing. In the meantime, it proposes to continue its retail operations, buying gasoline using only the cash flow it can generate through sales.

[15] Cango's position is that, given the protection of the Act, it could operate on its own cash flow and "down-size" its operation and, at the same time, make it more efficient; all of this with a view to staying alive for the benefit of all. "All" includes in this context the bank, the other secured creditors, the employees, and possibly even the unsecured creditors.

[16] In my view, Cango's financing problems existed long before the war. Edward J. Allen, a senior member of the family, began leasing gasoline stations from Ultramar, a refiner, in 1972. In 1980 he sold out the business, then consisting of 17 stations. From 1981 to 1988, Allen carried on business with Murray Hogarth, another independent, mostly under the name "Pioneer". By 1986 there were about 100 stations, and by 1988, 150. In 1988 Allen bought out Hogarth and embarked on a program of even more rapid expansion under the name Cango.

[17] This was financed initially by the CIBC. By the fall of 1989 it became apparent that more financing would be required. This was obtained, with some difficulty, through First Treasury, Lincoln and KKC in May, 1990.

[18] Even this additional financing was not sufficient to pay down the bank to the extent required. In June, 1990, Cango retained Allan H.T. Crosbie of Crosbie & Co., a specialty merchant bank to "assist the Cango Group with its financial difficulties". Specifically, Crosbie was hired "to negotiate a sale of all or part of the assets of the Cango Group". Crosbie has been working on behalf of Cango since June, 1990, and has been able to arrange tentative sales of 31 stations to Beaver, and another possible 11 to Canadian Tire. Crosbie is currently involved in discussions with other possible purchasers in Winnipeg, Vancouver and Italy.

[19] Cango was already in a vulnerable financial condition before the war entered the picture. If the war or its consequences caused any additional strain, a proposition of which I am not persuaded, it was because of Cango's pre-existing situation. Other circumstances, as for instance a prolonged price war, might have precipitated the present predicament. One contributing cause, for instance, might be the excessive capital expenditures of which Lincoln complained in the fall of 1990.

[20] Having said that, there can be no doubt that for some reason or reasons, Cango's position deteriorated very rapidly in the fall of 1990. As at December 30, 1990, Cango's interim consolidated balance sheet showed a shareholders' equity of *minus* $9,280,000. The shareholders no longer had any stake in the company at that stage.

[21] In order to be qualified to make an application under the Act, a company must be insolvent or have committed an act of bankruptcy. Cango qualifies in both respects. The company must also have outstanding bonds issued under a trust deed. As noted above, Cango deliberately qualified itself in this respect some months ago.

[22] The Act is remedial legislation intended to enable an insolvent company, under judicial supervision, to have an opportunity to put forward a plan with a view to continuation as a going concern. To this end, the legislation should be given a broad and liberal interpretation:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

Re Meridian Developments Inc. and Tbronto-Dominion Bank (1984), 11 D.L.R. (4th) 576 at p. 580, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215 (Alta Q.B.) *per* Wachowich J.

> ... this legislation should be used and limited to where there is a reasonable chance the insolvent company can continue to operate its business as a going concern.

Stephanie's Fashions Ltd. (Re), B.C.S.C., January 24, 1990 (unreported) [summarized 25 A.C.W.S. (3d) 1071] *per* MacKinnon J. at p. 4:

> There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed.

Nova Metal Products Inc. v. Comiskey, Ontario Court of Appeal, released November 23, 1990 (unreported) [since reported 1 C.B.R. (3d) 101 at p. 115, 41 O.A.C. 282, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey*] *per* Finlayson J.A.

> I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset.

Nova Metal, supra, per Doherty J.A. at p. 129.

[23] From a practical perspective, Cango was in difficulty well before the war in the Persian Gulf. The cause or causes of its difficulty may be too rapid growth, or under-financing, or any one of a dozen other reasons. It is not necessary to determine the actual cause. Cango itself recognized the difficulty, if not the reasons for it and has been engaged in searching for a solution for the past nine months. It has achieved a tentative sale of 31 stations to Beaver and a possible sale of a further 11 to Canadian Tire. Cango has also shut down 30 other stations "because those outlets had always generated negative cash flow".

[24] Cango recognizes that these steps are not sufficient, but over a period of nine months has not come up with anything more specific by way of a solution than the general statement set out in its material and summarized above.

[25] The Act contemplates that the debtor company will first ask the court for a stay of proceedings and will then, during the stay, produce a plan of arrangement. In the "normal" case, however, the debtor company will not have been searching for a solution for nine months without coming up with something more definitive than the general proposals put forward here.

[26] In the present case, Cango is simply asking the court to stay the hands of creditors in the hope that, in whatever period of grace is granted, something more will happen than has occurred during the past nine months, and that that something will permit the company to be

salvaged.

[27] On the evidence presented, I am unable to conclude that there is a reasonable chance that Cango will be able to continue to operate its business as a going concern.

[28] The Act contemplates a plan being brought forward and being voted on by the various classes of creditors. Before the court will consider approval, the plan must have been accepted by a majority in number and three-quarters in value of the creditors or classes of creditors voting. While there is at present no plan, the positions of some creditors may be relevant at this early stage.

[29] Although Cango says it proposes to pay out First Treasury from the proceeds of the sale to Beaver, First Treasury opposes the making of an order under the Act. Lincoln and KKC are also opposed. Those three make up well over half of the value of the secured claims. That in itself would be sufficient to defeat any plan.

[30] In addition, Petro Canada is opposed to any order being made under the Act. Its claim constitutes well over half of the unsecured claims. Again, that in itself would be sufficient to defeat any plan. This assumes that Petro Canada would remain a substantial creditor at the time of the vote. It would be in Cango's interest to ensure that Petro Canada was not a creditor at that time, but no suggestion was put forward as to how that could be brought about.

[31] Petro Canada's position appears to have been influenced by the fact that in December, 1990, the Allen family enhanced its own position vis-à-vis Petro Canada to the extent of $5 million by taking security from the company to that value.

[32] Petro Canada may also have been influenced by some of the evidence revealed on the cross-examination of the president of Cango by counsel for First Treasury. This was to the effect that Lincoln and Cango had discussed three scenarios for the salvaging of the business and none of those scenarios involved paying anything to the unsecured creditors.

[33] Whatever the reasons, it appears highly probable that any plan put forward by Cango would be defeated by both the secured and the unsecured creditors voting in their respective classes.

[34] Aectra said it was "open to serious consideration of a C.C.A.A. proposal". This is doubtless dictated by its position behind First Treasury, Lincoln and KKC. Similarly, the CIBC was "neutral" as between an order under the Act and an order appointing a receiver. The probability remains, therefore, that whatever scheme could be put forward by Cango, it would be defeated by both secured and unsecured classes of creditors.

[35] Cango says "there are approximately 2,500 full-time and part-time employment positions within this network". How many are employed by Cango is not stated. There is no reason to believe that if a receiver were appointed there would be any more resulting unemployment than if Cango were to be left in control.

[36] Much was made of environmental protection. According to Cango, it is not a problem, and if it is Cango is best equipped to deal with it. According to second-hand information from

the Ministry of the Environment, gasoline spills may constitute a problem. To cover the situation, the proposed receiver, Deloitte & Touche Inc. has worked out an arrangement with the ministry which would, in the event it is appointed, limit its liability and that of First Treasury.

[37] Cango asks that proceedings against it be stayed and that it be given an opportunity to put forward a plan. That plan would involve the selling in whole or in part of the business. It was argued on behalf of First Treasury *et al.* that the only point of the application was to preserve some core of the gasoline business for the Allen family. That may well be the case; there seems to be little likelihood of any appreciable recovery by the unsecured creditors whether or not relief under the Act is granted. If a receiver is appointed, he or she will probably sell off all or part of the business. Accordingly, the issues reduce themselves to the question, who is likely to do the better job of selling off the assets? "Better" in this context means not only who will raise the most money, but also who will best administer and distribute the proceeds.

[38] Cango argues that it has already sold a good number of stations and that those sales may be lost if a receiver is appointed. No evidence was tendered to show that Beaver or Canadian Tire, or any other prospective purchaser, would be less willing to deal with a receiver than with Cango, or that Cango would be more likely to get a higher price.

[39] First Treasury, on the other hand, argued that in advertising the Cango properties as having a "net value of capital employed of $82.1 million", Crosbie was grossly exaggerating the situation. It was suggested that he was concerned with the agenda of the Allen family and not with anything else. First Treasury argued that if nothing else, a receiver would at least bring a level playing field to the sale proceedings.

[40] As to continued operation of the Cango stations, Deloitte has already made arrangements with Petro Canada for the supply and delivery of products on the same terms as Cango, *i.e.*, c.o.d., or on short term credit secured by a bank letter of credit. Petro Canada has also undertaken to provide technical assistance in the event it is required.

[41] I conclude that the application under the C.C.A.A. should be dismissed because:

(a) the object is not really to continue the present business, but to sell it off in whole or in part;

(b) the proposed receiver is in at least as good a position as Cango to sell;

(c) the creditors, secured and unsecured, have lost confidence in Cango's management;

(d) in any event, any plan Cango could put forward would almost certainly be turned down by both the secured and the unsecured creditors.

[42] An order will therefore go dismissing the C.C.A.A. application and appointing Deloitte & Touche Inc. as receiver and manager. A draft order was tendered on the hearing. It was in generally acceptable form, although the schedules referred to in the draft were not attached. If there is any difficulty settling the form of the order, I may be spoken to.

[43] The order should expressly empower the receiver to make a voluntary assignment in bankruptcy should he be so advised. Much of the Cango operation depends upon leased premises and it may be necessary to resort to the provisions of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, in order to deal effectively with those leases. Cango's application under the C.C.A.A. expressly contemplated resort to the *Bankruptcy Act.*

[44] The draft order deals with the costs of First Treasury on the motion to appoint a receiver. I may be spoken to by letter as to the costs, including quantum, of all parties to the C.C.A.A. application.

[45] These matters were heard on March 6th and I was unable to give judgment at that time. The foregoing paragraphs were written on March 8th and early in the week of March 11th. I was advised on March 14th that the sale to Beaver had been confirmed. This led to communications amongst counsel, and at their invitation I scheduled a meeting for March 19th at 9:15 a.m. At 9:18 I was advised that the meeting was no longer necessary.

[46] The confirmation of the sale to Beaver does not alter my views as to the proper disposition of these matters.

[47] Order accordingly.

si Spergel Inc., as Trustee of the Estate of Dilollo, a Bankrupt v. I.F. Propco Holdings (Ontario) 36 Ltd.

[Indexed as: Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Feldman, Sharpe and Strathy JJ.A.

October 2, 2013

117 O.R. (3d) 81 | 2013 ONCA 550

Case Summary

Bankruptcy and insolvency — Limitations — Limitation period applicable to motion by trustee to set aside preferential payment by bankrupt not suspended by stay under s. 195 of Bankruptcy and Insolvency Act upon filing of appeal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195.

Limitations — Extension of limitation period — Limitation period applicable to motion by trustee to set aside preferential payment by bankrupt not suspended by stay under s. 195 of Bankruptcy and Insolvency Act upon filing of appeal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195.

After a bankruptcy order was made and a trustee appointed, the bankrupt filed an appeal from the bankruptcy order. Under s. 195 of the *Bankruptcy and Insolvency Act* ("*BIA*"), the bankruptcy order was stayed upon the filing of the appeal. The trustee brought a motion under s. 95 of the *BIA* for a declaration that a pre-bankruptcy payment by the bankrupt to the respondent constituted a preference. The respondent brought a motion for an order that the trustee's claim was time-barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The motion judge granted the motion, holding that the limitation period applicable to a motion by a trustee to set aside a preferential payment by a bankrupt under s. 95 of the *BIA* is not suspended by the stay under s. 195 of the *BIA*. The trustee appealed.

Held, the appeal should be dismissed.

While the motion judge was correct in his ultimate conclusion, he erred in holding that before s. 20 of the *Limitations Act* can apply to extend, suspend or vary a limitation period, there must be a limitation period in another statute and that other statute must provide for the extension, suspension or other variation of that limitation period. Section 20 speaks to two situations: (a) where a statute contains a limitation period or time limit to which the *Limitations Act* does not apply and a provision for the extension, suspension or variation of that period or time limit; and (b) where a statue simply contains a provision for the extension, suspension or variation of a

limitation period or other time limit imposed "by or under" another statute. An "extension, suspension or other variation" contained in the *BIA* would be capable of suspending the operation of the limitation period in the *Limitations Act*. However, s. 195 did not have that effect.

Guillemette v. Doucet (2007), 88 O.R. (3d) 90, [2007] O.J. No. 4172, 2007 ONCA 743, 48 C.P.C. (6th) 17, 287 D.L.R. (4th) 522; *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29, 166 A.C.W.S. (3d) 762; *Sally Creek Environs Corp. (Re)*, [2013] O.J. No. 2288, 2013 ONCA 329, **consd** [page82]

Other cases referred to

Canada (Attorney General) v. Fekete, [1999] A.J. No. 384, 1999 ABQB 262, 242 A.R. 193, 10 C.B.R. (4th) 102, 87 A.C.W.S. (3d) 374; *Cohen (Re)*, [1948] O.J. 545, [1948] 4 D.L.R. 808 (C.A.); *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108, 16 C.P.C. (7th) 1, 288 O.A.C. 355; *Crosley (Re); Munns v. Burn* (1887), 35 Ch. D. 266 (C.A.); *Dilollo v. Es-Lea Holdings Ltd*., [2010] O.J. No. 4060, 2010 ONCA 624, 69 C.B.R. (5th) 207, affg [2010] O.J. No. 93, 2010 ONSC 129, 62 C.B.R. (5th) 223 (S.C.J.); *Edwards Estate (Trustee of) v. Food Family Credit Union*, [2011] O.J. No. 3205, 2011 ONCA 497, 79 C.B.R. (5th) 264, 336 D.L.R. (4th) 719, 204 A.C.W.S. (3d) 912; *Employers Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd*., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; *Fimax Investments Group Ltd. v. Grossman*, [2012] O.J. No. 1821, 2012 ONSC 2436 (S.C.J.); *Gingras v. General Motors Products of Canada Ltd*., [1976] 1 S.C.R. 426, [1974] S.C.J. No. 152, 57 D.L.R. (3d) 705, 13 N.R. 361; *Goorbarry v. Bank of Nova Scotia* (2011), 109 O.R. (3d) 92, [2011] O.J. No. 5770, 2011 ONCA 793, 286 O.A.C. 282, 345 D.L.R. (4th) 624, 210 A.C.W.S. (3d) 514; *In re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.); *July v. Neal* (1986), 57 O.R. (2d) 129, [1986] O.J. No. 1101, 32 D.L.R. (4th) 463 (C.A.); *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd*., [2001] O.J. No. 3717, 155 O.A.C. 328, 28 C.B.R. (4th) 53, 113 A.C.W.S. (3d) 384 (C.A.), varg [2001] O.J. No. 1, 23 C.B.R. (4th) 170, 102 A.C.W.S. (3d) 274 (S.C.J.); *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.); *Mawji (Re)*, [2012] O.J. No. 1048, 2012 ONCA 152, 94 C.B.R. (5th) 135 (C.A.), affg [2011] O.J. No. 6535, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (S.C.J.); *Toronto-Dominion Bank v. Barry-Kays*, [2010] O.J. No. 2667, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (S.C.J.); *Westby ex p. Lancaster Banking Corp. (Re)* (1879), 10 Ch. D. 776 (Ch. Div.); *Wilson Truck Lines Ltd. v. Pilot Insurance Co*. (1996), 31 O.R. (3d) 127, [1996] O.J. No. 3735, 140 D.L.R. (4th) 530, 94 O.A.C. 321, 38 C.C.L.I. (2d) 159, [1997] I.L.R. 1-3402, 22 M.V.R. (3d) 216, 66 A.C.W.S. (3d) 754 (C.A.), supp. reasons (1997), 33 O.R. (3d) 37, [1997] O.J. No. 1182, 147 D.L.R. (4th) 242, 98 O.A.C. 329, [1997] I.L.R. I-3447, 70 A.C.W.S. (3d) 150 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 69 [as am.], 69.1 [as am.], 69.2 [as am.], 69.3 [as am.], (1) [as am.], (1.1), (2), 69.4 [as am.], 69.5 [as am.], 95 [as am.], (1)(*a*), 178(1) [as am.], (2), 195 [as am.], 215

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 28

Courts of Justice Act, R.S.O. 1990, c. C.43 [as am.]

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.], ss. 4, 19 [as am.], 20

Solicitors Act, R.S.O. 1990, c. S.15 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 63.01

Authorities referred to

Houlden, L.W., G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, looseleaf (Toronto: Carswell, 2013)

APPEAL from the order of D.M. Brown J., [2013] O.J. No. 373, 2013 ONSC 578 (S.C.J.) that the claim by the trustee in bankruptcy was statute-barred. [page83]

Mervyn D. Abramowitz and *Philip Cho*, for appellant.

Harvey Chaiton and *Douglas A. Bourassa*, for respondent.

The judgment of the court was delivered by

[1] **STRATHY J.A.**: — Under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"), a bankruptcy order is stayed upon the filing of an appeal. This appeal raises the issue of whether that stay suspends the limitation period applicable to a motion by a trustee to set aside a preferential payment by a bankrupt under s. 95 of the *BIA*.

[2] The motion judge found that the limitation period was not suspended by the stay and dismissed the preference motion as time-barred. For the reasons that follow, although I do not agree entirely with the motion judge's analysis, I agree with his conclusion and would dismiss the trustee's appeal.

A. *The Facts*

[3] On July 6, 2006, the respondent, I.F. Propco Holdings (Ontario) 36 Ltd. ("Propco"), obtained a default judgment against the bankrupt, Cosimo Dilollo ("Dilollo"), for $22,031,787.67.

[4] On December 15, 2006, Propco brought a bankruptcy application against Dilollo. Ultimately, Propco and Dilollo agreed to compromise Propco's judgment for $1.2 million. They

agreed that if this sum was paid, both parties would consent to the dismissal of Propco's bankruptcy application and would exchange releases.

[5] Between August and December 2007, Dilollo paid $1,136,500, which, although less than the agreed amount, Propco accepted in satisfaction of the settlement. As matters transpired, the bankruptcy application was not dismissed and releases were not exchanged. By early 2008, Propco's bankruptcy application remained outstanding and by order dated May 22, 2008, three other creditors were added as applicants to it.

[6] On June 5, 2009, the bankruptcy application was heard by Morawetz J. Dilollo admitted at the hearing that he had settled Propco's claim for "something around" $1.185 million. A bankruptcy order was made on January 11, 2010 [[2010] O.J. No. 93, 2010 ONSC 129 (S.C.J.)], and a trustee was appointed. In his endorsement granting the application, Morawetz J. referred to the settlement of the debt between Propco and Dilollo for $1.185 million.

[7] On January 20, 2010, Dilollo filed an appeal from the bankruptcy order. This court dismissed that appeal on September 27, 2010 [[2010] O.J. No. 4060, 2010 ONCA 624]. [page84]

[8] At the first meeting of creditors on May 31, 2011, the appellant, msi Spergel Inc. (the "Trustee"), was appointed in place of the original trustee.

[9] On August 24, 2012, the Trustee brought a motion under s. 95 of the *BIA* for a declaration that the $1.1365 million paid by Dilollo to Propco under the settlement constituted a preference and sought an order that Propco repay that amount to the Trustee.

[10] Propco, for its part, brought a motion for an order that the Trustee's claim was time-barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "*Limitations Act*"). Alternatively, it sought an order that if the Trustee's claim was not time-barred, it was entitled to file a proof of claim in Dilollo's estate for the full amount of its $22,031,787.67 judgment. Propco said that if the preferential payment was set aside, the settlement agreement under which the payment had been made should also be set aside, with the result that the full amount of its claim was outstanding and provable in the bankruptcy. The difference was important, because if Propco could file a claim for the full amount of the judgment, it would account for about 90 per cent of the value of proven claims.

B. *Statutory Provisions*

[11] The Trustee brought its motion to set aside the payment to Propco as a preference under s. 95(1)(*a*) of the *BIA*:

> 95(1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> *(a)* in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against -- or, in Quebec, may not be set up against -- the trustee if it is made, incurred, taken or suffered, as the case may be, during

the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

[12] There is no limitation period in the *BIA* applicable to the time within which the trustee is required to bring a motion to set aside a preference. In *Edwards Estate (Trustee of) v. Food Family Credit Union*, [2011] O.J. No. 3205, 2011 ONCA 497, 336 D.L.R. (4th) 719, at para. 4, this court applied the proposition that "general limitation periods in provincial statutes apply to bankruptcy proceedings", referring to *Gingras v. General Motors Products of Canada Ltd.*, [1976] 1 S.C.R. 426, [1974] S.C.J. No. 152 and *Employers Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114. [page85]

[13] Both parties, therefore, agreed that the general two-year limitation period in s. 4 of the *Limitations Act* applied to the motion to set aside the preference. That section provides:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[14] The Trustee acknowledged that it was aware of the potential preference claim on January 11, 2010, the date of release of the reasons of Morawetz J. granting the bankruptcy order. It also conceded that the limitation period began on the date of the bankruptcy order, but argued that Dilollo's appeal to this court suspended the running of the limitation period pending the disposition of the appeal. It relied in this regard on the combined operation of s. 20 of the *Limitations Act* and s. 195 of the *BIA.*

[15] Section 19 of the *Limitations Act* has the effect of invalidating any limitation period not specifically referred to in the schedule to that Act, unless it was in effect on January 1, 2004, and incorporates by reference a statutory provision listed in the schedule. It states:

19(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(*b*) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

[16] However, s 20 of the *Limitations Act* provides:

20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

[17] The Trustee argued that s. 195 of the *BIA* operated as a "suspension" of the limitation period pending the appeal to this court. That section provides:

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears

that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[18] Returning to the time periods at issue here, the key dates are as follows: [page86]

January 11, 2010	Bankruptcy order
January 20, 2010	Appeal filed by Dilollo
September 27, 2010	Appeal dismissed by Court of Appeal
January 11, 2012	Two-year limitation period expired
August 24, 2012	Preference motion commenced

[19] If the stay of proceedings pursuant to s. 195 of the *BIA* during the appeal of the bankruptcy order had the effect of suspending the limitation period for the preference motion, the limitation period would have expired on September 18, 2012, and the Trustee's preference motion would have been brought in time. If the stay did not suspend the limitation period, it would have expired two years after the date of the bankruptcy order -- that is, on January 11, 2012 -- and the preference motion, which was brought about 30 months after the bankruptcy order, would have been time-barred.

C. *The Motion Judge's Reasons*

[20] There were two issues before the motion judge. The first was whether the limitation period for the Trustee's preference motion was "suspended" by the stay of proceedings in s. 195 of the *BIA* during the pendency of the appeal from the bankruptcy order.

[21] The second issue was whether, if the motion was not time-barred, and if the Trustee was ultimately successful in voiding the preferential payment under s. 95 of the *BIA*, Propco was entitled to file a claim for the full amount of its judgment (in excess of $22 million), or was confined to claiming the settlement amount of $1,136,500.

[22] The motion judge found that before s. 20 can apply to extend, suspend or vary a limitation period, there must be a limitation period in another statute and that other statue must provide for the extension, suspension or other variation of *that limitation period*. Since there was no limitation period in s. 195 of the *BIA*, and that provision did not purport to suspend or extend a limitation period in the *BIA*, the ordinary limitation period applied. He expressed this conclusion as follows, at para. 16:

To engage section 20 of the *Limitations Act, 2002* requires that some other statute provides for a limitation period and also provides for the "extension, suspension or other variation of a

> limitation period or other time limit by or under another Act". Section 195 of the *BIA* does not contain any limitation period or provide for the "extension, suspension or other variation" of a limitation period. Since *BIA* s. 195 does not purport to extend, suspend or vary a [page87]limitation period contained in the *BIA*, section 20 of the *Limitations Act, 2002* does not apply. Since no other suspension provision contained in the *Limitations Act, 2002* would apply in the circumstances of this case, the basic two year limitation period set out in section 4 governs. The parties agreed that time started to run on the day the Bankruptcy Order was made, so the basic two-year limitation period expired on January 11, 2012, well before the Trustee initiated the Preference Motion. That motion, therefore, is statute-barred.

(Citations omitted)

[23] The motion judge also concluded that the stay pending appeal under s. 195 of the *BIA* was not functionally equivalent to a limitation period, and it was open to the Trustee to move to lift the stay if so advised. He stated, at para. 17 of his reasons:

> That a stay pending appeal might prevent a person from taking some step does not alter that conclusion. A stay of proceedings pending the hearing of an appeal is not the functional equivalent of a limitation period. Limitation periods set deadlines by which a person must initiate legal process in respect of a cause of action. Stays pending appeal are engaged following the initial disposition of the legal process in which the cause of action was asserted. Limitation periods and stays pending appeal conceptually are quite different creatures. If a stay might operate to prejudice a person's legal rights, recourse generally is available to seek a lifting of the stay from the court. Section 195 of the *BIA* specifically provides that "the Court of Appeal or a judge thereof may vary or cancel the stay . . . for such other reason as the Court of Appeal or judge thereof may deem proper". In the present case it was always open to the Trustee to seek a lifting of the stay from the Court of Appeal if the Trustee thought that its ability to initiate a preference motion might be prejudiced by the appeal. As matters transpired, the Trustee was left with ample time following the dismissal of the appeal to commence its Preference Motion.

[24] In the result, he found that the Trustee's motion was time-barred. Although not necessary to do so in the circumstances, the motion judge went on to consider whether, if the claim under s. 95(1)(*a*) of the *BIA* was not statute-barred, and if the payment under the settlement was found void as a preference, Propco was entitled to claim for the full amount of its judgment or was restricted to the compromised amount. He concluded that the Trustee could file a claim for the full amount of the judgment.

D. *The Parties' Submissions*

[25] The Trustee's position, both before the motion judge and in this court, was that pursuant to s. 195 of the *BIA*, the appeal of the bankruptcy order resulted in an automatic stay of proceedings and suspended the limitation period applicable to the s. 95 preference motion. In that case, the preference motion [page88]would not be statute-barred until two years less nine days[1] after the appeal of the bankruptcy order was dismissed by this court on September 27, 2010. Under this theory, the preference motion was brought about a month before the expiry of the two-year limitation period.

[26] The Trustee submits that the motion judge failed to follow "established jurisprudence" concerning the effect of a stay under the *BIA* on the running of limitation periods. It refers to case law under s. 69 of the *BIA* which holds that the limitation period ceases to run for creditors' claims against the bankrupt while the bankruptcy is in effect.

[27] The Trustee also submits that the motion judge erred in holding that the absence of a limitation period in the *BIA* for bringing a preference motion meant that s. 20 of the *Limitations Act* was inapplicable. In this regard, the Trustee argues that the motion judge failed to properly consider and apply this court's decision in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469.

[28] Propco submits that the motion judge was correct in finding that s. 195 of the *BIA* does not extend, suspend or vary the basic two-year limitation period, because it does not contain a limitation period or provide for the "extension, suspension or other variation" of a limitation period. It relies on this court's decision in *Guillemette v. Doucet* (2007), 88 O.R. (3d) 90, [2007] O.J. No. 4172, 2007 ONCA 743, which it submits makes it clear that s. 20 of the *Limitations Act* only applies where the other statute contains *both* a limitation period *and* a provision extending, suspending or varying that limitation period. Propco also relies on *Joseph* for the proposition that a common law extension of the limitation period is not available under s. 20.

[29] Finally, Propco distinguishes the authorities under s. 69 of the *BIA* relied upon by the Trustee, none of which involved s. 20 of the *Limitations Act* and which, it says, are based on English authority inapplicable to Ontario's comprehensive limitations regime.

E. *Analysis*

[30] The appropriate starting point for the analysis of the issues is the language of the statutory provision relied upon by the Trustee to suspend the limitation period. Section 195 of the *BIA* states that "all proceedings under an order or judgment [page89]appealed from shall be stayed" until the disposition of the appeal. It provides, however, that this court or a judge of this court may vary or cancel the stay if the appeal is not being prosecuted diligently, "or for such other reason as the Court of Appeal or a judge thereof may deem proper".

[31] The section contains no limitation period and makes no express reference to the extension, suspension or variation of any limitation period. For this reason, the motion judge found that s. 20 of the *Limitations Act* was inapplicable and the basic two-year limitation period applied.

[32] I agree within this conclusion, but do not agree with the portion of the motion judge's reasons dealing with the interpretation of s. 20 of the *Limitations Act*. In my view, read together, this court's decisions in *Guillemette* and *Joseph* establish that s. 20 speaks to two situations: (a) where a statute contains a limitation period or time limit to which the *Limitations Act* does not apply and a provision for the extension, suspension or variation of that period or time limit; and (b) where a statute simply contains a provision for the extension, suspension or variation of a limitation period or other time limit imposed "by or under" another statute.

[33] In *Joseph*, Feldman J.A. adopted this interpretation, but found that the "special circumstances" doctrine was a creature of the common law, and could not be considered an extension *under* the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It is apparent from her reasons

that, had she found it to be a statutory extension, she would have applied it to the limitation period under the *Limitations Act*.

[34] While there is language in *Guillemette* that could be taken to suggest, as Propco argues and as the motion judge held, that the operation of s. 20 is limited to statutes that contain their own limitation periods, that was not, in fact, the result in *Guillemette.* In that case, the limitation period in the *Solicitors Act*, R.S.O. 1990, c. S.15 was found to be of no effect by virtue of s. 19 of the *Limitations Act*, because it was not listed in Schedule A of the statute, but its "suspension" provision nevertheless applied to extend the limitation period in the *Limitations Act*.

[35] Section 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 is a well-recognized example of such a statutory extension. It suspends the operation of the applicable limitation period in favour of class members when a class proceeding is commenced. There is no limitation period in the statute itself that is suspended, but the statute operates to suspend another statutory limitation period applicable to the cause of action: see, for [page90]example, *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108, 16 C.P.C. (7th) 1.

[36] I therefore agree with the Trustee's submission that an "extension, suspension or other variation" contained in the *BIA* would be capable of suspending the operation of the limitation period in the *Limitations Act*. The question is whether s. 195 of the *BIA* has that effect. I agree with the motion judge's conclusion that it does not.

[37] The Trustee acknowledges that there is no direct authority that a stay under s. 195 of the *BIA* suspends the limitation period. It submits, however, that there is a long line of authority holding that the statutory stay of creditors' claims under s. 69 of the *BIA* has the effect of suspending the limitation period. It submits that the principles contained in the case law under s. 69 apply equally to s. 195.

[38] Section 69 of the *BIA* and several sections that follow -- s. 69.1 (Division I proposals), s. 69.2 (consumer proposals) and s. 69.3 (bankruptcies) -- provide for a stay of proceedings against an insolvent person or debtor, as the case may be, after the filing of a notice of intention, after filing a proposal or after a bankruptcy order. The wording of s. 69.3(1), dealing with bankruptcies, is typical:

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[39] Subsection (1.1) provides that the stay ceases to apply on the day the trustee is discharged. Subsection (2) deals with the claims of secured creditors, who are permitted to realize their security unless the court orders otherwise. Section 69.4 provides that a creditor may apply to the court to have the stay lifted, and s. 69.5 permits the collection of withholdings or deductions under provincial tax laws.

[40] These provisions promote the objects of the *BIA* by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and by preventing proceedings

by a creditor that would give that creditor an advantage over others: see *Cohen (Re)*, [1948] O.J. No. 545, [1948] 4 D.L.R. 808 (C.A.), at para. 12.

[41] These provisions stipulate that on the happening of the particular act, "no creditor has any *remedy* against the debtor or the debtor's property" (emphasis added).

[42] Although the heading of these provisions refers to a "stay of proceedings", they accomplish this result by preventing the exercise of the creditor's remedy -- the cause of action. [page91]

[43] This court has, on a number of occasions, adopted the definition of "cause of action" propounded by Morden J.A. in *July v. Neal* (1986), 57 O.R. (2d) 129, [1986] O.J. No. 1101 (C.A.), at p. 137 O.R., adopting the words of Lord Diplock in *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43 Q.B.: "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". For other examples, see *Wilson Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127, [1996] O.J. No. 3735 (C.A.), supp. reasons (1997), 33 O.R. (3d) 37, [1997] O.J. No. 1182 (C.A.); *Goorbarry v. Bank of Nova Scotia* (2011), 109 O.R. (3d) 92, [2011] O.J. No. 5770, 2011 ONCA 793.

[44] By providing that the creditor has no "remedy" against the bankrupt, s. 69 prevents the exercise of the creditor's cause of action while the bankruptcy is in effect. This is entirely consistent with the purpose of the *BIA* of providing for the orderly and fair distribution of a bankrupt's property and preventing any creditors from gaining an advantage. The section does not suspend the limitation period. It prohibits any action on a claim that is provable in the bankruptcy. In most cases, the limitation period becomes irrelevant because, by s. 178(2) of the *BIA*, on discharge the bankrupt is released of all claims provable in the bankruptcy other than those set out in s. 178(1).

[45] The Trustee relies, however, on a line of cases under s. 69, which are summarized by the following quote from L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, looseleaf (Toronto: Carswell, 2013), at p. 5-99:

> When a bankruptcy occurs, the *Statute of Limitations* ceases to run against claims . . . The creditor's ability to take proceedings against the debtor is stayed by the *Act*, and the stay of proceedings suspends the operation of the limitation period . . . . The suspension ends when the trustee is discharged (s. 69.3(1)), and the *Statute of Limitations* commences to run again at that time.

(Citations omitted)

Cases that follow this principle include *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd*., [2001] O.J. No. 1, 23 C.B.R. (4th) 170 (S.C.J.), vard [2001] O.J. No. 3717, 155 O.A.C. 328 (C.A.); *Canada (Attorney General) v. Fekete*, [1999] A.J. No. 384, 1999 ABQB 262, 242 A.R. 193; *Toronto-Dominion Bank v. Barry-Kays*, [2010] O.J. No. 2667, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (S.C.J.); *Mawji (Re)*, [2011] O.J. No. 6535, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (S.C.J.), affd [2012] O.J. No. 1048, 2012 ONCA 152, 94 C.B.R. (5th) 135; *Fimax Investments Group Ltd. v. Grossman*, [2012] O.J. No. 1821, 2012 ONSC 2436 (S.C.J.). [page92]

[46] The common root of these authorities runs deep -- an 1887 decision of the English Chancery Division, *Crosley (Re); Munns v. Burn* (1887), 35 Ch. D. 266 (C.A.). In that case, Crosley, a broker, was adjudged bankrupt in February 1874. It was discovered that he had misappropriated securities that he had held for a customer, Captain Ayscough. Ayscough made a claim in the bankruptcy and received a small dividend. The administration of the bankrupt estate was completed in 1880, and an order was made annulling Crosley's bankruptcy.

[47] Crosley died in 1885 and in May 1896 an order was made for the administration of his estate. Captain Ayscough made a claim for the balance of what he was owed, on the basis that the debt was incurred by Crosley's fraud and therefore survived the bankruptcy.

[48] It was argued, however, that the claim was barred by the six-year statute of limitations. Lord Justice Cotton said this, at p. 270 Ch. D.:

> Then it is said that the claim is barred by the Statute of Limitations. But the fraud was not discovered till after the adjudication in bankruptcy. While the bankruptcy was in force no action could be brought, so the statute could not begin to run till the annulling of the bankruptcy, and within six years from that time an order for administration was made. The Statute of Limitations is therefore no defence, and the appeal must be dismissed.

[49] Lindley J. agreed, at p. 271 Ch. D., stating:

> The short answer to the argument founded on the Statute of Limitations is that the statute did not begin to run till the bankruptcy had been annulled.

[50] While the respondent argues that the court referred to no authority in support of the proposition that the statute of limitations did not run during the bankruptcy, the proposition was not new. In *Westby ex p. Lancaster Banking Corp. (Re)* (1879), 10 Ch. D. 776 (Ch. Div.), at p. 784 Ch. D., the bankruptcy commenced in 1870. After the estate had been realized, and the trustees determined that nothing more could be brought in, the bankruptcy was deemed to be closed. The bankrupt failed to pay his creditors the requisite ten shillings on the pound, which would have entitled him to a discharge, and he never obtained a discharge. Subsequently, in 1878, the bankrupt inherited a large amount of money. A creditor, whose debt had appeared on the statement of affairs, but who had not proven his debt before the close of the bankruptcy, sent a proof of claim to the receiver, who had taken over as trustee.

[51] It was held that the creditor was entitled to apply for leave to enforce his debt as a judgment debt against the debtor's property. In answer to the argument that the creditor's claim [page93]was time-barred, Sir James Bacon, the chief judge in bankruptcy, abruptly dismissed the assertion, at p. 272:

> The argument founded on the *Statute of Limitations* as an answer to this claim is not tenable for a moment. *The Statute of Limitations has nothing to do with the bankruptcy laws*. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed.

(Emphasis added)

[52] In my view, this proposition remains valid. Section 69 of the *BIA* is not, as such, a provision that extends, suspends or varies a limitation period. It takes away creditors' civil remedies and requires them to submit their claims through the bankruptcy process. The bar on commencing or continuing proceedings serves this end and preserves the integrity of the bankruptcy process. In most cases, the limitation period is of no further significance because creditors' claims are dealt with in the bankruptcy. In the rare case, where the bankrupt is not discharged or the claim survives bankruptcy, the limitation period may resume running. It also continues to run against a creditor who seeks to recover a debt in proceedings unconnected to the bankruptcy: see Houlden, Morawetz and Sarra, at 5-99, referring to *In re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.).

[53] The stay under s. 195 of the *BIA* serves a very different purpose. It simply provides that on the appeal of any order or judgment made in the course of a bankruptcy, the *status quo* will be preserved, unless the court orders otherwise. This is not dissimilar to the automatic stay of a judgment for the payment of money, under rule 63.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Its purpose is to ensure that no steps are taken that cannot be unwound if the appeal succeeds.

[54] The Trustee also argued that the motion judge failed to appreciate that a trustee is incapable of acting where the very order from which it derives its authority is under appeal. It submits that during the stay under s. 195, a trustee is unable to hold a first meeting of creditors, hold a meeting with the inspectors, investigate potential claims and obtain legal opinions about such claims. This, said the Trustee, would put a trustee and creditors at risk, because the limitation period could slip away before the trustee had an opportunity to investigate potential claims or to take action. It argued that a trustee must have a full two years after its appointment to be able to investigate the situation and make decisions, with the advice of the creditors and the inspectors, before deciding whether to commence proceedings. [page94]

[55] The motion judge addressed this issue, at para. 17 of his reasons, referred to above at para. 23, where he noted that it was open to the Trustee to apply to lift the stay if it interfered with its ability to initiate the preference motion. As the motion judge also noted, the Trustee had ample time to commence the preference motion.

[56] Accordingly, I regard s. 69 of the *BIA*, and the line of cases under it, to be entirely distinguishable from s. 195 and from the case before this court. Both provisions are also distinguishable from s. 20 of the *Limitations Act*, which is concerned with provisions in other acts for the extension, suspension or other variation of limitation periods contained in those other acts.

[57] To conclude, this is not a case in which a statute other than the *Limitations Act* contains either a limitation period or an express extension, suspension or other variation of the limitation period. The Trustee relies, in effect, on an implicit or implied statutory extension of the limitation period. This court considered a somewhat similar argument in *Sally Creek Environs Corp. (Re)*, [2013] O.J. No. 2288, 2013 ONCA 329. In that case, certain creditors of the bankrupt brought a motion for leave pursuant to s. 215 of the *BIA* to commence an action for negligence against the

Office of the Superintendent of Bankruptcy and two of its employees. They alleged that the OSB was negligent in supervising the trustee in bankruptcy, with the result that the dividend paid to creditors was less than it would otherwise have been.

[58] In a taxation hearing, the registrar in bankruptcy made findings of serious misconduct on the part of the trustee. It was acknowledged that the limitation period for an action against the OSB began to run when the registrar's decision was released on June 23, 2008, because the creditors were aware on that date of the material facts with respect to their cause of action.

[59] In response to the motion for leave, the OSB argued that the motion was time-barred because it had been brought more than two years after the registrar's decision. The creditors responded, however, that the registrar's decision had been appealed, first to the Superior Court of Justice and then to this court. They argued that the appeal had the effect of "suspending" the limitation period. The motion judge found that all material facts were known by June 23, 2008, and the running of the limitation period was unaffected by the appeals.

[60] This court affirmed the decision of the motion judge. It noted, at para. 11, that the appellants had provided no authority for the proposition that the limitation period, [page95]having begun to run, was tolled by an appeal or as a result of the outcome of the appeal.

[61] The decision of this court in *Sally Creek*, like *Guillemette* and *Joseph*, is consistent with the purpose of the *Limitations Act* of promoting certainty and clarity in the law of limitation periods. That purpose is not accomplished by extending, suspending or varying a limitation period unless expressly authorized by statute. In my view, this is not such a case.

F. *Conclusion*

[62] For these reasons, I would dismiss the appeal. As a result, the payment to Propco could not be impeached and it is unnecessary to consider the second issue before the motion judge.

[63] In default of agreement as to costs, I would direct the parties to file brief written submissions, no more than three pages in length, exclusive of the costs outline. I would order that Propco's submissions be delivered within 20 days and the Trustee's submissions within 20 days thereafter.

Appeal dismissed.

Notes

1 Nine days being the time between the bankruptcy order and the filing of the appeal.

CITATION: Peoples Trust Company v. Rose of Sharon (Ontario) Retirement Community, 2012 ONSC 7319
COURT FILE NO.: CV-11-9399-00CL
DATE: 20121227

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Peoples Trust Company, Applicant

AND:

Rose of Sharon (Ontario) Retirement Community, Respondent

BEFORE: D. M. Brown J.

COUNSEL: C. Prophet and C. Stanek, for the Receiver, Deloitte & Touche Inc.

R. Jaipargas, for Trisura Guarantee Insurance Company

HEARD: December 21, 2012

REASONS FOR DECISION (corrected)

I. Motion to lift stay in a receivership in order to set down for trial a construction lien action

[1] On September 27, 2011, C. Campbell J. appointed Deloitte & Touche Inc. receiver and manager of all the assets, undertakings and properties of Rose of Sharon (Ontario) Retirement Community. Paragraph 8 of the Appointment Order contained the standard clause staying proceedings against the debtor.

[2] Rose of Sharon owned a long-term care condominium located on Maplewood Avenue, Toronto. Prior to the appointment of the Receiver construction lien litigation had broken out over the condominium project and the general contractor, Mikal-Calladan Construction Inc., had initiated lien proceedings. On January 30, 2012, Trisura Guarantee Insurance Company obtained an assignment of Mikal-Calladan's lien. On November 26, 2012, Trisura obtained an order to continue the construction lien action. As required by the terms of section 37 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, Trisura must set the construction lien action down for trial by December 31, 2012, failing which its lien will expire.

[3] Trisura therefore moved for an order lifting the stay of proceedings to allow it to pursue the construction lien action so that it can set the action down for trial.

[4] The Receiver did not oppose the lifting of the stay, but it sought certain terms for the order. Trisura has agreed to all the terms, but one – whether as a condition of lifting the stay this Court should set aside a default judgment granted against Rose of Sharon some two days after the Appointment Order was made and the earlier noting in default of Rose of Sharon.

II. Governing legal principles governing the lifting of stays

[5] On a motion to lift a stay of proceedings in a receivership the moving party bears the onus of convincing the court that the relief should be granted, and in considering such a request the court should look at the totality of the circumstances and the relative prejudice to both sides.[1] The parties agreed that the court may find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*. Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, "subject to any qualifications that the court considers proper", where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is equitable on other grounds to make such a declaration. In *Re Ma*[2] the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

> Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

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[1] *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199, paras. 13 and 14.
[2] (2001), 24 C.B.R. (4th) 68 (Ont. C.A.), paras. 2 and 3.

III. The basic chronology

[6] Mikal-Calladan preserved a Claim for Lien on November 19, 2010 against title to the Project. It perfected its lien by commencing the construction lien action – CV-10-417426 – on December 31, 2010. On July 21, 2011, Peoples Trust served a statement of defence in the Lien Action. Rose of Sharon was noted in default in the Lien Action; exactly when, the materials did not disclose.

[7] On August 31, 2011, with the consent of Peoples Trust, the parties agreed to refer the Lien Action to a construction lien master in Toronto for a trial. MacDonald J. made a standard Reference Order on that day which provided that "the Master determine all questions arising in this action on the reference".

[8] Then, less than a month later, at the suit of Peoples Trust, the Appointment Order was made.

[9] On September 12, 2011, before the Appointment Order was made, Mikal-Calladan had requisitioned default judgment against Rose of Sharon. On September 29, two days after the Appointment Order was made, the Registrar signed default judgment against Rose of Sharon for $4,195,768.64, plus costs of $1,350.00 (the "Default Judgment").

[10] As mentioned, earlier this year Trisura took an assignment of Mikal-Calladan's Lien Claim and obtained an order to continue the Lien Action about a month ago.

[11] With the December 31 deadline looming to set down the Lien Action or face the expiry of its lien, on November 7, 2012 Trisura's counsel wrote to the Receiver's requesting that the Receiver consent to a lifting of the stay so it could set the Lien Action down for trial. Trisura's counsel indicated that "the main issue in the lien action relates to the priority of the lien over the People's Trust mortgage".

[12] Receiver's counsel responded on November 22, 2012 advising that the Receiver was prepared to consent to lifting the stay on the following terms:

> Condition 1: Trisura obtained an order to continue in the Lien Action;
>
> Condition 2: Trisura agreed to set aside the noting in default of Rose of Sharon and the Default Judgment so that the Receiver could defend the Lien Action;
>
> Condition 3: Issues of liability, timeliness and quantum in the Lien Action would be determined in a Reference before a Master; and,
>
> Condition 4: The issue of the priorities of the construction lien vis-à-vis any other encumbrance would be determined by a judge of the Commercial List.

[13] Mr. Edouard Chassé, a claims adjuster retained by Trisura, in his affidavit stated that Trisura had obtained an order to continue and it agreed to Conditions 3 and 4. Trisura opposed Condition 2 "as the Receiver has had notice of the default for 14 months and has taken no steps" to set aside the noting in default and default judgment.

IV. Analysis

[14] There is no doubt that if the stay is not lifted, Trisura would be prejudiced materially by losing its ability to advance its lien claim. Section 37(1) of the *Construction Lien Act* provides that a perfected lien, such as that assigned to Trisura, expires immediately after the second anniversary of the commencement of the lien action unless either (i) an order is made for the trial of an action in which the lien may be enforced or (ii) an action in which the lien may be enforced is set down for trial. December 31, 2012 is the second anniversary of the commencement of the Lien Action, so unless the stay is lifted, Trisura's lien claim will expire. As mentioned, the Receiver has consented to the lifting of the stay, so the remaining dispute centres only around Condition 2 – the Receiver's requirement that the noting of default and Default Judgment against Rose be set aside.

[15] Trisura advanced two arguments why no setting aside should occur. First, Trisura argued that because the August 31, 2011 Reference Order of MacDonald J. stipulated that "the Master determine all questions arising in this action on the reference and all questions arising under the *Construction Lien Act*", it was not open to the court supervising the receivership proceedings to set aside a noting of default which had occurred in the Lien Action.

[16] I disagree, for two reasons. First, the Default Judgment was made two days after the Appointment Order. No doubt that occurred because the papers requisitioning the Default Judgment were moving through the court's administrative office and the Registrar was unaware of the Appointment Order. Nonetheless, given the stay of proceedings ordered in the Appointment Order, the Default Judgment contravened the Appointment Order and therefore was of no force or effect.

[17] Second, Trisura's submission ignored what occurred less than one month after MacDonald J. made his Reference Order – this receivership came about. As a result of the Appointment Order, the court supervising the receivership considers all issues relating to or touching upon the receivership and therefore is the proper court to determine whether, as a condition of lifting a stay of proceedings, certain relief should be granted to the receiver as part of the process of balancing the respective interests at stake on the lift-stay motion.

[18] Which brings me to the second argument made by Trisura: it contended that the appropriate test for considering whether to set aside a noting in default in a construction lien action is that set out in the *Construction Lien Act* and the related jurisprudence and, in the circumstances of this case, the Receiver could not meet that test. Section 54(3) of the *CLA* provides that where a defendant has been noted in default, it shall not be permitted to contest the claim "except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence". Section 67(3) of the *CLA* states that "except where inconsistent

with this Act…the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act."

[19] In *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, Master Polika held that Rule 19.03(1) of the *Rules of Civil Procedure* dealing with the setting aside of notings in default was inconsistent with *CLA* s. 54(3) because it was less stringent than the test under the *CLA* by reason of granting the court a discretion to set aside a noting of default on such terms as were just. Master Polika stated that the sole test a party moving to set aside the noting of default in a construction lien action needed to meet was that set out in *CLA* s. 54(3) – i.e. to satisfy the court that there existed evidence to support a defence.[3] In *A1 Equipment Rental Ltd. v. Borkowski* Lederer J. stated that a party moving to set aside a noting in default under the *CLA* must not only demonstrate that evidence existed to support a defence, it also had to move promptly to set aside the noting in default.[4]

[20] Whether, when a lien claimant seeks leave of the court supervising a receivership to lift the stay of proceedings and the receiver seeks a condition that a noting of default be set aside, the court must apply the test under *CLA* s. 54(3) or may proceed on a less stringent basis as part of its discretion in lifting the stay, is a question I need not determine for the simple reason that on the facts of this case the Receiver meets the test under the *CLA*.

[21] Trisura submitted that the Receiver cannot now attempt to impose a condition setting aside the noting of default when over a year has passed since that event. The evidence does not support that contention. First, just over a week after the making of the Appointment Order, counsel for Mikal-Calladan wrote to Receiver's counsel advising of the Default Judgment and stating:

> Under the circumstances, we will not take any steps to enforce our client's judgment in the absence of obtaining the necessary leave from the Court.

In light of that position taken by the lien claimant, it is not surprising that the Receiver took no immediate steps to set aside the Default Judgment or the noting in default.

[22] In its First Report dated December 12, 2011 the Receiver reported:

> While there may be setoffs against Mikail's claim that may be asserted by the Receiver, pending disposition of the Property, the Receiver does not intend to take any action in connection with any of the above-noted lien claims at this time.

Again, this constitutes evidence of a reasonable explanation by the Receiver about why it did not take steps at the time in the Lien Action.

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[3] (2009), 79 C.L.R. (3d) 144 (S.C.J.), para. 24.
[4] (2008), 70 C.L.R. (3d) 274 (S.C.J.), para. 51.

[23] On February 29, 2012, Trisura advised the Receiver of the assignment of the Lien Claim, but then took no further steps to move the Lien Action along until October 24, 2012 when it informed the Receiver that it wished to obtain a trial date. Further emails between counsel ultimately resulted in the Receiver's November 22, 2012 letter setting out the terms for lifting the stay of proceedings. In those circumstances, I see no argument that the Receiver failed to take steps promptly to set aside the noting in default once it became aware of Trisura's intention to proceed with the Lien Action. I also would note, by way of chronology, that on September 14, 2012, a month before Trisura approached the Receiver about further steps in the Lien Action, the Receiver had commenced a claim against Trisura under the performance bond for the Project.

[24] As to whether the Receiver has filed evidence to support a defence, it has. Although the Receiver has not filed a draft Statement of Defence, the Receiver provided Trisura with ample details of its defence through its July 10, 2012 letter to Trisura's counsel, in particular the sections entitled "Set-Offs" and "Deficiencies", as well as in portions of its Statement of Claim in the performance bond action, specifically paragraphs 42 and 62 of the claim.

[25] In balancing the interests of Trisura and the Receiver on this motion to lift the stay of proceedings, I conclude that it is fair and appropriate to require, as a term of lifting the stay, that both the noting of default of Rose of Sharon and the Default Judgment be set aside, and that the Receiver be permitted to file a Statement of Defence in the Lien Action within 20 days.

V. Summary and costs

[26] By way of summary, I grant the motion of Trisura to lift the stay of proceedings contained in the Appointment Order to allow it to pursue the Lien Action, including allowing Trisura to set the Lien Action down for trial. Out of an abundance of caution, given the proximity of the December 31 deadline, I also order the trial of the Lien Action. As conditions for lifting the stay I order as follows:

(i) the noting in default of Rose of Sharon and the Default Judgment against it are set aside so that the Receiver can defend the Lien Action;

(ii) the Receiver may file a Statement of Defence in the Lien Action within 20 days;

(iii) the issues of liability, timeliness and quantum in the Lien Action shall be determined in a Reference before a Master; and,

(iv) the issue of the priorities of the construction lien vis-à-vis any other encumbrance shall be determined by a judge of the Commercial List in these receivership proceedings.

As to costs, the conditions sought by the Receiver in its November 22, 2012 letter were reasonable. There really was no need for a contested motion. Accordingly, I grant the Receiver its costs of this motion fixed at $4,000.00 payable by Trisura within 20 days of the date of this Order. I am available at a 9:30 appointment tomorrow, Friday, December 28, 2012, to issue this order, if required.

D. M. Brown J.

Date: December 27, 2012

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation,* 2024 BCCA 318

Date: 20240909
Docket: CA50020

Between:

QRD (Willoughby) Holdings Inc., QRD (Willoughby) Limited Partnership, QRD (Willoughby) GP Inc., Quarry Rock Developments Inc., Richard Lawson and Matthew Weber

Appellants
(Respondents)

And

MCAP Financial Corporation

Respondent
(Petitioner)

And

Canadian Mortgage Servicing Corporation, Overland Capital Canada Inc., Wubs Investments Ltd., and Steelcrest Construction Inc.

Respondents
(Respondents)

And

MNP Ltd.

Respondent
(Receiver)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 9, 2024 (*MCAP Financial Corporation v. QRD (Willoughby) Holdings Inc.*, Vancouver Docket S237489).

Counsel for the Appellants: D.A.T. Moseley

Counsel for the Respondent, MCAP Financial Corporation: C.D. Brousson

Counsel for the Respondent, Canadian Mortgage Servicing Corporation:	H.D. Powell
Counsel for the Respondents, MNP Ltd.:	W.L. Roberts S.B. Hannigan B. Hunt
Place and Date of Hearing:	Vancouver, British Columbia August 14, 2024
Place and Date of Judgment, with Written Reasons to Follow:	Vancouver, British Columbia August 16, 2024
Place and Date of Written Reasons:	Vancouver, British Columbia September 9, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

Summary:

Appellants are debtors under and personal guarantors of mortgages related to a suspended real estate development project in Langley. In proceedings pursuant to the Bankruptcy and Insolvency Act ("BIA"), court below appointed respondent "MNP" receiver of the assets. Receiver did not obtain an appraisal of the property. After less than 2.5 months of marketing efforts, receiver appeared before the chambers judge and presented two bids, and advised that one of the bids, despite being lower, offered better value to creditors owing to the earlier closing date. The result would be to pay out the first mortgagee and only part of the amount owing to the second. Appellants opposed the sale on the grounds that another purported bidder was prepared to offer substantially more for the property, if given time to 'firm up' its bid. Chambers judge was ultimately not satisfied that this potential bid was anything beyond speculative, and approved the sale on the receiver's advice.

Appeal, heard by right under s. 193(c) of the BIA, dismissed. The chambers judge erred in balancing the Soundair factors in a way that was fair, or could be seen to be fair, by all parties. The judge ought to have concluded that the possibility of a significantly higher bid, in these circumstances, warranted a reasonable extension of time. However, time has since passed and in the absence of new or fresh evidence demonstrating the progression of the possible bid, it would not be provident to delay the sale any further. Discussion of 'stalking horse' bids.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal and application for leave were heard on an expedited basis and arise from an Approval and Vesting Order made by a judge in chambers in the Supreme Court of British Columbia on July 9, 2024. Leave to appeal was sought before a justice in chambers in this court on July 30, but because of time constraints, that application was deferred to be heard by the division that, if leave were granted, would hear the appeal.

[2] Following the hearing in this court on August 14, we notified counsel in writing of our decision that the appellants were entitled to appeal as a matter of right but that the appeal was dismissed, for reasons to follow. These are our reasons.

Factual Background

[3] The respondent QRD (Willoughby) Holdings Inc. ("QRD") is the owner of a large parcel of land in Langley, British Columbia, on which it planned to construct 87 three-storey townhouse units in three phases. The first mortgagee of the property

was the petitioner (respondent in this court) MCAP Financial Corporation ("MCAP"), which was owed some $33.6 million by the time of the hearing below. MCAP also holds security over the personal property comprising the project. QRD's indebtedness to MCAP was guaranteed personally by the respondents Messrs. Weber and Lawson.

[4] The Langley property is also subject to a second mortgage in favour of the respondent Canadian Mortgage Servicing Corporation ("CMSC") under which more than $8 million is outstanding, and later mortgages in favour of the respondents Overland Capital Canada Inc. ("Overland") and Wubs Investments Ltd. ("Wubs"). (I understand the two later mortgages are being challenged in other proceedings.) All four mortgages were duly registered against the property, as was a builder's lien filed by the main contractor, Steelcrest Construction Inc. ("Steelcrest").

[5] Unfortunately, construction of QRD's planned project came to a halt in the fall of 2023, due, the appellants say, to development approval delays and high interest and construction costs. QRD defaulted under the mortgages and other security instruments. By this time, two of the seven buildings comprising Phase 1 of the project were complete or nearing completion.

[6] On October 23, MCAP issued a demand letter and Notice of Intention to Enforce Security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and a demand letter to the guarantors. When payment was not received, MCAP petitioned in the Supreme Court on November 3, 2023 for, *inter alia*, a declaration of indebtedness (said to be $29,521,907.02 on October 23 plus interest accruing at the rate of $6,842.13 per day), and the foreclosure of the mortgage and other security. Rules 20-4, 21-7 and 13-5 of the *Supreme Court Civil Rules*, and s. 55(6) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, were cited in the petition as the legal bases for the relief sought.

[7] The Court granted an order appointing MNP as the receiver of all the assets and undertakings of QRD, QRD (Willoughby) Limited Partnership and QRD (Willoughby) GP Inc. on November 8, 2023. (I will refer to these entities collectively

as the “Debtors”.) The order was granted pursuant to s. 243(1) of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. After receiving the receiver’s First Report dated December 6, the Court gave the receiver authority on December 15 to borrow the funds necessary to ‘winterize’ the existing buildings and complete construction of the unfinished buildings in Phase 1. This work was carried out by Steelcrest.

[8] In April 2024, the receiver told the Court in its Second Report that it estimated total interest costs of some $317,000 per month were accruing on the debt and that MCAP and CMSC were the only creditors likely to recover some or all of their loans. No appraisal of the property was suggested or provided to the Court, although the receiver did state that it had obtained “marketing proposals and opinions of value from commercial and residential real estate brokerages.” By order dated April 19, the Court granted MNP the authority to market all or any of the property for sale on an “as is” basis, subject to court approval. According to MNP, it began marketing the property on or about April 24, through a real estate agency, Colliers International.

[9] Also in April, Mr. Weber advised the receiver about the possibility of a sale to “BC Builds”, a program of the provincial government that “partners” with developers to increase the availability of rental homes in the Province. According to Mr. Weber’s affidavit, the BC Builds program had launched in February 2024. He had met in March with an official of the program who recommended that he contact a non-profit organization that might be interested in purchasing the property with BC Builds’ assistance. Mr. Weber assembled a package of information requested by Mr. Kwong of BC Builds “as part of Step 01 of the Application Process” for consideration by the governmental body. On the same day, Mr. Weber told the receiver that he had submitted that application, suggesting that it would not be necessary for Colliers to market the project given Mr. Weber’s expectation that the project would be “accepted as part of the BC Builds program and that a non-profit would purchase the Lands.” According to its later Supplemental Report, MNP responded that it was open to any solution that would provide “superior recovery” to creditors, but that unless

and until the proposed transaction became “sufficiently certain as to present a viable solution”, it would carry on with the existing marketing plan.

[10] On June 24, 2024, the receiver filed an Application for orders approving the sale to, and vesting title to the property in, Redekop Ferrario Properties (DD) Corp. (“Redekop”) free and clear of all liens and encumbrances; an order approving the receiver’s activities since April 4 (as set out in MNP’s Third Report dated June 21); and increasing the receiver’s borrowing to a total of $2,589,000 and increasing its secured charge accordingly. MNP cited ss. 31 and 235 of the *BIA* in support of the orders, as well as the *Law and Equity Act* and Rules 13-5 and 21-7 of the *Civil Rules.* The Report made no mention of the BC Builds proposal.

[11] In its Application, the receiver stated that there had been “relatively strong interest” in the property, mainly from developers or builders who would purchase the property “as is” and take on the costs of completing the project. Between 10 and 15 parties had completed detailed due diligence and had calculated the costs of completing the project. Colliers had circulated a copy of *Practice Direction No. 62* of the Supreme Court to interested parties, together with notice of MNP’s Application. (The *Practice Direction* sets out the ‘default’ procedure for obtaining and managing sealed bids for court-ordered sales of real property.)

[12] On May 30, Redekop had made a “no subjects” offer to purchase the property. After some negotiation, the receiver and Redekop had entered into an agreement of sale and purchase for the price of $35,000,000, subject to court approval. (As I understand it, this then became the “Original Bid” as defined in the *Practice Direction*.) The agreement provided for a “break fee” of $200,000 payable to Redekop in the event a higher offer was ultimately approved. Redekop was also amenable to structuring the deal as a reverse vesting order (“RVO”), which was expected to increase the net amount available for the second mortgagee by some $800,000.

[13] In its Application, the receiver acknowledged the well-known “factors” set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (1991) 4

O.R. (3d) 1 for consideration by courts in motions of this kind, including the "interests of all parties" and whether the receiver has made a sufficient effort to obtain the price and has not acted improvidently. The Application continued:

> 21. In consideration of the *Soundair* principles and section 243(1)(c) of the *BIA*, this Court has the authority to (a) approve the sale of, and vest title in, the Property to the Purchaser free and clear of all claims and encumbrances.
>
> 22. The Receiver used an efficient process with integrity to market each parcel for sale. In particular, the Receiver engaged Colliers to market the Property for sale, who listed and marketed each parcel on an "as is, where is" basis, starting in April 2024. To ensure maximum exposure of the Real Property to interested parties, Colliers maintained a dedicated webpage, engaged a professional photographer to prepare advertisements, conducted tours of the Property, and engaged in direct discussions with prospective purchasers.
>
> 23. The Receiver made a sufficient effort to get the best price by way of the broad and open marketing process described above. As of the date of the Second Report, the Receiver has received one offer to purchase the Property. Based on its review and analysis of the offer received, the Receiver concluded that the Offer was the best given the circumstances. There was no unfairness in the working out of the sale process, which was fair, open and transparent. Finally, the Receiver considered the interests of all parties, including the Debtors and their primary secured creditor in determining to recommend the Offer to this Honourable Court for approval.
>
> 24. Ultimately, the Receiver has acted prudently and in a commercially reasonable manner with respect to the sale process for the Property. The processes followed by the Receiver had integrity, were fair and transparent, and took into account the interests of all parties. [Emphasis added.]

I note that the "break fee" in Redekop's bid was not mentioned in the receiver's Application itself, but was contained in the form of agreement between MNP and Redekop that was attached to MNP's Third Report. It was of course disclosed to the chambers judge by counsel at the later hearing.

[14] MNP's Application was heard by a judge in chambers on July 9. Counsel for the receiver told the judge that aside from Redekop's offer, two other parties had expressed interest in the property. One of them, from a numbered company, failed to materialize at the hearing. The second had been received on the day before the hearing and contemplated a price of $37 million. In the receiver's opinion, it had too

long a closing date given the significant 'burn' rate involved in maintaining the property. It also assumed an RVO structure for the deal. Counsel estimated that on an asset purchase, this offeror's bid would equate to about $35.4 million.

[15] The Debtors brought forward another proposal — this one from the Foundation Residence Society ("FRS"), a non-profit society reportedly backed by the provincial government through the BC Builds program. At the time of the hearing, it contemplated a purchase price of $64 million, of which $21 million would be accounted for by a mortgage back to the vendor. It also contemplated a long closing date and required the satisfaction of many conditions, including a funding commitment from the Province, via BC Builds, in favour of FRS. Counsel for the receiver described this proposal as "incredibly speculative" in his submissions to the chambers judge. There was no evidence as to how the purchase price of $64 million had been arrived at.

[16] The Debtors and guarantors Messrs. Lawson and Weber opposed MNP's Application and supported the FRS deal. Their Application Response and the supporting affidavit of Mr. Weber emphasized that acceptance of the Redekop offer would result in a shortfall of over $18 million. Indeed, it would provide for payment out to MCAP and up to $2 million for CMSC as the next charge holder, but would "wipe out all subsequent charge holders and equity in the Lands." On the other hand, the proposed sale to FRS for $64 million would, according to the Debtors, "make all stakeholders whole." The transaction would be carried out under the auspices of BC Builds, which the Response described as follows:

> 14. BC Builds is a new provincially operated program that partners with developers and housing operators to speed-up the delivery of lower cost rental homes in BC. The program encourages non-profit that would own and operate buildings to team up with a developer/builder and submit an application and can provide:
>
> a. low-cost construction financing for buildings owned and operated by both for-profit and non-profit developers;
>
> b. direct access to CMHC construction and financing;
>
> c. low-cost take-out financing; and

> d. grants of up to $225,000 per unit for buildings owned and operated by co-operative or non-profit developers and First Nations controlled development corporations.

[17] In his affidavit, Mr. Weber recounted that despite his bringing the potential FRS offer to MNP's attention in early April, the receiver had proceeded to appear in court on April 19, 2024 to obtain the order approving the marketing of the property for sale to Redekop. In his words:

> There was no mention of my various communications with Mr. Kwong of the Application in the Receiver's Second Report to the court. My understanding is this information was not before the Court when it made the Further Amended and Restated Receivership Order, although I was not in attendance when it was made. …
>
> The Application was reviewed by BC Builds, and on or about April 22, 2024, it was moved to Step 02 of the Application Process. …
>
> As a result of discussions I was having with non-profit organizations introduced by my MLA and by others, on or about April 23, 2024, I reached a verbal agreement with Augustino Duminuco ("Mr. Duminuco") who is a director of a non-profit organization called Foundation Residence Society ("FRS") whereby FRS will purchase the Lands for $64 million, which amounted to the cost base of the Project at the proposed closing date to make all stakeholders whole.
>
> The Receiver was kept appraised of this development and it is my understanding from what the Receiver has told me that the marketing of the Lands commenced the following day on or about April 24, 2024. [Emphasis added.]

[18] Mr. Weber went on to depose that on or about May 15, a written "agreement" for the sale of the property to FRS had been "completed". This document appears to have been signed by Mr. Weber on behalf of QRD and by Messrs. Duminuco and Wong on behalf of FRS. (Of course, it is highly doubtful QRD had the authority to enter such a contract once it was in receivership.) It contemplated that the purchase price of $64 million would be paid in part by the vendor's taking back a mortgage of $15 million — i.e., that the sale would realize cash of about $49 million. FRS's obligation to complete was described as subject to review and approval of project documents, state of title, inspection and condition reports, the environmental condition of the property, approval through

the BC Builds program and a feasibility study on or before June 28. A completion date of August 29 was contemplated.

[19] On May 22, a telephone meeting of representatives of QRD, the receiver, MCAP, and CMSC (represented by "Atrium") had been held. The Application Response recounted:

> 26. On or about May 22, 2024, the Owners hosted a … call with the Receiver, MCAP, and Atrium to provide further details and answer questions with respect to the FRS CPS [contract of purchase and sale] and the status of the Application.
>
> 27. On or about May 30, 2024, the Receiver received the Redekop Offer.
>
> 28. On or about June 5, 2024, the Owners hosted a … call with Mr. Kwong and with the Receiver, MCAP, and Atrium with a view to providing not only an update but instilling confidence in the status and viability of the Application.
>
> 29. The Owners continued working with Mr. Kwong and his team at BC Builds and with FRS with respect to the Application and provided substantiation of rental numbers to assist with conditional budget approval as part of Step 02 of the Application Process on or about June 11, 2024, given that when asked for assistance from the Receiver, the Receiver refused assistance, but also advised that it would not oppose or take issue with it.
>
> 30. On or about June 11, 2024, the Receiver accepted the Redekop Offer.
>
> 31. On or about June 25, 2024, an Addendum to the FRS CPS [contract of purchase and sale] was entered into with the following changes: a. subject removal was changed to the later of 60 days after the issuance of a Commitment Letter from BC Builds or July 31, 2024; b. completion was changed to be 60 days following subject removal; c. the VTB mortgage was changed to be a loan from the seller to the buyer in an amount up to $21,500,000.00 repayable over ten years and bearing interest at 0.0%; d. the deposit was changed to $250,000.00 to be paid by certified cheque, bank draft, or wire transfer no later than 5:00 pm on the 5th business day after the Letter of Intent from BC Builds is received and is refundable up until subject removal.
>
> (the "Addendum to the CPS").
>
> 32. The Owners have continued with the Application Process and expect approval imminently and have reached out to BC Builds for confirmation of same. [Emphasis added.]

[20] In terms of certainty of completion, then, Redekop's "no subjects" agreement and the CPS were polar opposites — the latter transaction could collapse if no commitment letter was issued by BC Builds and if BC Builds did not do so for

several months, the subject removal date would be extended indefinitely. Completion would not occur until 60 days after removal of the subjects. Even greater uncertainty revolved around FRS's requirement of funding from BC Builds. This was the subject of a "Letter of Interest" from Mr. Kwong of BC Builds to the Society dated July 5, in which he stated:

> Before moving forward with the application approval process, we still require completion of the following:
>
> 1. A review of any potential conflicts of interest between the vendor/QRD and your organization;
> 2. Confirmation before July 8 court event of amendments to the contract of purchase and sale with the vendor/QRD, including industry-standard representations and warranties for delivery of the construction and improvements on the Project free of defects or deficiencies;
> 3. Proof of your organization's history and capacity in asset management.
>
> The above items, once provided, can be completed by BC Builds within a short timeline. Once these items are addressed, we can proceed with the application approval process through our various approving authorities:
>
> 1) Project Steering Committee; internal committee of BC Housing; meetings occur on a weekly basis.
> 2) Executive Committee; internal committee of BC Housing; meetings occur on a weekly basis unless a quorum is not established.
> 3) Board of Commissioners; external approving committee; meetings occur on a monthly basis unless a quorum is not established.
> 4) Ministry of Housing/ Treasury Board; meeting occurrences are uncertain as the schedules are not dictated by BC Housing.
>
> The above only describes the meeting times and do not describe the timing of getting the recommendations and submission reports to these approving bodies which may require several weeks to be vetted and included onto meeting agendas. We also want to note that because of the Provincial election that is anticipated to occur in Fall 2024, the approvals from the Ministry or Treasury Board may be further delayed due to the election process and government not in session. BC Builds is also prepared to move forward with seeking approvals from our internal committees as well as our Board of Commissioners and will seek Provincial approvals when we are able and when government is in session. [Emphasis added.]

[21] In their Responses to the receiver's application, MCAP and CMSC adopted the receiver's submissions, emphasizing what they referred to as the speculative

nature of the FRS agreement and the significant monthly 'burn' rate. At the hearing, counsel for CMSC acknowledged that his client was concerned primarily with closing certainty and the minimization of delay, even though the FRS transaction might, if realized, result in greater recovery for this creditor. MCAP went further, suggesting that if more delay was encountered, even *it* might not be paid out in full if the Redekop deal were not approved.

[22] Application Responses were also filed by Overland, to which approximately $8 million was owing in July 2024, and by Wubs, to which some $4.5 million was owing. Both would come away empty-handed after the sale to Redekop and both opposed the granting of the order sought by MNP. Overland noted in particular that the receiver had failed to disclose the BC Builds proposal to the Court in its Application and in its Reports to the Court. Wubs contended that the large disparity between the price of $35 million offered by Redekop and the FRS price of $64 million and the "very short window" of marketing by the receiver, militated in favor of rejecting the Application. In its words:

> These facts tend to discolour the process by which the Receiver has proceeded with the result that the Court cannot reasonably have confidence that the offer being brought is the best one, especially given another offer in the wings for nearly 50% more.
>
> Again, without a fulsome explanation backed up with market/appraisal evidence, the Court is left to its own devices to determine if the Redekop offer presents the best path forward. This is unfair not only to the Court, but also to all chargeholders save the Petitioner and the second charge holder, albeit with a shortfall to them as well.

[23] I also note the "Supplemental Report to Receiver's Third Report to Court" dated July 6, which we were told had been accepted for filing, although it is not stamped. In general terms, the Report advanced the receiver's arguments made before the chambers judge on July 9. I will not rehearse those arguments here except to note that the receiver supported the conversion of Redekop's offer to an RVO if ultimately approved by the Court.

[24] Finally, I note that a representative of Steelcrest appeared before the chambers judge to express opposition to the proposed transaction with Redekop. He

told the Court there was mould in the buildings that could be remediated for about $225,000 and thus "eliminate the concern that some people have with regards to the timeliness of coming to a resolution today." He described the mould as "far from untreatable at this time" but offered on behalf of Steelcrest to oversee the remediation. No actual *evidence* regarding mould was provided to the Court, but as will be seen, the chambers judge accepted that a mould problem did exist. (This fact is borne out in an affidavit that the receiver sought to introduce as fresh evidence in this court.)

Chambers Judge's Reasons

[25] The receiver's Application was heard at length on July 9 and the chambers judge was able to give oral reasons the same day. They were brief and to the point. The judge found first that the sale process engaged in by the receiver had been "fair and appropriate". He noted that the receiver had led a process of approximately 2.5 months in which some 5,700 emails had been sent to potential purchasers, of which 30 had responded and asked for access to the data room. Eight had followed up with a tour and the receiver "ended up…with two valid competing bids." (At para. 2). As for the offer from BC Builds, the chambers judge stated:

> The potential for an offer from BC Builds (the provincial government program aimed at building affordable rental housing) is, with respect, speculative. I do not doubt the *bona fides* of their intention to move the matter forward. However, the evidence before me shows that the length of time that it would take to even get a potential offer before the legislature for approval is inordinate (not through any fault of BC Builds). [At para. 3.]

[26] The judge noted that there was urgency to complete a "favourable transaction" because of the economic 'burn' rate and the possible mould contamination in the buildings, which needed to be remediated in the summer months. The cost of doing so, he suggested, could be determined at a later date. Based on the evidence, however, he was satisfied that putting off the application until the end of August was unlikely to generate any greater offers. (At para. 5.) In his view, the "only real competition" to Redekop's offer was the bid from the

numbered company that had declined to provide any information sought by the receiver, including the identity of its principals.

[27] In the result, the chambers judge approved Redekop's offer as commercially reasonable and one that should be approved. The orders sought by MNP were granted.

[28] The Debtors filed a Notice of Appeal in this court on July 18, 2024. In that Notice, the Debtors did not seek leave to appeal. MNP filed an urgent application on July 23 seeking, *inter alia*, an order striking out the notice of appeal as null and void, or alternatively, denying leave if the notice of appeal was converted to an application for leave. In turn, the appellants sought the dismissal of that application or an order converting their notice of appeal to an application for leave and an extension of time. The motions could not be heard until July 30, at which time the chambers judge in this court deferred the question of leave to this division in light of the short time-frames involved.

Leave to Appeal

[29] Before us, MNP continued its preliminary objection to the appeal on the ground that it was not properly brought as an appeal as of right because s. 193 of the *BIA* required that leave be obtained. Section 193 provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[30] In my view, it is highly unlikely that subparagraph (b) has any application in this instance. As Ms. Hannigan submitted, the phrase "the bankruptcy proceedings"

appears to limit the court to considering only "cases" of a similar nature in *this* proceeding, and the Debtors have not identified any other such "cases" in this proceeding. (See *Forjay Management Ltd. v. Peeverconn Properties Inc.* 2018 BCCA 188 at paras. 39–43.) In any event, the parties seem to agree that if this appeal is to proceed as of right, it is most likely by operation of subparagraph (c). This provision was the subject of discussion in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.* 2022 BCCA 158, a decision of myself in chambers, at paras. 35–56.

[31] Like the applicants in *Crowe Mackay*, the receiver in the case at bar takes the position that s. 193(c) should be applied narrowly. The receiver relies on an Ontario line of cases exemplified by *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225. There, Mr. Justice Brown in chambers stated that despite its broad language, the provision did not apply to orders that were procedural in nature, orders that did not bring into play the value of the debtor's property, or orders that did not result in a loss to creditors. (At para. 53.) He ruled that the asset vesting order before him simply "marked the final step in the Receiver's monetization of the debtor's assets" and did not "bring into play" the value of the property. (At para. 60.) Thus despite the debtor's submission that the sale had been improvident, the debtor's notice of appeal was set aside as null and void.

[32] In more general terms, Brown J.A. acknowledged that the history of s. 193(c) was "unusual". He continued:

> Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation. However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c) – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings. [At para. 47; emphasis added.]

(See also *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation* 2021 ONCA 581; *Cardillo v. MedCap Real Estate Holdings Inc.* 2023 ONCA 852; *Re Harmon International Industries Inc.* 2020 SKCA 95.)

[33] As against the relatively narrow approach taken in *Bending Lake*, I note first *Fallis and Deacon v. United Fuel Investments Ltd.* [1962] S.C.R. 771. In *Fallis*, the Court was asked to quash an appeal taken from an order granting the winding-up of a company under the *Winding-up Act* of Ontario. Speaking for the Court, Cartwright J., as he then was, reasoned:

> In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al.* [[1925] S.C.R. 364], upholding the judgment of the Registrar affirming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:
>
> > The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "<u>The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail</u>. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.
>
> Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000. [At 774; emphasis added.]

It will be apparent that the Court looked to what the appellant would suffer or gain if the winding-up proceeded. The Court also disapproved an earlier case, *Cushing Sulphite-Fibre Co*. *v. Cushing* (1906) 37 S.C.R. 427, where it had held that a judgment refusing a winding-up order *did not involve any amount* and therefore no right of appeal lay from it. In the opinion of Cartwright J., *Cushing* had to be reconsidered in light of the enactment of s. 43 of the *Supreme Court Act* in 1913, which stated that where a right of appeal is dependent on the amount in question, the amount may be proven by affidavit. (See R.S.C. 1952, c. 259.)

[34] The *Fallis* reasoning was adopted and followed by Finch J.A., as he then was, in *McNeill v. Roe, Hoops & Wong* (1996) 20 B.C.L.R (3d) 274 (C.A.), in connection

with a debtor's application for an absolute discharge from bankruptcy. Finch J.A. noted at the outset that what is now s. 193(c) had come into force in November 1992. Until then, the provision had authorized appeals if the property involved in the appeal exceeded $500. He reviewed *Fallis* and *Orpen v. Roberts* [1925] S.C.R. 364, and continued:

> The "property involved in the appeal" which the bankrupt wishes to pursue may be determined by comparing the order appealed against with the remedy sought in the notice of appeal. Here, Mr. Justice Thackray's order required the bankrupt to pay $168,750 by monthly instalments. The notice of appeal seeks an order "to discharge the Appellant from bankruptcy on such terms and conditions as the Court may deem just." In his submissions, counsel for the bankrupt suggested that reasonable conditions for discharge might include payment of monthly sums up to a total of about $40,000. Applying the test set out in *Fallis* and adopted by other judges of this Court, it is clear that if the appellant is granted the relief sought on appeal, the loss to the creditors would far exceed the sum of $10,000. I am therefore of the view that the bankrupt had an appeal as of right under s. 193(c). [At para. 13; emphasis granted.]

[35] In a more recent case, *MNP Ltd. v. Wilkes* 2020 SKCA 66, the Court reviewed what it described as two different approaches to the interpretation of s. 193(c) — first, the *Orpen-Fallis* line of authority and cases following it (including *McNeill*, *Galaxy Sports Inc. v. Abakhan & Associates Inc.* 2003 BCCA 322, *Re Kostiuk* 2006 BCCA 371 and *Farm Credit Canada v. Gidda* 2014 BCCA 501, as well as a few cases from other provinces), and the "*Alternative Fuel-Bending Lake* approach". In connection with the first group, Madam Justice Jackson for the Court in *Wilkes* quoted the following passage from an annotation in the *Canadian Bankruptcy Reports* at 4 C.B.R. (n.s.) 209:

> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant

> could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal. [At para. 34; emphasis added.]

[36] The Court in *Wilkes* expressed the view that subparas. 193(c) and (e) should not be interpreted in either a narrow or expansive way, but "according to their terms and within their context." In Jackson J.A.'s analysis:

> In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the Act, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).
>
> On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes that were *in pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite-Fibre Company v. Cushing* (1906), 37 SCR 427, which was expressly overruled by *Fallis*, albeit after the 1949 amendments.
>
> This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). ... [At paras. 50–52; emphasis added.]

[37] Ultimately, the Court concluded that the mere fact that the question on an appeal is procedural should not *by itself* determine whether it falls within s. 193(c). In Jackson J.A.'s words:

> According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction. [At para. 64; emphasis added.]

[38] On this point I note as well the recent decision of *Peakhill Capital Inc. v. 1000093910 Ontario Inc.* 2024 ONCA 59, in which one of the issues before the Court was whether an order approving a sale process was "merely procedural", such that the purported appeal did not (on the authority of *Bending Lake*) fall within s. 193(c). The receiver relied on *Re Harmon*, *supra*, where the Court had ruled that a similar order was "merely an order as to the manner of sale" and that "no value was in jeopardy". The Court in *Peakhill*, however, found that in the particular circumstances of the case, the decision of the court below not to entertain the debtor's cross motion (for the approval of an agreement of sale entered into by it before the receivership began), although procedural in nature, also had the effect of putting into play, and jeopardizing, the value of property by an amount exceeding $10,000. In the words of Madam Justice Simmons in chambers:

> ... Although no loss was crystallized by the refusal decision or the Order, given the circumstances of a receivership sale and the terms of the Stalking Horse APS, which established a floor price of $24,455,000 and required payment of up to $250,00 to 255 if a superior bid was obtained, the likelihood of loss in excess of $10,000, as compared to completion or enforcement of the unconditional original APS at a sale price of $31,000,000 appears inevitable.
>
> The refusal decision deprived the Debtor of any right it may have had to enforce the unconditional original APS at a price of $31,000,000 and instead required that the Property be sold, subject to the uncertainties of the market, based on a floor price of almost $7,000,000 less and a guarantee to the

> stalking horse purchaser of a payment of up to $250,000 in the event of a superior bid. The Debtor asserts that, because the original APS has not been terminated, either it or the Receiver can still enforce it. Whether that is so remains to be seen. In the circumstances, I conclude that the property involved on the appeal exceeds $10,000 as required under s. 193(c) of the *BIA*. [At paras. 37–8; emphasis added.]

[39] Returning to the case at bar, the receiver submits that s. 193(c) is not engaged given that the Debtors are opposing not only the sale to Redekop but any and all other offers tabled in the court below. Thus it is said they are effectively seeking an adjournment of the application brought below. MNP characterizes this as a purely procedural matter and submits there is no "property involved in the appeal" valued over $10,000 when the effect of the orders appealed (i.e., the liquidation of the property) is compared to the remedy sought (i.e., additional time to pursue that objective.)

[40] With respect, this argument not only runs contrary to *Fallis*, but seems to put form over substance. In my view, the purported appeal does put the value of the property 'in play', and by an amount exceeding $10,000. The substance of the parties' dispute is whether it was fair and appropriate in the circumstances of this case for the receiver to sell the subject property for $34 million or to delay further in hopes of receiving a final and binding commitment to purchase from FRS for $64 million less the amount taken back by the mortgage in favour of the vendor, or any other offer that might arise. Looked at in this way, several millions of dollars are "in jeopardy" in this appeal.

[41] This interpretation also seems to me to be consistent with the plain and ordinary grammatical meaning of the words "property involved in the appeal" in s. 193(c). Certainly if one were describing in normal conversation the appeal sought to be brought by QRD, one would say that it "involves" more than $10,000.

[42] Finally, I note that the role of evidence must be emphasized in this analysis. While the appellant does not bear the burden to show a certain or automatic change in value should the appeal be allowed, courts should remain wary of granting leave on overly speculative grounds. As Jackson J.A. put it, "the claim must be sufficiently

grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal." (*Wilkes*, at para. 64.) In the case at bar, the appellants have provided affidavit and documentary evidence to support the details of the potential FRS bid. While the chambers judge concluded that the bid itself was "speculative" given the various hurdles to its closing, this is not a case where the appellant brings only a bald assertion of an improvident sale. The evidence supports a conclusion that FRS was a serious suitor, and that should the appeal be allowed, a change in value of over $10,000 would be squarely in play.

[43] In the result, I conclude that QRD's purported appeal comes within s. 193(c) and that it was not necessary to obtain leave.

[44] I would have granted leave, moreover, had I not been satisfied that s. 193(c) applies. It seems clear that the "usual" factors applicable to leave applications in civil cases are to be considered in this context: see *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005) 10 C.B.R. (5th) 201 (Ont. C.A.); *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.* 2021 ABCA 66; *Menzies Lawyers Professional Corporation v. Morton* 2015 ONCA 553. The issues raised by this appeal, involving as they do the proper management of stalking horse bids or arrangements akin thereto and questions of fairness to all parties involved in the proceeding, are of interest to practitioners in the area of receivership and commercial law generally. It would not in my opinion be consistent with the interests of justice to withhold leave had s.193(c) not applied.

[45] I turn next to the substantive appeal.

The Main Appeal

Grounds of Appeal

[46] The appellants — namely the Debtors and Messrs. Lawson and Weber — advanced four rather lengthy grounds of appeal in their factum, which may be summarized as follows:

i) the chambers judge erred in "not applying, misapplying, and/or departing from" the test for the approval of asset sales by receivers set forth in *Soundair*;

ii) the judge erred in making certain findings of fact despite the lack of an evidentiary basis for doing so and/or misapplying the evidence presented;

iii) the judge erred in granting the orders it did despite a dearth of evidence regarding fair market value of the property and various other matters;

iv) the judge erred in disregarding and/or not giving sufficient weight to the "potential" that BC Builds would provide approval of the FRS Agreement, the request of one other possible bidder for more time, and the possibility that other bidders "if given sufficient opportunity, would submit competing bids on the basis of an RVO structure."

The appellants seek an order that the appeal be allowed, the orders made July 9 be set aside in their entirety, and that the receiver's application be remitted to the chambers judge to "start again from square one."

Standard of Review

[47] The appellants acknowledge in their factum that in order to succeed on an appeal from a discretionary decision such as that of the chambers judge below, an appellant must show that the Court materially misconstrued the law or gave no, or

insufficient, weight to relevant considerations. In support, the appellants referred to *Perrier v. Canada (Revenue Agency)* 2021 BCCA 269, where this court stated:

> Discretionary decisions may, of course, be overturned if a judge has materially misconstrued the law or made a palpable and overriding error in respect of the facts underlying the exercise of discretion. Discretionary decisions may also be overturned, however, where the judge has made no manifest error of law or fact, but has failed to apply the discretion in a principled and reasonable manner. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, the Court described the standard as follows:
>
> > [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
>
> [At para. 45.]

General Principles

[48] It may be worthwhile at the outset to restate some of the general principles applicable to receivers, court orders of sale, and the particular process followed in this case. As Madam Justice Fitzpatrick observed in *Forjay Management Ltd. v. 0981478 B.C. Ltd.* 2018 BCSC 527, "it is trite law that a court-appointed receiver is an officer of the court and not beholden to the secured creditor or creditors who caused its appointment". (At para. 21.) As such, a receiver owes fiduciary duties to all parties, including the debtor and all classes of creditors. (See *Parsons v. Sovereign Bank of Canada* [1913] A.C. 160 (U.K. J.C.P.C.) at 167; *Ostrander v. Niagara Helicopters Ltd.* (1973) 1 O.R. (2d) 280 (H.C.J.); and Frank Bennett, *Bennett on Receiverships* (3rd ed., 2011) at 38–40.) Bennett adds that the receiver has a duty to exercise reasonable care and control of the debtor's property as an ordinary person would give to his or her own, failing which it may be liable in negligence. (At 39, citing *Plisson v. Duncan* [1905] 36 S.C.R. 647.)

[49] Where the sale of the debtor's property is to be authorized by the court, the receiver must consider possible methods of sale, make its recommendation to the

court and proceed with the method chosen by the court. According to the well-known case of *Re Nortel Networks Corporation* (2009) 55 C.B.R. (5th) 229 (Ont. S.C.J.), the court generally considers:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
>
> (d) is there a better viable alternative? [At para. 49]

[50] Bennett notes that where the debtor's equity is not enough to satisfy the security holder's debt, the court must favour the security holder. However, he continues:

> … if there is a possibility that the debtor' s equity may be sufficient to retire the debt to the security holder and other security holders, then the court must protect the debtor's real equity for other security holders. The court must rely on qualified and reputable appraisals as well as the receiver's recommendations in making these decisions. This is an area ripe for litigation. [At vii.]

He goes on to observe that where the receiver does not obtain an valuation or appraisal of the asset(s) being sold, the court might not approve the sale as it will have no indication of market value. (At 316, citing *Canrock Ventures LLC v. Ambercore Software, Inc.* 2011 ONSC 1138.)

[51] All counsel in the case at bar referred in their submissions to the much-quoted description of the duties of court-appointed receivers formulated by Galligan J.A. in *Soundair*:

> As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986) 60 O.R. (2d) 87 …, of the duties which a court must perform when deciding whether a receiver who has sold the property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I.
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and is not acted improvidently
> 2. It should consider the interests of all parties.
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.

> 4. It should consider whether there has been unfairness in the working out of the process. [At 6.]

[52] In *Soundair* itself, the assets in question constituted the entire business of a small airline as a going concern — an unusual asset to be selling. The receiver had rejected an offer from Air Canada and another to purchase the assets and then entered into negotiations with two other airlines, subsidiaries of Canadian Airlines, who made an offer. The Air Canada group then made another offer, which the receiver declined because it contained an unacceptable condition. Instead the receiver accepted the offer it had negotiated with the Canadian Airlines group. The Air Canada group then made a second offer that was "virtually identical" to its first one, except that the unacceptable condition had been removed. The Court nevertheless approved the sale to the Canadian Airlines consortium and dismissed the offer of the Air Canada group, which then appealed.

[53] In the course of his reasons dismissing the appeal, Gallagher J.A. (speaking for himself) noted that during the hearing of the appeal, counsel had gone on at some length comparing the prices contained in the two offers and had "put forth various hypotheses supporting their contentions that one offer was better than the other." He described the limited circumstances in which an appellate court should intervene in a contest between competing offers:

> It is my opinion that the price contained in the 922 offer [by Air Canada and another party] is relevant only if it shows that the price obtained by the Receiver in the OEL offer [i.e. the subsidiaries of Canadian Airlines] was not a reasonable one. In *Crown Trust v. Rosenberg*, *supra*, Anderson J. ... discussed the comparison of offers in the following way:
>
> > No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.
>
> In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:
>
> > If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly

> carried out his function of endeavouring to obtain the best price for the property.

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

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

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

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

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. ...

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court. [At 8–10; emphasis added.]

Stalking Horse Bids

[54] The foregoing principles — and others — apply where the ‘stalking horse’ bid process is followed. Stalking horse bids have been used in Canada since around 2004, when Mr. Justice Farley approved one in connection with an arrangement under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”) proposed by Stelco Inc.: see *Re Stelco Inc.* [2004] O.J. No. 4899 (Sup. Ct.), 135

A.C.W.S. (3d) 372. J.L. Cameron, A. Mersich and K. Wong, authors of "Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings", in J. Corraini & D.B. Dixon, eds., *Annual Review of Insolvency Law*, vol. 21 (2023), describe stalking horse bids as follows:

> A stalking horse process occurs where an offer to purchase the debtor's assets or business is negotiated with a potential purchaser in advance of the sales process. This offer is known as the "stalking horse bid". If approved by the court, the stalking horse bid is used as a baseline offer against which all other bids submitted in the sales process are compared. If no superior bids are received during the sales process, the stalking horse bid will be accepted and submitted to the court for approval of the sale. However, in certain situations, acceptance and approval of the stalking horse transaction is done simultaneously with approval of the stalking horse sales process. [Citing *Eastwinds Caribbean Limited Partnership et al v. Octopus Holdings Ltd. et al* (13 June 2019), Calgary 1901-07681 (Alta. Q.B.).] In such cases, the transaction contemplated by the stalking horse bid is approved, subject to the debtor receiving any superior offers during the sales process.
>
> More frequently, if the sales process produces an offer that is superior to the stalking horse offer, the sales process will contemplate a run-off auction between the stalking horse bidder and the party, or parties, that submitted the superior offer. For another bid to be considered "superior" to the stalking horse bid, it must typically exceed the stalking horse bid by a minimum amount prescribed in the stalking horse bid agreement and sales process. This amount is known as an "overbid increment". [At 369; emphasis added.]

Stalking horse agreements are commonly used in insolvency proceedings to "establish a baseline price and transactional structure for any superior bids from interested parties" and that they may in the right circumstances maximize value for the benefit of the stakeholders.

[55] Reference may also be made to Janis Sarra, *Rescue! The Companies Creditors Arrangement Act* (2007) at 118–123, who writes that the premise underlying such bids is that the stalking horse bidder has undertaken a fair amount of due diligence in determining the value of the assets in question, such that other potential bidders can rely "to some extent" on the value attached to the asset by the stalking horse bidder.

[56] Professor Sarra observes that certain "concerns" have arisen about stalking horse bids, one being that "the stalking horse can exert considerable control over

timelines, making them very tight such that other bidders do not have a meaningful opportunity to undertake their due diligence." If such concerns arise, she suggests, the court should approve the bid only *as a stalking horse bid* and not as a final agreement, "hence creating incentive on the parties to ensure a complete and fair process in order for any bid to be viewed as a final bid." (At 123; see also Daniel R. Dowdall and Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?" in Janis Sarra, ed., *Annual Review of Insolvency Law*, vol. 3 (2005) at 11.)

[57] Stalking horse bids were recently discussed at some length by Madam Justice Fitzpatrick in *Re Freshlocal Solutions Inc.* 2022 BCSC 1616 at paras. 15–33, a case decided under the *CCAA*. She reviewed various cases, including *Re Boutique Euphoria Inc.* 2007 QCCS 7129, *Re Brainhunter Inc.* [2009] O.J. No. 5578, *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.* 2012 ONSC 1750, *Re Danier Leather Inc.* 2016 ONSC 1044 and *Re Quest University Canada* 2020 BCSC 1845, all of which set out the various factors that should be considered by a court in assessing a stalking horse bid. In *Freshlocal*, Fitzpatrick J. observed:

> In *Quest University Canada (Re)*, 2020 BCSC 1845 at paras. 53–58, I addressed authorities that have discussed the question as to whether the financial incentives in a stalking horse offer are appropriate. At para. 59, I set out certain factors that can be considered in determining whether a given break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate:
>
> a) Was the agreement reached as a result of arm's length negotiations?;
>
> b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;
>
> c) Is the relief supported by the major creditors?;
>
> d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;
>
> e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;
>
> f) Will the fee and charge enhance the realization of the debtor's assets?;

> g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and
>
> h) Does the monitor support the relief?
>
> At the most basic level, the benefits of entering into a stalking horse bid that can be potentially achieved in these proceedings must be justified by the costs in doing so. That cost/benefit analysis requires a rigorous review of all the relevant circumstances toward answering the question—is a stalking horse offer appropriate at this time in these *CCAA* proceedings? [At paras. 32–3; emphasis added.]

[58] It is not always the case that courts are satisfied that stalking horse bids will "optimize the chances … of securing the best possible price for the assets up for sale." (*CCM* at para. 6.) *Freshlocal* provides a good example. In that instance, the proposed agreement had not "come about through a competitive process" and the inference could be drawn that it "arose less from Freshlocal's objective enthusiasm for the transaction and more from [the interim lender's] not so veiled threats of litigation." (At para. 37.) Again in Fitzpatrick J.'s analysis:

> I accept here that Freshlocal was under substantial time pressures to move this proceeding forward to a sale. However, it is anything but transparent as to how the purchase price in the SH Agreement came about.
>
> In that vein, Freshlocal's reference, supported by the Monitor, that the SH Agreement establishes a minimum or "floor price" is concerning. This is more akin to a "reserve bid" at auction. I acknowledge that this phrase has been used in the past to describe stalking horse bids, but it is an unfortunate one in the sense that it gives the sense that higher bids are being sought and fully expected. A more appropriate description might be "value price", where the stalking horse is put forward as an appropriate pricing of the debtor's assets, in the event that no higher offer is received.
>
> It is not the underlying rationale of a stalking horse offer to allow a bidder to get a bargain basement price, save as might be (or likely will be) exceeded in the true marketplace, while securing substantial financial benefits for that bidder (see my discussion below).
>
> Freshlocal refers to the SH Agreement guaranteeing an outcome. I accept that the SH Agreement achieves that goal, but at what cost to the stakeholders?
>
> As was noted in *Boutique Euphoria*, an important consideration is to ensure you are riding the right "horse" in the sales process by having the right "benchmark" to hopefully attract other—and higher—bids. A failure to test the market toward picking your "horse" might very well mean that the debtor has "baked in" a result with a stalking horse offer which is not necessarily reflective of the value of the assets. [At paras. 40–4; emphasis added.]

[59] The Court went on to scrutinize the amount of the termination or 'break' fee and how it had been arrived at, the existence of any support by other stakeholders for the stalking horse arrangement, the fact that the insolvent company had agreed that it would engage in negotiations only with the interim lender, whether the stalking horse bidder had done due diligence on which other potential buyers could rely, whether other creditors objected to the arrangement, how the break fee affected the likely return, and whether the fee was "related to the stalking horse bid process itself and the efforts undertaken towards that end." (At para. 71, quoting *Boutique Euphoria*.) In the end, Fitzpatrick J. dismissed the application for approval of the stalking horse agreement, expressing confidence that the number of other bidders who had come forward expressing interest in the assets for sale made the proposed arrangement not only inappropriate but unnecessary.

[60] The Court also disapproved proposed stalking horse arrangements in *Farm Credit Canada v. Gidda* 2015 BCSC 2188 and in *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.* 2014 BCSC 1855. In *P218*, Mr. Justice G.C. Weatherill observed:

> The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process. [At para. 34; emphasis added.]

He was critical of the absence of evidence as to whether the break fee of $1.5 million was reasonable, evidence as to the value of the assets, and evidence as to whether other sale processes had been considered. (At para. 39.)

[61] In *Gidda*, the Court quoted paras. 20–21 of *PT218* and continued:

> However, the Receiver, in this case, completely ignored the fact that approval of a stalking-horse bid must be granted by the court prior to undertaking such a process. In this case, the Receiver did not apply to approve the Haakon bid as a stalking-horse bid. By failing to apply to the court, the Receiver completely avoided having to justify whether such a stalking-horse bid was appropriate in the circumstances. [At para. 37; emphasis added.]

The Court also queried whether market exposure of about *three months* was sufficient, especially given that one agreement of sale for part of the assets had been tentatively accepted by the receiver even before the property was listed for sale. (See para. 35.)

Analysis

[62] With the foregoing principles in mind, I return to the four grounds of appeal stated at para. 46 above. None of these raises a clear point of law that by itself would justify allowing the appeal. This is not a criticism of counsel, but a reflection of the nuanced way in which the usual *Soundair* factors line up in this case. Nor is there in my view any palpable and overriding error of fact on which the appeal can be decided. Indeed, many of the "findings" to which the appellants object — e.g., that the FRS offer was "speculative" or that the length of time it would take for FRS to obtain funding from BC Builds was "inordinate" — were actually expressions of opinion or characterizations by the chambers judge. All of them were open to him on the evidence. Other so-called "findings" were inferences the judge drew concerning what was likely to happen in future — for example, his observation that further offers were unlikely to arise by the end of August. Again, predictions like this are the kind that courts in bankruptcy or receivership cases are frequently required to make, and usually cannot be said to be clearly right or wrong.

[63] Rather than attempting to analyze the remaining grounds of appeal one by one, I propose to restate what emerged from counsels' submissions before us as the crux of the appellants' argument. I do so bearing in mind Mr. Moseley's suggestion that this court's guidance might be useful to the practice regardless of the outcome of this appeal. In my opinion, the real issue for this court involves the sale process considered *as a whole*: did the chambers judge err *in the circumstances of this case* in approving the Redekop offer without ordering at least a short adjournment to determine whether the BC Builds proposal or any other bid with sufficient certainty to compete with Redekop's bid might be elicited? Put another way, did the court below 'balance' the *Soundair* factors in a manner that was appropriate and fair to all the parties, and that could be seen as such?

[64] These questions engage all four *Soundair* factors, which I set out again here for convenience and will address below:

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

2. It should consider the interests of all parties;

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

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

Sufficient Efforts?

[65] While it would appear that Colliers took the usual steps beginning in April 2024 to solicit offers locally for the Langley property, the period of time over which the property was on the market was at most 2.5 months — a period that is markedly short compared to those approved in similar cases. In *Farm Credit Canada*, for example, the Court was critical of the fact that the property in question had been listed only "a little over three months" and noted the absence of any international advertising that might have been done to attract overseas buyers. (See paras. 33–4.) In the case at bar, Colliers advertised the property in the *Western Investor* and sent out emails to almost 5,700 potential purchasers. MNP also stated in its Third Report that "direct communication through phone, email and in-person meetings with over 100 prospective purchasers" took place, but without elaboration as to MNP's own efforts. It stated that in its opinion, *Colliers' marketing program* had "adequately" exposed the property to the market.

[66] Even at the time MNP's Second Report was filed, however, the receiver was aware of Mr. Weber's discussions with BC Builds and FRS in which a price of almost double Redekop's bid had been suggested, although not accompanied by a binding offer. Yet the receiver was apparently unwilling to contact or negotiate with

BC Builds directly (as it had done with Redekop), leaving Mr. Weber to do so on his own. He expressed a sense of unfairness when he deposed at the end of his affidavit of July 3:

> I do not understand why the Receiver would accept the Redekop offer after only approximately a month and a half of marketing and for an amount that would leave over $18 million dollars, plus interest owing, while being apprised of the CPS and the imminent approval from BC Builds. Furthermore, it would wipe out over $8.25 million of original equity, years of work, and short [sic] the Province of affordable homes it desperately needs.

[67] Weighing against further delay, of course, was the high "burn rate" consisting of interest of approximately $235,000 per month and maintenance costs of approximately $165,000 per month. In my respectful view, these factors and the wide disparity between the bids may have led the receiver to focus its attention too quickly on the Redekop offer and fail to take any other bids or potential bids seriously. The potential of a bid being made at $64 million should have led the receiver — and ultimately the Court — to consider whether a longer marketing period was necessary to allow all the parties to have confidence that the process had likely elicited as good an offer as could be realistically expected.

Efficacy and Integrity of the Process

[68] In the case at bar, counsel were in agreement that Redekop's offer had arisen in the course of, and presumably as a result of, Colliers' marketing efforts; the receiver had not approached Redekop *before* undertaking the marketing program. Technically, then, Redekop's bid was not a "stalking horse" bid as the term is normally used. At the same time, and as all counsel also seemed to acknowledge, it was "*akin* to" a stalking horse bid: because *Practice Direction 62* required that Redekop's offer, as the "Original Bid", be disclosed prior to the court hearing, it effectively established a "floor" or "baseline" for subsequent bids. One might infer that this occurred because of the absence of an appraisal of the subject property — a deficiency that was not explained. MNP argued, however, that in this instance, given that the three (ultimately two) "offers" put before the chambers judge by the receiver on July 9 were clustered between $34 and $37 million, a fair market value

close to the price offered by Redekop could be inferred. This may or may not be so. In fact, while the *raison d'être* of stalking horse bids is to create a price floor, a floor set below market value can have the effect of artificially depressing later bids. This is so because subsequent bidders will lack incentive to *significantly* outbid the stalking horse and because, as suggested by Professor Sarra, subsequent bidders come to the table relying on the due diligence of the stalking horse. In any event, an appraisal would have allowed the chambers judge to be sure.

[69] As we have seen, where an actual stalking horse process is proposed, the receiver is bound to obtain the court's prior approval so that the court can be satisfied the necessary safeguards — usually the availability of a fair market appraisal — exist. I agree with the Court in *Gidda* that where a break fee is proposed, the fee itself must also be specifically approved (and therefore brought to the Court's attention.) As stated in *P218*:

> ... the mere fact that the proposed Termination Fee is within the range of reasonableness as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable …. The court is not simply a rubber stamp for the agreement that was made. [At para. 36.]

Interests of all Parties

[70] The receiver was bound, of course, to protect the interests of the creditors and to obtain the highest price it could for their benefit. Indeed, the interests of the creditors (which would include in this case those who were unlikely to be paid out under the Redekop arrangement) has been said to be the *primary* concern of a court-appointed receiver: see Galligan J.A. in *Soundair* at 12 and Goodman J.A., dissenting, at 23. But the interests of "*all*" parties, including the Debtors and the personal guarantors of MCAP's mortgage, are also required to be considered. As stated in the seminal case of *Cameron v. Bank of Nova Scotia* (1981) 45 N.S.R. (2d) 303 (C.A.):

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or where the circumstances indicate that insufficient time was allowed for the making of

> bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply be a consideration of the interests of the creditors. [At 307; emphasis added.]

Both Galligan J.A. and Goodman J.A. in *Soundair* also referred to the importance of protecting the "integrity of the court process": at 12, 23, citing *Cameron*.

[71] Looked at from the Debtors' point of view, the receiver's insistence that its process and the Redekop bid were "adequate" might well have seemed unfair. The possibility of a bid equal to almost double that of the Redekop bid merited some efforts *on the receiver's part* to direct some energy to negotiating a firm offer from BC Builds/FRS or other possible bidders.

Unfairness in Working out the Process?

[72] In all the circumstances, it seems to me that the 'balancing' process carried out by the court below was not done in a manner that was fair and could be seen to be fair by all parties. Respectfully, I conclude that the chambers judge erred in proceeding to grant the Asset Vesting Order without giving additional time — say two to four weeks — so that all parties could be satisfied either that the BC Builds offer could not be firmed up appropriately, that it was simply not worthwhile to wait any longer, or that the fair market value of the property was in the vicinity of $34 million.

[73] In terms of the standard of review, I conclude that the chambers judge gave "no, or insufficient, weight to relevant considerations" in the exercise of his discretion. (See *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27.)

No Fresh Evidence

[74] The period between the July 9 order and the hearing of this appeal on August 14 provided the appellants with another few weeks in which to firm up the BC Builds/FRS offer or find another offer, if humanly possible. But no application to

adduce fresh evidence was brought by the Debtors in this court; nor did FSR or BC Builds appear at the hearing or attempt to provide us with any new information. Mr. Moseley had to concede that his client's appeal would be difficult to sustain, although he suggested it provided us with an opportunity to clarify the law. *Had fresh evidence of a firmer offer been adduced*, I would have been inclined to admit it as meeting the *Palmer* criteria, allow the appeal and specify a short period (two to four weeks) during which the bidding process could be reopened.

[75] I acknowledge that an order of this kind should of course be made only in unusual circumstances: see *Re Selkirk* (1987) 64 C.B.R. (n.s.) 140, quoted from at para. 53 of these reasons; *MNP Ltd. v. Mustard Capital Inc.* 2012 SKQB 325. In this instance, however, the circumstances *were* unusual — the absence of any appraisal, the large disparity between Redekop's price and the price purportedly offered by BC Builds/FRS, and the relatively short marketing period of two months (until the Redekop agreement was signed) at most. This case seems similar to *Re 1587930 Ontario Ltd. v. 2031903 Ontario Ltd.* (2006) 25 C.B.R. (5th) 260 (Ont. Sup. Ct). In that instance, two competing groups were bidding for property being sold under the *CCAA.* On the eve of the court hearing, one of the bidders was permitted to apply to introduce new evidence. The chambers judge described the options available to the Court:

> Counsel for the Monitor advised that in his view, the Court would have before it three options. The first option would be to accept the Sagecrest offer, either on the basis that the time was past for the introduction of further evidence or even with consideration of fresh evidence, the Sagecrest offer represented the most realistic return for all creditors under the Proposed Plan.
>
> The second option would be to accept the new evidence and accept, as urged by Messrs. Soorty and Cocov, their offer on the basis that it represents a firm agreement to close by no later than November 3, 2006, with a certain return to Sagecrest of its outstanding debt and an enhanced recovery to the unsecured creditors.
>
> The third option would be to in effect re-open the opportunity to any party to put in a further offer on the understanding that the timeframe should be such that there would be a closing within 30 days to reduce the "burn" estimated to now exceed $500,000 per month. [At paras. 11–13.]

[76] The judge concluded that the third option was the most appropriate, reasoning that:

> It is with some reluctance that I have concluded that in the circumstances, option 3 is the most appropriate at this time. I am mindful that this is a *CCAA* proceeding, not an auction process. Both sides have pointed to the decision of the Court of Appeal in *Soundair* as setting out the guiding principles. The factual distinction between this case and the facts in *Soundair* is that here there is at least the potential for a much-improved return for unsecured creditors.
>
> The improved return is a factor, which while not necessarily the only consideration, it is a significant one. While I am concerned with the risk to the estate of the company of the cost of the further time involved, I have concluded that it is a risk worth taking, since the unsecured creditors who will bear that risk are prepared to do so.
>
> ...
>
> A *CCAA* proceeding is different from an ordinary civil action and trial. The process itself anticipates dynamic and "real time" process that should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors. There is no need to apply the criteria of introduction of new evidence to this proceeding in my view.
>
> What is of greater significance is whether the offer process should be allowed to continue. I have concluded that in these somewhat unique circumstances that it should.
>
> I do think that it would operate unfairly to Sagecrest to accept they Soorty/Cocov offer outright at this stage. Among other matters, there is an outstanding appeal by Sagecrest of disallowance of part of its claim, which is waived only if its offer is accepted. In addition, Sagecrest has become in effect a "stalking horse" with its firm offer and should not be prejudiced by what is both a last minute and still somewhat uncertain position.
>
> In addition, the unsecured creditors should not be deprived of the possibility of Court consideration of an improved Sagecrest offer. [At paras. 19–25; emphasis added.]

In the result, the judge ordered that the bidding process should be "re-opened" for a short time.

[77] *Re 1587930 Ontario Ltd.* was of course not an appeal, but in my respectful opinion, fairness in *this* case also required the chambers judge to grant a two-to-four week period for all offers to be finalized and reconsidered by the receiver. Alternatively, MNP should either have had an appraisal done or taken steps to

satisfy itself as to the fair market value of the property without reference to Redekop's bid.

[78] Again, on the other side of the scales was the fact that interest and site management costs were accruing every month, such that even the first mortgagee might not ultimately have received full payment of its loan. It is because of this "burn rate" that only a short period of delay as opposed to, say, six to ten months would have been appropriate.

In the Absence of Fresh Evidence

[79] In the absence, however, of new or fresh evidence from the Debtors of the kind I have described, it is my opinion that this court should not now delay the sale any further. In effect, the Debtors have had the benefit of the sort of adjournment the chambers ought to have ordered, with nothing to show for it. This is indeed unfortunate, especially for the personal guarantors, but the realities of the case must now be recognized as leading to the sale to Redekop.

[80] It is unnecessary to consider the fresh evidence application of the receiver, given that the proferred affidavits merely support the dismissal of the appeal.

Disposition

[81] In the result, we concluded that the appeal must be dismissed. We thank all counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Grauer"

I agree:

"The Honourable Justice Winteringham"

Court of Queen's Bench of Alberta

Citation: 1635623 Alberta Ltd (Adrenaline Diesel and Bonnie's Equipment Services Ltd.) (Re), 2022 ABQB 361

Date: 20220519
Docket: 24-2806908
Registry: Edmonton

In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended and in the matter of the Notice of Intention to make a proposal of 915245 Alberta Ltd. o/a Prairie Tech Oilfield Services

Between:

915245 Alberta Ltd o/a Prairie Tech Oilfield Services

Applicant

- and -

1635623 Alberta Inc o/a Adrenaline Diesel and Bonnie's Equipment Services Ltd.

Respondents

Corrected judgment: A corrigendum was issued on May 20, 2022; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] Is a notice-of-intention-filing debtor entitled to the return of property subject to possessory and garage-keeper liens?

[2] The debtor says that the notice-triggered stay of proceedings in ss. 69(1) of the *Bankruptcy and Insolvency Act* bars the continued possession of the property, that the "possession for the purpose of recovery" exception in ss. 69(2) does not apply, and that, as a result, the property must be returned to it.

[3] The lien holders argue that their continued possession of the property does not run afoul of ss. 69(1) and that, in any case, ss 69(2) shelters them.

[4] I find for the lien holders on the first ground.

B. Positions

[5] 915 acknowledged both lien holders as secured creditors, per the *BIA* definition:

> ***secured creditor*** means a person holding a mortgage, hypothec, pledge, charge, or **lien** on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor .... [part of s 2 *BIA*]

[6] Its argument is premised on the mere possession by the lien holders of the property in question being a "remedy" ... or any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy" per ss 69(1) (reproduced below).

[7] On that premise, 915 focused on whether the lien holders qualify for the exception in ss. 69(2) i.e., where possession of assets by secured creditors is "for the purpose of realization." In 915's view, neither lien holder held that property for that purpose, making the exception unavailable.

[8] Per 915, the net result was that the lien holders must surrender possession of the property to it.

[9] The lien holders engaged on 915's "purpose of possession" argument, asserting that their possession was for realization purposes.

[10] But they also made an alternative (upstream) argument that mere possession per their liens is not in fact the exercise of a "remedy" or an "action, execution or other proceedings" to recover claims i.e. that ss 69(1) did not apply in the first place.

[11] Per the lien holders, with ss. 69(1) not affecting such mere possession, no recourse to ss. 69(2)'s safe harbor was necessary.

[12] And, by extension, with their possession lawful, 915 could not call on replevin, which assumes an unlawful holding of property.

[13] In their view, 915 jumped into a series of arguments missing its linchpin – that the lien holders were pursuing "remedies" or an "action, execution or other proceedings" to recover their debt claims.

[14] The threshold issue is whether mere continued possession by the lien holders breaches the ss 69(1) stay.

C. Analysis

Stay provision

[15] Here are the key parts of ss 69(1):

> **1)** Subject to [subsection] (2) ..., on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > **a)** no creditor has any **remedy against** the insolvent person or **the insolvent person's property, or shall commence or continue any action, execution, or other proceedings, for the recovery of a claim provable in bankruptcy,**
>
> until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.
>
> **2)** The stays provided by subsection (1) do not apply
>
> > **a)** to prevent a secured creditor **who took possession of secured assets of the insolvent person for the purpose of realization** before the notice of intention under section 50.4 was filed **from dealing with those assets**;
> >
> > **b)** to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, **from enforcing that security**, unless the secured creditor consents to the stay; [or]
> >
> > **c)** to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security **from enforcing the security** if the insolvent person has, under subsection 244(2), consented to the enforcement action ....

[16] The starting point is the interpretation of "remedy …, or action, execution, or other proceedings, for the recovery of a claim provable in bankruptcy."

[17] Does ss. 69(1) preclude a secured creditor from simply maintaining – i.e., not enforcing or realizing on -- its secured position? (In the case of a possessory or garage keeper's lien holder, that means simply maintaining possession.)

[18] I start by exploring the purpose of ss. 69(1) and the other *BIA* stay provisions.

Purpose of ss 69(1) and kindred BIA provisions

[19] The *BIA*'s stay provisions are aimed at maintaining the status quo.

[20] The Ontario Court of Appeal so confirmed in ***msi Spergel Inc v IF Propco Holdings (Ontario) 36 Ltd***, 2013 ONCA 550:

> **[Sections 69, 69.1, 69.2 and 69.3 *BIA*] promote the objects of the *BIA*** by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and **by preventing proceedings by a creditor that would give that creditor an advantage over others**: see *Cohen (Re)*, 1948 CanLII 282 (ON CA), [1948] O.J. No. 545, [1948] 4 D.L.R. 808 (C.A.), at para. 12.

> Although the heading of these provisions refers to a "stay of proceedings", they accomplish this result by **preventing the exercise of the creditor's remedy** -- the cause of action.
>
> **By providing that the creditor has no "remedy" against the bankrupt, s. 69 prevents the exercise of the creditor's cause of action while the bankruptcy is in effect. This is entirely consistent with the purpose of the *BIA* of** providing for the orderly and fair distribution of a bankrupt's property and **preventing any creditors from gaining an advantage**. The section does not suspend the limitation period. **It prohibits any action on a claim** that is provable in the bankruptcy. ... [paras 40, 42 and 44] [emphasis added]

[21] As that Court said further about s. 69 (in part):

> ... The goal of the **stay** and preference **provisions** under **ss. 69**, 95, 96 and 97 of the *BIA* is to **give the debtor some breathing room to reorganize**. ... [***1732427 Ontario Inc v 1787930 Ontario Inc***, 2019 ONCA 947 at para 13] [emphasis added]

[22] See also ***Re Emergency Door Service Inc***, 2016 ONSC 5284, where Newbould J. found similarly (approving Lederman J.'s analysis below):

> ...The remedial purpose in proposal proceedings is to save a debtor form the social and economic losses resulting from a bankruptcy. Interpreting the word "remedy" in s. 69(1) (*a*) to include injunctive relief sought against a debtor that has made a proposal would be a purposive interpretation that fulfills the aim of the legislation.
>
> In *Golden Griddle Corp. v. Fort Erie Truck and Travel Plaza Inc*, 2005 CanLII 81263 (ONSC), the same arguments made in this case ... were made to Justice Lederman in a case in which **a franchisor sought an injunction to prevent a franchisee who had filed a notice of intention to make a proposal from post-filing breaches of provisions of the franchise agreement and a lease**. ... Lederman J. ...stated [at paras. 11 and 12]:
>
> **While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving**, in the words of L.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 -- Stays of proceedings, under the *Bankruptcy and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors** and hopefully put together a prospective financial restructuring which would meet their requirements."
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and **the remedy sought should be**

> **considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent persons to put forth a proposal it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on the ability, it should not be stayed.**
>
> There is much to say in favour of this principle enunciated by Lederman J. in *Golden Griddle.* It gives effect to the **aim of the proposal provisions of the *BIA* to permit a debtor** who had filed a notice of intention to file a proposal **some space if needed to achieve a successful proposal.** [paras 29-31] [emphasis added]

[23] For a similar reading, see also ***Canadian Petcetera Partnership v 2867 R Holdings Ltd***, 2010 BCCA 469:

> In my opinion, the purpose of s. 65.1 [*BIA*] [restriction on lease terminations] ... is similar to [that of] the provision in s. 69(1), which stays creditors from attempting to recover claims provable in bankruptcy while the debtor is endeavouring to reorganize its financial affairs with its creditors. **Both sections have the purpose of maintaining the status quo among creditors and preserving the debtor's assets during the reorganization process**. ... [para 20] [emphasis added]

[24] And ***Heritage Flooring BIA Proposal (Re)***, 2004 NBQB 168 (Glennie J.): "The purpose of the *BIA*'s stay provisions as incorporated in section 69 is to **maintain the status quo**." [part of para 57] [emphasis added]

[25] In a similar vein (in a bankruptcy context), see Elson J.'s comments in ***Bank of Nova Scotia v Avramenko***, 2020 SKQB 54:

> ... In my view, and construing s. 69.3(1) purposively, the **stay of proceedings does not apply to steps a judgment creditor takes to preserve a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, the reality is that **these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** ... [para 17] [emphasis added]

[26] This "stay" or "freeze" character of ss 69(1) is expressly reflected in ss. 69(2), which refers to "the **stays** provided by subsection (1)."

[27] As reflected in the decisions above, ss 69(1)'s purpose is a general ceasefire i.e., to prevent any creditor from gaining an edge over other creditors or otherwise improving or in any way changing its position (subject to certain exceptions, including secured creditors who are sufficiently advanced in their realization efforts that they are allowed to continue them).

[28] Hence the references to "breathing room" or "space" within which to assemble a proposal for the consideration of the creditors and the court.

[29] Accordingly, ss. 69(1)'s statement that "no creditor has any remedy ... against the insolvent person's property" cannot be read literally i.e., as *eliminating* every creditor's remedy.

Every creditor – secured, preferred or unsecured – has some kind of remedy. For instance, a secured lender holding a general security agreement has a security interest in the debtor's personal property. Such an agreement provides a suite of remedies in case of default, including active steps like seizing and selling the property, seizing, and retaining the property, and appointing a receiver.

[30] But it also provides a passive remedy in the sense of limiting the debtor's powers over the property. The mere existence of a registered-at-PPR security interest may eliminate or restrict the debtor's power to sell or encumber the property, among other limitations.

[31] That "shadow" cast over the debtor's property is, in a sense, a "remedy", aimed at ensuring, or at least assisting in, recovery by the creditor.

[32] Read purposively as explained, and emphasizing its express "stay" nature, ss 69(1) is all about shutting down the exercise of remedies i.e., steps that would advance the creditor towards recovery.

[33] It is not about eliminating or even reversing any creditor's position, even if the creditor's position is itself a kind of remedy.

[34] Such would go beyond ss. 69(1) clear "stay" or "hold the line" focus.

[35] Creditors are not allowed to *advance* their position; they are allowed to *hold* them.

Notice-of-intention trustee's (limited) rights in respect of the debtor's property

[36] That (stay only) nature of ss 69(1) is reflected in the limited powers of a notice-of-intention trustee over the debtor's property.

[37] Per paragraph 50.4(7)(a) *BIA*:

> Subject to any direction of the court under paragraph 47.1(2)(a), the **trustee under a notice of intention** in respect of an insolvent person
>
> **a)** shall, for the **purpose of monitoring the insolvent person's business and financial affairs**, have **access to and examine the insolvent person's property**, including his premises, books, records, and other financial documents, **to the extent necessary to adequately assess the insolvent person's business and financial affairs**, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

[38] Nothing there about the trustee taking possession of the debtor's property or obliging any creditor with possession to turn it over.

[39] To the extent it would have made any difference, no interim receiver was appointed here, under s 47.1 *BIA*, to "take possession of all or any part of the debtor's property" and "exercise such control over that property ... as the court considers advisable" (paras 47.1(2)(b) and (c)).

[40] Even if we assume that ss 16(3) and 17(1) *BIA*, which apply where the debtor becomes bankrupt, apply in an NOI context (and I could find no case so finding), neither undercuts the position of a secured creditor having lawful possession of the debtor's property:

> **16(3) The trustee shall**, as soon as possible, **take possession of ... all property of the bankrupt** ... and make an inventory, **and for the purpose of making an inventory the trustee is entitled to enter,** subject to subsection (3.1), **on any**

> **premises on which the** deeds, books, records, documents or **property of the bankrupt may be, even if they are in the possession** of an executing officer, a **secured creditor** or other claimant to them.
>
> **17 (1)** Where **a person has in his possession or power any property of the bankrupt that he is not by law entitled to retain as against the bankrupt or the trustee, that person shall deliver the property to the trustee.**

[41] The former provision expressly recognizes that some or all the debtor's property may be in the possession of a secured creditor.

[42] The latter says that, where that possession is lawful, it may continue, even in the face of a bankruptcy trustee's demand to turn over the property.

[43] Nothing in the *BIA* undercuts the legality of possession by a possessory or garage-keeper's lien holder.

[44] As noted, the *BIA* expressly recognizes lien holders as secured creditors.

[45] By contrast, possession by or on behalf of an execution creditor (e.g., after seizing and removing property for an enforcement sale) is expressly undercut, in the event of a bankruptcy, by ss. 70 (bankruptcy trumps execution proceedings), 71 (bankrupt's property vests in trustee, subject to rights of secured creditors), and 73(2) (seized-and-removed property to be turned over to trustee in bankruptcy).

[46] No equivalent provisions provide a similar ("turn over possession") outcome for secured creditors, whether in an NOI or bankruptcy context.

[47] I note as well that, assuming they apply in a notice-of-intention setting, the *BIA*'s general "treatment of secured creditors" provisions (ss. 127 to 134) themselves do not contemplate a secured creditor (including a lien holder) having to yield possession (outside of such a creditor failing to prove a claim within the appointed period – ss 128(1.1)) unless the trustee redeems the security i.e. by paying out either the value of the property in question or the debt in question, whichever is less (ss 128(3).

Non-conflicting provincial law continues to operate

[48] With no *BIA* provision undercutting a lien holder's continued possession in the NOI context here, the provincial statutes undergirding the lien holders' possession here – the *Possessory Lien Act* and the *Garage Keepers' Lien Act* – continue to operate in full force, per ss 72(1) *BIA*:

> 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 …

NOI stay provision not eclipsing downstream rights of secured creditors

[49] Per s. 69.3, if a bankruptcy occurs, secured creditors are (subject to identified limitations, under s 79, 127-134 – other) able to enforce their security.

[50] Nothing guarantees that a party filing a notice of intention will (1) end up filing a proposal; (2) getting creditor and Court approval for the proposal; and (3) performing the

proposal in full. Instead, the proposal plan may fall off the rails at various points and for various reasons, leading to bankruptcy in various ways.

[51] For the protection for secured creditors in bankruptcy to have meaning, a notice of intention cannot effectively unplug a secured creditor's security. Otherwise, the "safe haven" for secured creditors in bankruptcy would be illusory.

[52] For confirmation of a possession-based lien holder's secured position in bankruptcy, see ***Bankruptcy of Gerald Thomas King***, 2004 NSSC 84 (Registrar Cregan) at paras 11-18 and ***1064521 Ontario Ltd (Re)***, 1998 CanLII 14641 (Cameron J.) (five paragraphs from "The *Municipal Act* provides ..." to "... clear priority over other liens and charges") (municipal lien for unpaid taxes).

[53] Same if the notice-of-intention efforts lead to a proposal: the proposal may or may not be made to them. If it is, or at least to a subset of secured creditors including these lien claimants (or perhaps only them), they will have an opportunity vote on the proposal. A possible outcome is that the proposal is voted down by the secured creditors, or at least the relevant subclass of such creditors.

[54] The possible survival of secured creditors' claims even where a proposal is made also confirms the over-reading of ss 69(1) by 915 i.e., with such claims not being effectively undone at the NOI stage.

Lien holders not attempting to enforce (instead only hold) their secured position

[55] Subsection 69(1) would have been engaged if the lien holders had had been attempting to enforce their claims (i.e., arranging for sale of the liened property) when the notice of intention was filed.

[56] See, for example, ***Winroc Supplies Ltd v Willows Golf Corp***, (1993) 112 Sask R 54, where Wedge J. (in obiter, since the then-new ss 69(1) was found not to apply) found that ss. 69(1) (if it had applied) "stayed **any further action or proceedings by ... lienholders**", with that provision "[making] it clear that a secured creditor cannot **enforce** its security pending a proposal." [He] found that the lienholders' actions (there, to **enforce an order for sale**) were "clearly a continuation of **proceedings** by creditors with claims provable in bankruptcy **for the recovery of their claims** provable in bankruptcy" and that they "[fell] within s. 69(1)."

Role of ss 69(2) (exception for secured creditors en route to realization)

[57] Subsection 69(2) creates exceptions where such activity by security creditors is sufficiently advanced i.e., where they have taken possession "for the purpose of realization" (69(2)(a)), or at least where they have raised the realization flag and the debtor has allowed the ten-day freeze period to expire (para 69(2)(b)) or, in any case, where that flag has been raised and the debtor has surrendered (para 69(2)(c)).

[58] Secured creditors who have so advanced, are permitted to continue with their realization efforts.

[59] But the lienholders here are not on a realization or recovery march at all.

[60] The barring of realization efforts, and the exempting of a subset of those efforts, is irrelevant where the creditor is upstream of realization efforts, as the merely-holding-property lienholders here.

[61] In other words, ss 69(1) stays the pursuit of realization or enforcement efforts; ss 69(2) permits a subset of such efforts to continue; and neither have any thing to do with a lien holder simply maintaining possession of liened property.

Application of these principles on the ground

[62] In the case of Adrenaline, it acknowledges being in a strictly "hold" position with its lien at the date of 915's notice of intention (February 22, 2022) i.e., not taking any realization steps before that date: Adrenaline brief, paras 1-5.

[63] It purported to take realization steps about a month later, but as explained above, through the combined effect of ss 69(1) and (2), those efforts were necessarily futile, with all remedial and realization steps barred.

[64] But the key is that, even with its enforcement steps barred, Adrenaline was able to continue its mere holding of the property i.e., continue to rely on the *existence* of its secured position i.e., all aside from *enforcing* that position i.e., taking the kinds of realization or enforcement steps barred by ss 69(1).

[65] As for Bonnie's Equipment, it was not even able to take realization steps, all aside from the *BIA* stay, with the intent-to-enforce-via-sale trigger in ss 10(1) of the *Possessory Liens Act* not engaged, since (in the case of apparently non-motor-vehicle property, such as the trailers here) the necessary notice cannot be issued until the debt and storage charges have been outstanding for at least six months (not satisfied here).

[66] Bonnie's Equipment was necessarily in a hold-and-wait position, with no realization even possible, when the *BIA* notice of intention came down. (If the trailers are "motor vehicles", the *Garage Keepers' Lien Act* would apply, but the analysis would be the same, with Bonnie's Equipment having not moved into "realization", versus holding, mode.)

[67] Expressed differently, a lienholder's holding, or detention, of liened property is not, in and of itself, the exercise of a "remedy" or the taking of an "action, execution, or other proceedings" for the recovery of the underlying debt – it is simply the maintenance of a possession-based lien.

[68] Such liens are undoubtedly the platform for *enforcement steps* e.g., the sale process envisaged by s. 10 *PLA* or, in the case of a garage keeper's lien, by the combined effect of ss 6, 8, and 9 of the *Garage Keepers' Lien Act* and the Part 5 of the *Civil Enforcement Act* ("Seizure of Personal Property), which includes s. 48 ("Sale of [seized] property, etc.").

[69] But neither lien holder here had moved into the enforcement or realization zone here.

[70] As explained, that does not mean that they lose the safe harbour of ss 69(2): it means they were not off-side ss 69(1) in the first place.

D. Conclusion

[71] 915 seeks to convert ss. 69(1)'s stay of proceedings into the elimination of the lien holder's secured position.

[72] That reading is not supported by the provision's clear (status-quo-preserving) purpose.

[73] 915 did not cite any cases where ss 69(1) or any of the *BIA* stay provisions (69(1), 69.1(1), 69.2(1) or 69.3(1) were interpreted as requiring possession-based security – arising from a lien, pledge, pawn, perfection-by-possession *PPSA* security, or otherwise – to be surrendered because of the stay.

[74] The lien holders here are blocked by ss 69(1) from taking steps to enforce their lien (e.g., to have the liened property sold).

[75] But the provision does not undercut their right to *maintain* their secured-via-possession position.

[76] With that continued possession lawful, by definition a replevin order (anchored in "unlawful detention" of property) is unavailable.

E. Closing note

[77] I thank all counsel for their helpful written and oral submissions.

Heard on April 6, 2022.
Dated at Edmonton, Alberta on May 19, 2022.

M. J. Lema
J.C.Q.B.A.

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Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice M. J. Lema

Corrected the citation line to 1635623
Fixed wording in para 72
Fixed wording in para 76

Romspen Investment Corporation v. Courtice Auto Wreckers Limited et al. [Indexed as: Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Doherty, MacPherson and Lauwers JJ.A.

April 13, 2017

138 O.R. (3d) 373 | 2017 ONCA 301

Case Summary

Bankruptcy and insolvency — Stay of proceedings — Union bringing post-receivership application for certification for bargaining unit comprised of six employees of company in receivership — Union alleging that receiver subsequently fired four of those employees and hired new workers to replace them — Motion judge erring in dismissing union's motion for leave to proceed with certification application and unfair labour practice complaint in face of stay imposed by receivership order — Motion judge's concerns about allowing certification application to proceed being speculative — Employees' legally protected rights not in conflict with Bankruptcy and Insolvency Act in circumstances of this case — Good reasons existing to lift stay and permit certification application and unfair labour practice complaint to go forward — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

After a receivership order was made in respect of several corporations, the union brought a certification application, seeking to represent a bargaining unit comprised of six employees of one of those corporations. The union claimed that two days later, the receiver dismissed four of those employees and hired new workers to replace them. OLRB stayed the certification application, holding that the stay imposed by the receivership order applied. The union brought a motion for leave to proceed with the certification application and with an unfair labour practice ("ULP") complaint. The motion was dismissed. The motion judge found that the effect of the certification application was to increase the rights of the members of the proposed bargaining unit relative to other creditors of the corporation, which would be contrary to the policy and purpose of the stay of proceedings, that recognition of the proposed bargaining unit could impact the sale of the business, and that there was no certainty that the proposed bargaining unit would be meaningful after the completion of the sale of the corporation's assets. As for the ULP complaint, the motion judge found that as the certification application was not validly commenced, the union could not assert that the employees were terminated in response to that application. The union appealed.

Held, the appeal should be allowed.

Per MacPherson J.A. (Doherty J.A. concurring): The union could not appeal the motion judge's decision as of right under either s. 193(*a*) or s. 193(*c*) of the *Bankruptcy and Insolvency Act*

("*BIA*"). The union should be granted leave to appeal as the central issue in the appeal -- the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law -- was one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally. The appeal would not unduly hinder the progress of the insolvency proceedings.

The motion judge's concerns about the results of permitting the certification application to proceed were speculative and unsupported by the evidence. His reasoning that the certification application would increase the rights of the members of the proposed bargaining unit relative to other creditors rested on [page374] supposition. Certification does not have the effect of automatically increasing the rights employees have as creditors, thereby prejudicing other creditors. It was simply conjecture at this point to assume that the union would be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, there was no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale of the business. The motion judge erred in finding that the union would not be prejudiced by the continuation of the stay. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. Courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process. Further, maintaining the stay and delaying the representation vote risked undermining the legitimacy of the vote. The receiver could point to little material prejudice should the stay be lifted. The *BIA* is not intended to extinguish legally protected rights unless those rights are in conflict with the *BIA*. There was no conflict here. There were sound reasons to lift the stay and allow the union to proceed with the certification application.

The ULP complaint should be allowed to proceed as well. The fact that the certification application might be an irregularity (unless and until leave was granted *nunc pro tunc*) did not erase the fact that the application was filed. It would be unfair and a triumph of form over substance to prevent individuals who had lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in the original proceeding.

Per Lauwers J.A. (dissenting): The decision of the experienced motion judge was entitled to deference. Two distinct regulatory regimes came into contact in this case: the Ontario labour relations regime and the federal insolvency regime. This is precisely the kind of conflict that the paramountcy doctrine is intended to recognize and accommodate. While the first branch of the paramountcy analysis was not engaged as there was no operative incompatibility or conflicting language, the second branch was engaged, under which the motion judge was obliged to consider the exigencies of each regime and reconcile them if possible. That was a nuanced, difficult and delicate task informed by the motion judge's knowledge of both the law and the operation of the marketplace. The motion judge's statement that certification could negatively impact the sale of the business was self-evidently true and fell well within the margin of appreciation that was his due, given his knowledge of the commercial realities. If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their

leverage over the other creditors. Finally, the motion judge's conclusion that there was no basis for the unfair labour practice complaint was entitled to deference.

GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35, 271 D.L.R. (4th) 193, 351 N.R. 326, J.E. 2006-1500, 215 O.A.C. 313, 22 C.B.R. (5th) 163, 51 C.C.E.L. (3d) 1, 53 C.C.P.B. 167, [2006] CLLC Â220-045, EYB 2006-108008, 149 A.C.W.S. (3d) 542, consd

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APPEAL from the order of Wilton-Siegel J., [2016] O.J. No. 1908, 2016 ONSC 1808, 36 C.B.R. (6th) 141 (S.C.J.) dismissing a motion for leave to proceed with a certification application and an unfair labour practice complaint.

Mark Zigler and *James Harnum*, for appellant International Union of Operating Engineers, Local 793.

Lisa S. Corne and *David P. Preger*, for respondent Rosen Goldberg Inc., in its capacity as court-appointed receiver.

MACPHERSON J.A. (DOHERTY J.A. concurring): —

A. *Introduction*

[1] The appellant International Union of Operating Engineers, Local 793 (the "union") appeals from the decision of Wilton-Siegel J. (the "motion judge") of the Superior Court of Justice (Commercial List). The motion judge dismissed the union's motion seeking leave to proceed with matters relating to certification and unfair labour practices before the Ontario Labour [page377] Relations Board (the "OLRB"). The issue on the appeal is whether the motion judge erred in so doing.

B. *Facts*

(1) *The parties and events*

[2] On the application of Romspen Investment Corporation as secured creditor, and pursuant to an order of Penny J. of the Superior Court of Justice on October 19, 2015, Rosen Goldberg Inc. (the "receiver") was appointed receiver of several corporations (together, the "Ambrose Group"). One of those corporations is Courtice Auto Wreckers Limited (the "employer"). Paragraphs 7 and 8 of the receivership order provide that no proceeding can be commenced or continued in any court or tribunal against the receiver or the debtors except with the consent of the receiver or with leave of the court.

[3] On December 9, 2015, the union applied to the OLRB for certification, seeking to represent a bargaining unit comprised of six employees at the employer's Harmony Road location in Oshawa (also known as Ontario Disposal).

[4] The union asserts that two days later, on December 11, the receiver dismissed four of the six employees in the proposed bargaining unit and, on December 14, hired new workers to perform duties substantially similar to those performed by the dismissed employees. The receiver offers business reasons for the dismissals and denies hiring replacement workers.

[5] On December 14, the OLRB stayed the union's certification application, holding that the stay imposed by the receivership order applied.

[6] On December 18, the union filed an unfair labour practice ("ULP") complaint with the OLRB, alleging that the receiver dismissed the employees at least in part as a result of anti-union animus.

[7] In light of the OLRB's decision on December 14, the union sought leave of the court to proceed with its certification application and ULP complaint at the OLRB.

(2) *The motion judge's decision*

[8] The motion judge dismissed the union's motion in its entirety.

[9] The motion judge framed the inquiry in this fashion [at para. 23]:

> [The Union's motion raises two separate, but related, issues. The Union seeks an order lifting the stay of proceedings under paragraphs 8 and 9 of the Receivership Order to allow it to proceed with the Certification [page378] Application against the Debtor. In addition, as the ULP Complaint will also require an inquiry into the conduct of the Receiver, the Union seeks an order lifting the stay of proceedings under paragraph 7 of the Receivership Order, as well as an order granting leave to proceed against the Receiver under section 215 of the *BIA*, in respect of the ULP Complaint.

[10] With respect to the first issue -- the certification issue -- the motion judge considered whether he should make an order validating the commencement of the certification application on a *nunc pro tunc* basis. He framed the issue in this fashion [at para. 43]:

In considering the Union's request for an order lifting the stay of proceedings in respect of the Certification Application on a *nunc pro tunc* basis, the Court must first address whether such an order would have been granted if it had been sought prior to commencement of the Certification Application.

[11] The motion judge concluded that the court would not have granted leave at the relevant time. He offered four reasons in support of this conclusion:

- The effect of the certification application is to increase the rights of the members of the proposed bargaining
- unit relative to other creditors of the Ambrose Group. This would be contrary to the policy and purpose of the stay of proceedings, which effectively freezes the rights and remedies of all creditors of the debtor as of the

date of the receivership order.

- Recognition of the proposed bargaining unit could impact the sale of Ontario Disposal and the proceeds that
- can be realized therefrom. It is inequitable to require creditors to accept a potential diminution in the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen.

- The fact that there may be purchasers who are willing to take Ontario Disposal assets subject to the
- proposed bargaining unit does not support the case for lifting the stay. In such circumstances, the union will be able to pursue the certification application against the purchaser as soon as a sale is completed. Accordingly, the union is not prejudiced by the stay.

- There is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale
- of Ontario Disposal assets. There is no guarantee what form the sale of Ontario Disposal assets will take. [page379]

[12] Turning to the question of whether leave should be granted to permit the union to proceed with its ULP complaint, the motion judge again provided a negative answer. The core of his reasoning on this issue was [at para. 57]:

> [U]nless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action. Therefore, unless the Certification Application was validly commenced, there can be no ULP Complaint. Given the determinations above that the Certification Application is null and void, and that there is no basis for an order lifting the stay in respect of the Certification Application on a *nunc pro tunc* basis, it follows that there is no basis for the ULP Complaint.

[13] The union appeals from the motion judge's order.

[14] The receiver moves to quash the appeal on the basis that the motion judge's order does not fall within the meaning of s. 193(*a*) through (*c*) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Accordingly, the appeal cannot proceed without leave of a judge of this court. The union did not seek the required leave when it filed its notice of appeal.

[15] The union resists the receiver's motion to quash. The union asserts that there is an automatic right of appeal under s. 193(*a*) and (*c*) for appeals involving "future rights" and property in excess of $10,000 and that its appeal implicates these categories.

[16] In the alternative, if this court determines that s. 193(*a*) and (*c*) of the *BIA* do not support its direct appeal, the union makes a cross-motion seeking leave to appeal pursuant to s. 193(*e*) of the *BIA*.

C. *Issues*

Preliminary issues

(1) Is the appeal as of right pursuant to s. 193(*a*) or 193(*c*) of the *BIA*?

(2) If the answer to (1) is no, should the union be granted leave to appeal pursuant to s. 193(*e*) of the *BIA*?

The appeal

(3) Did the motion judge err by not granting the union leave to continue its certification application at the OLRB?

(4) Did the motion judge err by not granting the union leave to continue its ULP complaint at the OLRB? [page380]

D. *Analysis*

Preliminary issues[1]

(1) *Motion to quash*

[17] The union says that its appeal is as of right under either s. 193(*a*) or (*c*) of the *BIA*:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
(*a*) if the point at issue involves future rights;

.??.??.??.??.

(c) if the property involved in the appeal exceeds in value ten thousand dollars[.]

(a) *BIA s. 193(a)*

[18] The union asserts that in this case there are legal rights at issue that qualify as inchoate future rights. These future rights include the union's right to bargain collectively for its members (which only exists if the certification application is successful) and the employees' right to be represented by a union of their choice in their dealings with their employer.

[19] I do not accept this submission. The leading case dealing with the interpretation of s. 193(*a*) of the *BIA* is *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 115 O.R. (3d) 617, [2013] O.J. No. 1918, 2013 ONCA 282 ("*Pine Tree Resorts*"), where Blair J.A. defined "future rights", at para. 15:

"Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

(Citations omitted)

[20] In this proceeding, the right at issue before the motion judge was the union's existing right to apply for certification at a time when a stay is in place. Accordingly, it cannot reasonably be [page381] said that the union's right to apply for certification depended on a future event that

had not yet occurred.

(b) *BIA s. 193(c)*

[21] The union contends that the rights at issue in its ULP complaint exceed $10,000. In addition to reinstatement of the four terminated employees, the union will seek back pay and damages that will exceed $10,000.

[22] I am not persuaded by this submission. The right of appeal without leave under s. 193(*c*) must be narrowly construed and limited to cases where the appeal directly involves property exceeding $10,000 in value: *Enroute Imports Inc. (Re)*, [2016] O.J. No. 1744, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. In my view, the union's proposed appeal involves a procedural matter -- can the union proceed at this time with its certification application and ULP complaint at the OLRB? The appeal does not involve directly any quantum of money.

(c) *Conclusion*

[23] The union cannot appeal as of right from the motion judge's decision. The receiver's motion to quash the appeal is *prima facie* valid.

(2) *Cross-motion for leave to appeal*

[24] In order to avoid its appeal being quashed, the union brings a cross-motion seeking leave to appeal pursuant to s. 193(*e*) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> .??.??.??.??.
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

[25] The test for granting leave to appeal under this provision was set out by Blair J.A. in *Pine Tree Resorts*, at para. 29:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,
>
> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and [page382]
>
> c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[26] The central issue in this appeal is the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law. The factual context for the intersection of these laws in this case is the receiver's legitimate attempt to sell a large failing company and the important labour rights of some of the company's employees, including their right to seek to join a union and their right not to be fired unfairly. In my view, it is obvious that this issue is one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally.

[27] The resolution of this appeal requires careful consideration of whether the motion judge's decision is consistent with the leading case in this domain involving the intersection of the *BIA* and provincial labour law, namely, the Supreme Court of Canada's decision in *GMAC Commercial Credit Corp.* ù *Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35 ("*GMAC*"). I cannot say that the proposed appeal appears to be unmeritorious.

[28] Finally, I am satisfied that this appeal will not unduly hinder the progress of these insolvency proceedings. The issues on appeal are narrow and the record is modest. Moreover, the receiver did not move to quash the appeal until almost six months after the union filed its notice of appeal and three months after the hearing date was set. As a result, the receiver's motion to quash and the union's cross-motion for leave were argued as part of the appeal proper. It cannot be said that granting leave in these circumstances would unduly hinder the progress of these proceedings.

[29] For these reasons, I would grant the union leave to appeal from the motion judge's order.

The appeal

(3) *The certification application*

[30] In determining whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides: *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, [2012] O.J. No. 6219, 2012 ONSC 7319, 97 C.B.R. (5th) 303 (S.C.J.), at para. 5. While not strictly applicable, a court may take guidance from the jurisprudence addressing the lifting of stays under s. 69.4 of the *BIA*: see *Peoples Trust Co*., at para. 5; and Lloyd W. Houlden, Geoffrey B. Morawetz [page383] and Janis P. Sarra, *The 2016-2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016), at p. 1085. While the motion judge correctly identified these principles, in my view each of the four reasons he relied on to support his decision not to lift the stay presents problems. I will address those reasons in turn.

[31] First, the motion judge reasoned that leave ought to be refused because the certification application would in effect increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group.

[32] In my view, this reasoning rests on supposition. A successful certification application does not guarantee employees better wages; it simply allows employees to combine their bargaining power and rely on the union's assistance in negotiating their terms and conditions of employment. While it is true that upon certification certain rights and obligations crystallize that would not otherwise (*e.g.*, the employer's duty to recognize the union and bargain with it in good

faith), certification does not have the effect of automatically increasing the rights employees have *as creditors*, thereby prejudicing other creditors. It is simply conjecture at this point to assume that the union will be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, at this juncture, allowing the union's certification application to proceed merely entitles the union to a representation vote, not to certification.

[33] The motion judge next reasoned that recognition of the proposed bargaining unit could negatively impact a sale of Ontario Disposal and that, in the circumstances, it would be inequitable to require creditors to accept such an outcome.

[34] In my view, this line of reasoning is speculative. While some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with its clarity of terms, would be attractive to a prospective purchaser. The union, on behalf of its members, has an interest in the business being sold as a going concern and therefore has an incentive to act in a manner that would promote such an outcome.

[35] More fundamentally, however, there is simply no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale. The receiver's statement in its first report that it has "serious concerns" that certification could negatively impact a sale amounts to little more than self-serving speculation. Without having concrete evidence before him to ground the receiver's apparent concern, the motion judge erred in denying the union leave to proceed with its certification application on this basis. Further, even if there was some evidence to substantiate the receiver's concern, the union has indicated its [page384] willingness to delay bargaining a collective agreement for up to a year should the receiver produce such evidence.

[36] The motion judge also reasoned that the union will be able to pursue its certification application against the purchaser as soon as a sale is completed and that, therefore, the union faces no prejudice as a result of the continuation of the stay.

[37] I am not persuaded by this point. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. The right to form and join a union of one's choosing is a fundamental right under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A (the "*LRA*"). While flexibility is required to address the challenges in any particular insolvency proceeding, courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process: *GMAC*, at paras. 50-51.

[38] Further, maintaining the stay and delaying the representation vote risks undermining the legitimacy of the vote. As the board itself noted in this case [at para. 17], "the scheme of the [*LRA*] is premised on quick votes". Quick votes at once minimize the possibility of undue influence and maximize the validity of the vote as a reflection of employee wishes. Delaying the vote prejudices these important objectives.

[39] Moreover, at present, there is nothing on the record that suggests that a suspension of these employees' labour rights will be a short-lived, stop-gap measure. On the motion, the receiver offered no specifics of a planned sale or prospective purchaser. As of the appeal hearing, the receiver had been running the business for over a year with no definite end in sight. In my view, it is unreasonable to characterize as entirely non-prejudicial what amounts to an

indefinite suspension of the union's and employees' ability to exercise labour rights they otherwise enjoy at law, especially where, as here, employees have allegedly faced retribution for so doing.

[40] Finally, the motion judge reasoned that leave ought to be refused given that there is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets.

[41] Again, this is speculative. Whatever the results of the sale, the employees' have presently existing rights, established under the *LRA*, to organize themselves and select a collective bargaining agent. The fact that a court may speculate as to the ultimate efficacy of their decision to organize in this manner [page385] does not diminish the prejudice suffered now by preventing employees from exercising those rights.

[42] In light of the above, I am of the view that the motion judge erred in refusing to lift the stay. It therefore falls to this court to determine afresh whether the union ought to be granted leave to proceed with its certification application.

[43] I turn, then, to consider the relative prejudice to both sides.

[44] On the one hand, the receiver can point to little material prejudice should the stay be lifted. For the reasons discussed above, I do not accept that a sale will be prevented or that sale proceeds will be diminished should the union be granted leave to proceed with its certification application. And while I am willing to accept that certification proceedings inevitably involve some legal costs, I do not accept that these costs would be significant in this case. The union's certification application is an especially simple one. There are six employees in the proposed bargaining unit. The union applied for a unit at a specific street address (rather than a municipal-wide unit) and it appears from the record that there is only one classification of employees on-site. As the union's in-house counsel, a labour lawyer who has been involved in many certification applications, swore in her affidavit in support of the union's motion, "this [certification application] is as straightforward as any I have seen". It is also important to recognize that the employer is only one of a number of corporations within the Ambrose Group and that the the Ontario Disposal location, for which the union seeks certification, represents only one of the employer's two operations (the other operation has been unionized for some time). In these circumstances, I am simply not persuaded that allowing the union's certification application to proceed would cause any more than *de minimis* prejudice to Ambrose Group creditors.

[45] On the other hand, a lot is at stake for the union and the employees. Maintaining the stay prejudices the important objectives "quick votes" are designed to serve, unduly interferes with employees' ability to exercise their statutory labour rights, and, particularly where employees have allegedly been dismissed for exercising those rights, undermines employee confidence in the efficacy of core labour rights and protections.

[46] Labour rights do not end when insolvency proceedings begin. Indeed, s. 72(1) of the *BIA* provides:

> 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 [page386] statute as supplementary to and in addition to the rights and remedies provided by this Act.

(Emphasis added)

[47] As the Supreme Court of Canada explained in *GMAC*, at para. 47, "[t]he effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*". There is no such conflict here.

[48] In light of the above, on weighing the relative prejudice to both sides, I am satisfied that there are sound reasons in this case to lift the stay and allow the union to proceed with its certification application.

(4) *The unfair labour practice complaint*

[49] The threshold for granting leave to proceed against a receiver is not a high one and is designed to protect a receiver against only frivolous or vexatious actions or actions that have no basis in fact: *GMAC*, at para. 55. Given the timing of the dismissals, the *prima facie* merit of the ULP complaint is, in my view, obvious.

[50] The motion judge, however, reasoned [at para. 39] that, given that the commencement of the certification application forms the core factual basis for the ULP complaint, "[i]n this particular case, there can be no ULP complaint independent of the prior commencement of the Certification Application".

[51] The union argues that the motion judge erred in holding that the union was not entitled to bring a ULP complaint without a valid prior commencement of a certification application.

[52] I do not accept this argument. On my reading of his reasons, the motion judge was not holding that, as a matter of law, ULP complaints cannot exist independently of certification applications. He was simply of the opinion that, in the particular circumstances of this case, given its factual basis, the ULP complaint could not stand independently of the certification application.

[53] Even on this more narrow interpretation, however, the motion judge's reasoning is flawed. The fact that the certification application may be an irregularity (unless and until leave is granted *nunc pro tunc*) does not erase the fact that the application was filed. I see no sound basis upon which to preclude the union from relying on this fact to establish how and when the employer became aware of the union's organizing campaign. It would not only be unfair but also a triumph of form over substance to prevent individuals who have lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in a legally distinct proceeding. [page387] In any event, I would hold that the certification application ought to proceed and, as such, so too should the ULP complaint.

E. *Disposition*

[54] I would grant the appellant leave to appeal, allow the appeal, set aside the order of the motion judge, and grant the appellant leave to proceed with its certification application and unfair labour practice complaint before the Ontario Labour Relations Board.

[55] The appellant is entitled to its costs of the appeal which I would fix at $12,000, inclusive of disbursements and HST.

[56] LAUWERS J.A. (dissenting): ù Like my colleague, and for the reasons he gives, I would grant leave to appeal from the bankruptcy judge's order. The issues raised are undoubtedly important to the practice of insolvency law.

[57] However, I would dismiss the appeal of the bankruptcy judge's refusal to lift the stay with respect to both the union certification process, and the unfair labour practice complaint.

[58] The bankruptcy judge is owed deference regarding the exercise of his discretion, and I am not persuaded that he erred in law or in principle, as I will explain.

A. *The Organization of these Reasons*

[59] I begin with an overview of the insolvency system, make several preliminary observations and then turn to describe the governing principles for this appeal. After setting out the bankruptcy judge's reasoning, I apply the governing principles to the facts as he found them, taking into account my colleague's reasoning.

B. *An Overview of the Insolvency Regime*

[60] The insolvency regime in Canada is intricate and the way it addresses the interests of debtors, creditors and others is carefully calibrated. The regime includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). See, generally, the decision of Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, at paras.12-24.

C. *Preliminary Observations*

[61] There is no doubt that "creditors include unionized employees", as Abella J. states in [page388] *GMAC Commercial Credit Corp. -- Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35, at para. 2. Indeed, creditors include all of the debtor's employees, unionized or not.

[62] The intersection of insolvency law and labour relations law has occupied much judicial time in recent years. Judges have struggled to find the right balance between the interests of employees on the one hand, including the importance of maintaining an effective mechanism for rescuing distressed companies if possible, and, on the other hand, for efficiently and fairly liquidating them in the interests of all the creditors including the employees, if it is not possible.

[63] Some instructive contextual comments are made in the paper delivered in a 2017 National Judicial Institute program entitled "From Deterrence to Detente: Overview of the Intersection of Labour Law and the CCAA", authored by Massimo Starnino, Debra McKenna, Lauren Pearce and Glynnis Hawe, members of the Paliare Roland Rosenberg Rothstein LLP law firm. The authors begin the discussion with this observation, at p. 2:

> Experience tells us that in practice the singular focus of creditors is to use leverage in the CCAA process, and sometimes to manufacture leverage through the CCAA process, to

> extract the biggest piece of an economic pie that, no matter how expanded, is inevitably perceived to be inadequate.

[64] The authors note that increasingly, "the battle for value . . . has often been between lenders . . . on the one side, and organized labour on the other" (at p. 2). The complaint is made, at p. 3, that the court is inclined to accept "arguments that the rights and obligations created by provincial labour legislation are in conflict with the restructuring objective of the CCAA and therefore subordinate to the broad discretionary authority afforded to the court". As union counsel did in this case, they urge bankruptcy and *CCAA* judges to take into account how their jurisdiction might be affected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*.

[65] The effort in this case to certify the union after the receiver's appointment represents a new front in the "battle" the authors describe between employees and the other creditors of an insolvent business, and requires careful scrutiny. Even if the effect is limited in this particular case because some of the other units in the debtor's business are unionized already, my colleague's decision would be a critical precedent of broader application. It is necessary to step back and consider the larger context.

D. *The Governing Principles*

[66] There are several avenues into the insolvency regime. An insolvent person's creditor can apply for a bankruptcy order [page389] (*BIA*, s. 43), or the insolvent person can make an assignment (*BIA*, s. 49). An insolvent person can make a proposal (*BIA*, s. 50) and, if it fails, the result is bankruptcy (*BIA*, s. 57). As in this case, a secured creditor can apply to the court for the appointment of a receiver (*BIA*, s. 243). A qualified debtor corporation can make an application under the *CCAA*, which aims at restoring the health of the debtor company, if possible, as a going concern. However, if the company cannot be restored as a going concern, then the *CCAA* or the *BIA* can be used to liquidate the company and, once ordered into bankruptcy, the priorities of the creditors are determined under the *BIA*: see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, [2015] O.J. No. 4147, 2015 ONCA 570, 387 D.L.R. (4th) 426.

[67] While each of these avenues into the insolvency regime has unique features, they also have several interlocking common elements that reflect important underlying principles.

[68] First, the root principle is that creditors in the same class, including employees, are to be treated equally in relation to the distribution of the remaining assets of the estate. This is also known as the *pari passu* principle. It is reflected in s. 141 of the *BIA* and elsewhere: see *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, [1985] S.C.J. No. 68; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, [1990] S.C.J. No. 45, at para. 22.

[69] Second, the date on which the respective rights of creditors are to be determined is the effective date of the bankruptcy, or the date of the appointment of the receiver, or the making of a *CCAA* order. As an incident of the *pari passu* principle, after the effective date no creditor is to be permitted to advance its position over that of similarly situated creditors.

[70] Third, the administration of the debtor's assets is to be orderly. Central to the court's insolvency work is the ability to impose order on what would otherwise be a fractious and expensive free-for-all among the creditors intent on taking as much of the debtor's assets as soon as they could through self-help or litigation. To this end, the trustee or receiver is

responsible for establishing a summary procedure for determining the validity and the value of the creditors' interests. This is to avoid exhausting a debtor's assets in defending a multiplicity of lawsuits, and to avoid distracting the trustee or receiver from the orderly administration of the estate. Hence, the "single proceeding model" for administrating claims expeditiously: see *Century Services*, at para. 22; *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, at paras. 33-34. In bankruptcy, there is a "public interest in the [page390] expeditious, efficient and economical clean-up of the aftermath of a financial collapse", as Binnie J. noted in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 2001 SCC 92, at para. 27.

[71] For example, in *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1394, 2016 ONSC 1802, 35 C.B.R. (6th) 89 (S.C.J.), the *CCAA* judge approved an expedited grievance arbitration process that was substantively the same as, but procedurally different from, the grievance arbitration process in the collective agreement. He did this over the objection of the union, relying on several cases including *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558, 55 C.B.R. (5th) 68 (S.C.J.), *per* Morawetz J.; *White Birch Paper Holding Company (Arrangement in respect of)*, [2010] Q.J. No. 5701, 2010 QCCS 2590, 65 C.B.R. (5th) 186; *AbitibiBowater inc. (Arrangement relatif à)*, [2010] Q.J. No. 2176, 2010 QCCS 1064, *per* Gascon J., as he then was; and *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (S.C.J.), *per* Pepall J., as she then was, at para. 33. The union sought leave to appeal to this court in *Essar Steel*, which was rejected by Gillese J.A.: *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1939, 2016 ONCA 274, 36 C.B.R. (6th) 56. She considered the bankruptcy court's ability to expedite the grievance process to be well-settled law (at para. 33). I return to this case below in discussing the lurking constitutional issues.

[72] The imposition of a stay of proceedings against the debtor is the insolvency regime's primary tool for establishing order. The stay is intended to preserve the status quo; it is "crucial to the orderly administration of the estate and ensures that a creditor will not benefit or improve his or her position at the expense of other creditors": F. Bennett, *Bennett on Bankruptcy*, 19th ed. (Toronto: LexisNexis, 2016), at p. 377. See, also, R.J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at p. 152; J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 57.

[73] A stay is imposed directly by ss. 69-69.3 of the *BIA* in defined circumstances, or by court order in conjunction with a receivership order under s. 243 of the *BIA* and s. 101 of the *CJA*, as in this case: see Wood, at p. 334. In *CCAA* proceedings, the stay is court-imposed under s. 11 *et seq.* of the *CCAA*: see, *e.g.*, *Sproule v. Nortel Networks Corp.* (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967, 2009 ONCA 833, at para. 16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531; *Nortel Networks Corp. (Re)*, at para. 47; Wood, at pp. 333-34; Sarra, at pp. 51-52.

[74] Order is also ensured by the court's ongoing supervision of the insolvency. Receivers appointed by court order under s. 243 of the *BIA*, and monitors appointed under s. 11.7 of the *CCAA*, [page391] are also supervised by the court in accordance with the terms of the appointing order: *Ma (Re)*, [2001] O.J. No. 1189, 143 O.A.C. 52 (C.A.). Finally, order is ensured by the prospect of lawsuits for misconduct, with leave of the court, against the trustee specifically under s. 37, and against the trustee or interim receiver under s. 215 of the *BIA*.

[75] The fourth common element to each of the avenues into the insolvency regime is the existence of a process for managing exceptions. The court has discretion to lift the stay in circumstances where it is necessary. This is provided for in s. 69.4 and in s. 215 of the *BIA*. There is a difference in approach. Under s. 69.4 of the *BIA*, a person seeking leave need not prove a *prima facie* case, only that there are sound reasons, consistent with the scheme of the *BIA* to relieve against the automatic stay, whereas under s. 215 of the *BIA* the applicant must establish a *prima facie* case: Contrast *Ma*, at paras. 2-3, with *GMAC*, at para. 59.

[76] With respect to receivers appointed by court order under the *BIA*, and monitors appointed under the *CCAA*, since the stay flows from the court's order, the court must be persuaded to lift the stay, and applies the same principles.

[77] In discussing the appropriate analysis under s. 215 of the *BIA*, the Supreme Court noted in *GMAC* that the test involves a balancing of "the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver" (at para. 61).

[78] Whatever the applicable test, "lifting the automatic stay is far from a routine matter", as this court noted in Ma, at para. 3. I point out that the insolvency regime does not contemplate that each creditor will proceed by separate litigation after getting leave of the court. Indeed, even if a creditor, suing with leave, succeeds in getting judgment, it is still caught by the stay in respect of recovery. It must be kept in mind that the lifting of a stay is exceptional, in view of the expectation that most creditors' claims will be resolved through the summary procedure, and not through ongoing court or administrative law proceedings: see, *e.g.*, *Moloney*, at paras. 33-34; Bennett, at p. 378; *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 71.

[79] These governing principles have a role to play in the exercise of a bankruptcy judge's discretion and in the proper disposition of this appeal. [page392]

E. *The Application Judge's Reasons*

[80] Drawing on the principles set out above, the bankruptcy judge correctly sets the normative context in his decision, at para. 44:

> A receiver is a court-appointed officer whose role ideally is to take possession of the property of a debtor, to put the business of the debtor on a viable financial basis with a view to maintaining it in the short term, and to sell the business on a basis which maximizes the proceeds of sale available to satisfy the liabilities of the debtor to its creditors. To this end, a receiver is typically granted extensive powers, including the power to terminate the employment of employees who the receiver determines are not reasonably necessary for the conduct of the business to be sold. *The stay of proceedings typically granted is designed to prevent particular creditors from improving their position relative to other creditors.* It is also intended to permit the receiver to concentrate on its principal functions, all without the time and expense of litigation outside of any court-ordered claims process that is required within the receivership proceedings. *In a broader sense, the stay therefore freezes the rights and remedies of creditors as they existed as of the date of the receivership order.* Any motion to

> lift a stay of proceedings should be assessed in relation to the extent that it furthers the purposes of receivership proceedings.

(Emphasis added)

[81] In explaining why he refused leave to the union to commence the certification application before the Ontario Labour Relations Board, the bankruptcy judge states, at para. 46, that the debtor's creditors must not be able to improve their relative positions, and reiterates that the date for determining the relative positions of the creditors is the date the receiver is appointed:

> First, *the effect of the Certification Application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Debtor.* I accept that, if the Certification Application were granted, the Union has agreed, subject to its discretion, to postpone negotiation of a collective agreement under certain conditions for a certain period of time. *Nevertheless, the effect of the Certification Application is to create rights in favour of employees that did not exist at the date of the Receivership Order.* As the proposed bargaining unit had not been certified by the OLRB, the employees of the Ontario Disposal division did not have the right to bargain for a collective agreement. *Commencement of the Certification Application would therefore be contrary to the policy and purpose of the stay of proceedings, which, as mentioned, effectively freezes the rights and remedies of all creditors of the Debtor as of the date of the Receivership Order.*

(Emphasis added)

[82] The bankruptcy judge also refers to a practical reason for refusing to lift the stay "based in the purpose and policy of receivership proceedings" (at para. 47). He points out that recognition of the proposed bargaining unit by the Labour Relations Board "could impact the sales proceeds" (at para. 48). In his view, "it is inequitable to require creditors to accept [page393] a potential diminution of the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen" (at para. 48).

[83] Finally, with respect to the union's unfair labour practice claim, the bankruptcy judge finds, at para. 57: "unless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action". Since he would not have lifted the stay to permit the certification application to proceed *nunc pro tunc*, there was no factual basis for the unfair labour practice claim.

F. *The Principles Applied*

[84] As a commercial list judge with long experience in insolvency, the bankruptcy judge would be fully alive to the relevant law and to the business realities faced by the debtor, the creditors and the receiver. Moreover, he would be intimately familiar with the particular facts of the case. That is why it is important for this court, from the viewpoint of the standard of review, to defer to the bankruptcy judge in the exercise of his discretion under s. 215 of the *BIA* or the terms of the receivership order: see, *e.g.*, *Royal Crest Lifecare Group Inc. (Re)*, [2004] O.J. No.

174, 181 O.A.C. 115 (C.A.), at para. 23, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 104; *Grant Forest*, at paras. 97-99.

[85] Did the bankruptcy judge err in principle or exercise his discretion unreasonably? My colleague says that he did. I disagree.

[86] In this part of my reasons, I begin with the *Charter* issue, continue with the doctrine of paramountcy, and then attend to the reconciliation of the *BIA* and labour law, specifically the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), the *pari passu* principle, the effect of certification on sale proceeds and the issue of prejudice.

(1) *The Charter issue*

[87] More atmospherically than substantively, in aid of its argument that s. 72 of the *BIA* obliges the bankruptcy court to give full effect to the *LRA* bargaining rights and process, the union enlists the 2015 labour trilogy of the Supreme Court of Canada: *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, [2015] S.C.J. No. 1, 2015 SCC 1 ("*MPAO*"); *Meredith v. Canada (Attorney General)*, [2015] 1 S.C.R. 125, [2015] S.C.J. No. 2, 2015 SCC 2; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, [2015] S.C.J. No. 4, 2015 SCC 4. The appellant quotes para. 58 [page394] of *MPAO* in which the court states that the purpose of the *Charter* s. 2(*d*) guarantee of associational rights is "to protect individuals against more powerful entities". The court stated: "By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires." The court added: "In this way, the guarantee of freedom of association empowers vulnerable groups", including employees, "and helps them work to right imbalances in society".

[88] The appellant's factum simply asserts that: "Given the constitutional protection afforded to this process, the court should be wary of allowing the existence of a receivership to frustrate the certification application." Fair enough, but the union had the entire life of the business before insolvency within which to pursue certification.

[89] In oral argument, counsel for the union expanded on this brief allusion. He asserted that the *MPAO* decision constitutionalized bargaining rights, and argued that the right of employees to unionize should "supersede" any concern in relation to the sale of the business. He added that there is no empirical evidence that unionization will reduce the sale value of the asset, but even if that were to be the outcome of the employees' exercise of their rights under the labour legislation: "So be it."

[90] However, counsel for the union did not take the position that the constitutionalization of labour rights takes away entirely the bankruptcy court's discretion under s. 215 of the *BIA* or the order appointing the receiver to refuse to lift the stay where labour rights are in issue. He acknowledged that "sometimes the discretion must be exercised" and cited *Hawkair Avation Services Ltd. (Re)*, [2006] B.C.J. No. 938, 2006 BCSC 669, 22 C.B.R. (5th) 11.

[91] In *Hawkair*, the union sought to certify just before the company was to bring forward its reorganization plan under the *CCAA*. The *CCAA* court concluded that in the context the prejudice to the union was minimal while the prejudice to the creditors was great. By contrast,

the union points out that in this case there is no imminent reorganization and there is no empirical evidence of prejudice.

[92] In my view, this constitutional issue was not properly joined before the bankruptcy judge, nor before this court. It is not sufficient to simply allude to associational rights under s. 2(*d*) of the *Charter* and to the 2015 labour trilogy and assert they are dispositive. A similar argument was made in *Essar Steel* to the effect that the grievance provisions of the collective agreement were not subject to the *CCAA* stay. The constitutional [page395] argument was more fully developed in that case, and the *CCAA* court's rejection of it was approved by this court.

[93] In my view, giving unions carte blanche to begin certification efforts for insolvent enterprises after the date of the appointment of a trustee or receiver or the date of an order under the *CCAA* would effect a sea change in insolvency law; it would profoundly alter the economic dynamics of insolvency, and whether the *CCAA* route is preferable to outright bankruptcy. The consensus is that the *CCAA* has been effective in salvaging businesses and jobs, including union jobs. It would be unwise for this court to sanction such a profound change in the absence of full evidence and argument addressing both whether the s. 2(*d*) *Charter* right of employees has been substantially limited in the insolvency context, and whether any such limit is demonstrably justified under s. 1 of the *Charter*: see *Gordon v. Canada (Attorney General)*, [2016] O.J. No. 4330, 2016 ONCA 625, 404 D.L.R. (4th) 590, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 444; [2016] S.C.C.A. No. 445. The issue is too important to the insolvency regime and too complex for the drive-by analysis the union proposes.

[94] In the article "From Deterrence to Détente", the authors specifically refer to "the acquisition of collective bargaining rights" as one of the new fronts in the "battle" they describe between employees and the other creditors of an insolvent business.

(2) *The role of paramountcy*

[95] In support of his view that the *Labour Relations Act* must be given full operational scope in this case, my colleague relies on the underlined words in s. 72 of the *BIA*, which provides:

> 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.

(Emphasis added)

[96] He draws support from the words of Abella J., who said in *GMAC* that s. 72 of the *BIA* "is not intended to extinguish legally protected rights unless those rights are in conflict" with the *BIA* (at para. 47). The appellant also points to para. 51 of *GMAC*, where Abella J. quoted *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, [2004] S.C.J. No. 3, 2004 SCC 3, at para. 43:

> [E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at law . . . so long as the doctrine of paramountcy is not [page396] triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

[97] My colleague concludes that there must be an operative conflict before the principle of paramountcy can give the *BIA* priority over the *LRA*, and asserts there is no such conflict here.

[98] I disagree with his construal of paramountcy and his assessment that no conflict exists on the facts of this case. Neither *Crystalline* nor *GMAC* is the latest word from the Supreme Court on paramountcy.

[99] The doctrine of paramountcy must be sensitive to the context in which it operates. There are two distinct branches to the test, as explained by Gascon J. in *Moloney*, which he echoed in the companion case *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, [2015] 3 S.C.R. 397, [2015] S.C.J. No. 52, 2015 SCC 52. At para. 18 of *Moloney*, Gascon J stated:

> A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

[100] He explained, at para. 25:

> In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, [*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3] at para. 73.

[101] Justice Gascon noted, at para. 29, that "if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict". He added: "Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law" (citations omitted). In remedial terms, he stated: "In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists." [citations omitted]

(3)*Reconciling the BIA and the Labour Relations Act*

[102] In this case, two distinct regulatory regimes come into contact: the Ontario labour relations regime and the federal insolvency regime. There is no operative incompatibility or [page397] conflicting language on the facts of this case to engage the first branch of the paramountcy analysis. However, in my view the second branch is engaged, under which the bankruptcy judge is obliged to consider the exigencies of each regime and reconcile them if possible.

[103] The court's task here is not to reconcile statutory language, but to reconcile different policies. This is a nuanced, difficult and delicate task informed by the bankruptcy judge's knowledge both of the law and the operation of the marketplace in the context of the specific matter before him, drawing also on his experience and wisdom, and his sense of what is commercially reasonable. The bankruptcy judge brought just that perspective to this case, as I will explain.

[104] Bankruptcy judges have proven to be adept at managing the interface between the two regulatory regimes. A good example is *Essar Steel*, where the *CCAA* judge found a way to reconcile grievance arbitration required by the collective agreement with the restructuring need for speed, expediency and reduced process costs.

[105] It is worth pointing out that s. 33 of the *CCAA*, which came into force in 2009, directly addresses collective agreements. Subsection 33(1) provides:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered *except as provided in this section or under the laws of the jurisdiction governing collective bargaining* between the company and the bargaining agent.

(Emphasis added)

[106] Can anything be drawn from this provision? It plainly assumes a collective agreement is in existence at the date proceedings are commenced and does not contemplate a new certification. This is a reasonable assumption for insolvency proceedings in general, built as they are to preserve the status quo.

(4) *The pari passu principle*

[107] In my view, the policy contest presented in this case is precisely the kind of conflict between provincial regulatory regime for labour relations and the federal insolvency regime that the paramountcy doctrine is intended to recognize and accommodate.

[108] My colleague relies on the Supreme Court's decision in *GMAC*. In that case, the issue was whether leave should be granted to the union under s. 215 of the *BIA* so that the Labour Relations Board could determine "successor employer" status. [page398]

[109] However, there is a crucial distinction between this case and *GMAC*. The union had long been certified in *GMAC*. By contrast, in this case, the certification effort followed the appointment of the receiver by several months. This distinction is important because it engages one of the fundamental policy principles in insolvency law, which is to preserve the status quo among the creditors as of the date the receiver was appointed. The bankruptcy judge accurately identified that this principle would be violated if the debtor could be forced to accept union certification post-bankruptcy. In my view, my colleague does not give due weight to this critical principle.

[110] In particular, my colleague says the bankruptcy judge was wrong to refuse leave on the basis that the certification application would effectively increase the rights of the members of the post-bargaining unit relative to the other creditors. He takes the view that "certification does not

have the effect of automatically increasing the rights employees have as creditors, thereby prejudicing other creditors".

[111] I take a different view. It seems quite plain that neither the employees nor the union would be pursuing certification if it did not provide an advantage in the bankruptcy process. While a successful certification application does not guarantee employees better wages or working conditions, their enhanced bargaining power is surely what unionization is all about: see *MPAO*, at para. 70.

[112] The union's offer, as the bankruptcy judge notes [at para. 46], is this: "*subject to its discretion*, to postpone negotiation of a collective agreement *under certain conditions for a certain period of time*" (my emphasis), in effect to delay bargaining the first collective agreement for up to a year. This offer is plainly tactical, and the fact it was made at all simply underlines the force of the point that the union expects enhanced bargaining power to be effective in the insolvency.

[113] In addition to the operation of successor rights, and access to unfair labour practice remedies, the court must take cognizance of the significant protections given to a union seeking to negotiate a first collective agreement, which may include the imposition of such an agreement through arbitration ordered by the labour board under s. 43 of the *Labour Relations Act*. This is distinct from the more limited protections provided to the union in subsequent negotiations.

(5) *The effect of certification on the sale proceeds*

[114] In its first report to the court, the receiver advised: [page399]

> The Receiver has no long-term business goals or strategic plans for the Debtors' assets. Given the temporary nature of its appointment and its mandate to maximize realizations for the benefit of all stakeholders by, ideally, selling the Debtors' businesses as going concerns, the Receiver (unlike an ultimate purchaser) is fundamentally ill-equipped to evaluate the certification application properly nor to bargain collectively. Moreover, the Receiver is seriously concerned that any decision it makes or agreement it enters into with the Union will be unacceptable to prospective purchasers and will suppress realizations.
> The collective bargaining process, if permitted to proceed, will also add significant professional costs to the Receiver's administration. The cost of a labour negotiation will, in effect, be a super-priority expense that will ultimately be absorbed by and materially prejudice other creditors through reduced realizations and distributions.

[115] My colleague disputes the application judge's reasoning that certification of the bargaining unit could negatively impact a sale of the Harmony Road depot to the prejudice of all the creditors, on the basis that "this line of reasoning is speculative". He asserts that "while some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with the clarity of terms, would be attractive to the perspective purchaser", and adds that "the receiver's statement in its first report that it has aeserious concerns' that certification could negatively impact a sale amounts a little more than self-serving speculation".

[116] In my view, the bankruptcy judge's statement that certification could negatively impact the sale of the Harmony Road depot is self-evidently true and falls well within the margin of appreciation that is his due, given his knowledge of the commercial realities. I would be most reluctant to disparage the advice of the court-appointed receiver as mere "self-serving speculation". Such an officer has no self-interest and owes duties to all the parties and to the court. In my view, it was open to the bankruptcy judge to accept the receiver's advice.

[117] If the union achieves certification and the Harmony Road depot is sold in such a way as to attract successor labour rights, then any prospective purchaser of the depot will be faced with the obligation to immediately embark on first collective agreement negotiations. This is not a small additional burden on what would otherwise be the terms and conditions of the depot's sale. It will plainly discourage some potential bidders and therefore negatively affect the depot's market price by reducing the number of buyers who would be willing to engage. Any cooling of the interests of potential purchasers in the debtor's assets would reduce the proceeds of sale to the prejudice of all the creditors. With respect, this is more than a mere "inconvenience to the receivership process". [page400]

[118] If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their leverage over the other creditors.

(6) *The role of prejudice*

[119] I agree with my colleague that the bankruptcy judge's decision does prejudice the employees and the union, at least measured by how certification would work if there were no insolvency. But that is not the right measure under the *BIA*.

[120] While it was possible in *GMAC* and *Essar Steel* to give considerable scope to the operation of the labour relations regime in relation to *existing collective agreements*, the bankruptcy judge concluded it was not desirable in this case because so many essential insolvency principles would be violated. This is a valid consideration, as the Supreme Court noted in *Moloney* and in *407 ETR*.

[121] There is limited scope for accommodating a certification effort after the receiver's appointment, because doing so would contradict bedrock insolvency principles. In his reasons, the bankruptcy judge identifies the central question as whether "unions have a right to commence certification applications during receiverships" (at para. 41). The bankruptcy judge's implicit response is that there is no universal answer; it is a case-specific issue for the judge to determine based on the facts. I agree. I would defer to the bankruptcy judge's judgment in the context of this case.

(7) *The unfair labour practice complaint*

[122] The bankruptcy judge showed that the unfair labour practice allegation was linked to the certification effort. In a factual sense there is no doubt that had the certification effort not started, there would have been no basis for an unfair labour practice allegation. If the certification effort was misguided, as he found, then there is no basis whatever for the complaint. Again, I would defer to the bankruptcy's judge's decision.

G. *Disposition*

[123] I would dismiss the appeal respecting the bankruptcy judge's refusal to lift the stay both with respect to the union certification process and the unfair labour practice complaint.

Appeal allowed.

Notes

1 At the appeal hearing, the court heard argument on the two preliminary issues. The court determined that the union could not bring its appeal as of right under s. 193(*a*) or (*c*) of the *BIA*. However, the court granted the union leave to appeal pursuant to s. 193(*e*) of the *BIA*. The court announced that reasons supporting these two conclusions would follow in the judgment on the main appeal.

1994 CarswellOnt 266
Ontario Court of Justice (General Division — Commercial List)

Royal Bank v. Sun Squeeze Juices Inc.

1994 CarswellOnt 266, [1994] O.J. No. 567, 24 C.B.R. (3d) 302, 46 A.C.W.S. (3d) 821

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.

Farley J.

Heard: February 28, 1994
Judgment: March 16, 1994
Docket: Doc. B253/93

Counsel: *J.A. Carfagnini* and *R. Chadwick*, for Coopers & Lybrand Ltd., court-appointed receiver and manager.
Paul G. Macdonald, for plaintiff.
Edward M. Morgan, for defendants.
Ronald M. Moldaver, Q.C., for Josef Blum, majority shareholder of defendants.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Debtors and creditors
VII Receivers
VII.2 Jurisdiction of court to appoint
Headnote
Bankruptcy --- Receiving order — Effect of receiving order
Receivers --- Jurisdiction of court to appoint
Receiving orders — Effect — Court having jurisdiction to require receiver-manager to consent to receiving order pursuant to petition — Appropriate for court to require consent where bankruptcy best position for debtor and for trustee to resolve certain issues — No interested party to be prejudiced by receiving order.
The bank issued a petition for a receiving order against the defendant company, naming a proposed trustee. The company filed a Notice Disputing the Petition. The court appointed a receiver-manager, which reported that the company's operations were no longer feasible. The receiver-manager was authorized by the court to realize upon the company's assets.
The issue before the court was whether it should authorize the receiver-manager to consent to the receiving order.
Held:
The receiver-manager was directed to consent to a receiving order pursuant to the petition.
The evidence showed that the company was indebted to the bank and that it had not, within the six months preceding the petition, met its liabilities generally as they became due. Several actions had been commenced against the company. The receiver-manager saw little benefit to incurring further costs to defend the actions given the bank's priority position and the fact that it would suffer a significant shortfall on its loans. It was appropriate in the circumstances to direct the receiver-manager to consent to the receiving order. Bankruptcy would allow the trustee to resolve the allegations of fraudulent preferences to the company's majority shareholder, and to investigate suspicious circumstances surrounding a secret bank account. Further, since the company was merely an insolvent shell, its assets having been sold and its operations having been discontinued, no interested party would be prejudiced by a receiving order.
Table of Authorities
Cases considered:

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), affirmed (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *referred to*

Brandon Packers Ltd., Re (1962), 3 C.B.R. (N.S.) 326, 33 D.L.R. (2d) 503 (Man. C.A.), leave to appeal to S.C.C. refused [1962] S.C.C. ix — *referred to*

Can Corp Financial Services Ltd., Re (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) — *referred to*

Chinavision Canada Corp. v. Ling (January 12, 1994), Doc. B285/92, Farley J. (Ont. Gen. Div. [Commercial List]) — *referred to*

Everex Systems Inc. v. Pride Computer Distribution Ltd. (1988), 68 C.B.R. (N.S.) 24 (B.C. S.C.) — *considered*

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — *referred to*

Goodis-Wolf Inc., Re (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) — *considered*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*

Prairie Palace Motel Ltd. v. Carlson (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) — *referred to*

Western Hemlock Products Ltd., Re (1961), 2 C.B.R. (N.S.) 207, 35 W.W.R. 184, 27 D.L.R. (2d) 457 (B.C. S.C.) — *referred to*

Statutes considered:

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

s. 38

Company Act, R.S.B.C. 1979, c. 59 —

s. 110

s. 111

Petition for receiving order.

***Farley J.*:**

1 The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

2 On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately $16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court au thorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

3 Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately $1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

4 Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

5 Actions have been commended and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the $75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: *Re Can Corp Financial Services Ltd.* (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) at p. 107.

6 As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p. 240; *Re Brandon Packers Ltd.* (1962), 33 D.L.R. (2d) 503 (Man. C.A.), at pp. 510-511 and 513, leave to appeal to S.C.C. refused [1962] S.C.C. ix; *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) at p. 165; *Chinavision Canada Corp. v. Ling* (Ont. Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in *Brandon* at p. 511:

> The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the *Companies Act*). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded ...

7 As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed. (London: Sweet & Maxwell, 1989), at p. 219; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (C.A.); *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at p. 111.

8 Freedman J.A. in *Brandon, supra*, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C. S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the *Company Act*, R.S.B.C. 1979, c. 59.

9 As Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* 3rd ed., Vol.1, (Toronto: Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-2-49 where it is said [at D§12]:

> **(a) Conflict Between Assignment and Petition**

> There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: *Re Lalonde* (1924), 4 C.B.R. 416 (Ont. S.C.); *Re Lakeshore Golf & Country Club* (1933), 19 C.B.R. 127 (C.S. Que.); *Re Slavonia SS Agencies* (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is that bankruptcy proceedings are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: *Re Croteau & Clark Ltd.* (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. (413 (S.C.).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in *Chinavision, supra*, at p. 4 as well.

10 Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See *Prairie Palace, supra*, at p. 65; *Re Western Hemlock Products Ltd.* (1961), 2 C.B.R. (N.S.) 207 (B.C. S.C.) at p. 210; *Chinavision, supra*, at pp. 4-5. Guy J.A. in *Brandon, supra*, said at p. 513:

> Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

11 Thus this mater boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in *Kerr, Hat* and *Nova, supra*. The question of "need" for a bankruptcy was canvassed in *Prairie Palace, supra*, at p. 165 and *Chinavision, supra*, at pp. 4-5.

12 Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited *Re Goodis-Wolf Inc.* (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-155 that:

> *The existence of a prior civil action has not always resulted in the court staying or dismissing a petition*: see, for example, *Re Hutchens* (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and *Re H.M. Simpson Ltd.* (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, *(*sub nom. *Jenkins Transfer Ltd. v. H.M. Simpson Ltd.)* 246 A.P.R. 307 (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory

to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider, on balance, that it is preferable that the litigation be allowed to take its course.

13 [emphasis added]

14 That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the $75 million claim against the Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

15 In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to s. 38 of the BIA. There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

Receiver-manager directed to consent to receiving order.

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Sequestration of Solution Highpoint Inc. **2022 QCCS 3505**

SUPERIOR COURT
(Commercial Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT MONTREAL
OF

No : 500-11-061189-227

DATE : September 28, 2022

UNDER THE PRESIDENCY OF **THE HONORABLE** **MICHEL A. PINSONNAULT, JCS**

In the case of the sequestration of:

Highpoint Solution Inc.
Debtor
And
Raymond Chabot Inc.
Sequestration
c.

Unisson Acoustic Speakers Inc.
And
Liftket Entertainment Inc.
Applicants
And
National Bank of Canada
Guaranteed Creditor

JUDGMENT ON APPLICATIONS FOR REPOSSESSORSHIP OF PROPERTY
(Articles 1605 *C.cQ.* and 81.1 *LFI*)

PREVIEW

[1] On July 22 and 25, 2022, the Applicants, Les Enceintes Acoustiques Unisson inc. (" **Unisson** ") and Liftket Entertainment inc. (" **Liftket** ") filed two Applications for Repossession of Property pursuant to which they asked the Court to declare the extrajudicial resolution of various sales of equipment that they made in favor of the Debtor Solution Highpoint inc. (" **Highpoint** ") since February 2022 with respect to Liftket (the " **Liftket Application** ") and since April 2022 with respect to Unisson (the " **Unisson Application** "), all pursuant to articles 1605 et seq. of the *Civil Code of Québec* (" **CCQ** ").

[2] Alternatively, the Applicants request the Court to judicially resolve all such sales of the equipment more fully listed in their respective legal proceedings and to order Raymond Chabot Inc., as Receiver of the Assets [1] of Highpoint (the " **Receiver** "), to proceed to return possession of the same to them.

[3] On August 31, 2022, Liftket amended the Liftket Application so that, in addition to the conclusions related to the out-of-court resolution [2] , the Court also granted a *Request for the Repossession of Goods* [3] sold and delivered to Highpoint within thirty days of the date of appointment of the Receiver, in accordance with the provisions of section 81.1 (1) of the *Bankruptcy and Insolvency Act* (" ***BIA*** ") (the " **Liftket 81.1 BIA Application** ") and ordered the Receiver to return to it the equipment identified in Invoice 1629 dated June 1, 2022 [4] .

[4] The Receiver refused to comply with Request 81.1 LFI Liftket for reasons which will be discussed in more detail below.

[5] The Receiver and the National Bank of Canada (the " **NBC** "), as Highpoint's secured creditor benefiting from a chattel mortgage on all of the Debtor's assets, including the equipment targeted by the Applicants, contest the latter's Claims.

[6] BNC is also a secured creditor of Highpoint under interim financing in the amount of $640,000 authorized by the Court pursuant to the Order appointing Raymond Chabot Inc. as Receiver dated August 8, 2022 (the " **Receiving Order** "), such claim being secured by

the Interim Lender's Charge [5] on all of Highpoint's Property including the equipment claimed by the Applicants.

[7] For its part, the BNC concludes with the rejection of the Unisson and Liftket Requests (collectively the " **Requests** ") on the following grounds:

- Application 81.1 LFI Liftket must be rejected, because Liftket is not a *supplier* of *goods* in the current context within the meaning of Article 81.1 LFI;
- The Requests for extrajudicial resolution of sales based on Article 1605 C.cQ must be dismissed, because Highpoint was never in default by *operation of law* within the meaning of Article 1597 CcQ before August 8, 2022;
- Furthermore, the extrajudicial resolution would not have the effect of extinguishing the BNC's movable mortgage relating, among other things, to the equipment referred to by the Applicants.

[8] The Receiver's position is - and has always been - that the Unisson and Liftket Applications are unfounded in fact and in law, and constitute essentially attempts by ordinary creditors of Highpoint to initiate an asset scramble with a view to obtaining an undue preference over other creditors of Highpoint, all contrary to the objectives and guiding principles of the *BIA* .

[9] Both of the Applications were initially presentable on 8 August 2022, the same date on which the Motion for the appointment of a receiver [6] was presentable. However, at the request of counsel for Unisson and Liftket, their Applications were adjourned *sine die* .

[10] Following the appointment of Raymond Chabot Inc. as Receiver of Highpoint's Assets, the latter initiated, in accordance with the powers granted to him by the Court, a solicitation process (the " **Solicitation Process** ") aimed at soliciting offers with respect to the Debtor's business and Assets – including the equipment acquired by the Debtor from Unisson and Liftket, and with respect to which the latter are now claiming restitution (the " **Unisson Equipment** " and the " **Liftket Equipment** ").

[11] Although on August 8, 2022 [7] , Unisson and Liftket's attorney was present at the hearing for the appointment of a Receiver for the Highpoint Property, the attorney never made any objections or opposition on behalf of his clients as to:

- The appointment of a Receiver for the Highpoint Assets;
- The initiation of the Solicitation Process by the Receiver for all Highpoint Assets including Unisson and Liftket Equipment; and
- The establishment of the Temporary Lender's Charge in the amount of $768,000 in favor of BNC covering all Highpoint Properties including Unisson and Liftket Equipment.

[12] Further, as part of the Solicitation Process, the Receiver was advised by certain parties that they would be potentially interested in acquiring the Debtor's business and/or assets, as a going concern (" *as a going concern* "), provided that the Receiver was able to obtain from the Court an approval and vesting order providing clear title to all of the Debtor's Property, including, without limitation, the Unisson Equipment and the Liftket Equipment.

[13] For these reasons, the Receiver maintains that the Unisson and Liftket Claims must be decided once and for all.

[14] The Tribunal noted that in the context of this litigation, the parties have agreed to reserve all their rights and arguments in relation to the formal identification of the Equipment

claimed by Unisson and Liftket including the determination of whether such equipment is still in its original condition or whether it has been modified or incorporated into other Highpoint Property. This second step would also allow for the determination of whether the equipment in question is in the possession of third parties, if applicable. Such questions will be relevant only to the extent that the Tribunal grants one and/or the other of the Unisson and Liftket Requests.

[15] In short, were Unisson and Liftket entitled to resolve extrajudicially (without any legal action) all their sales of equipment made in favour of Highpoint since February 2022 in a context where this equipment was and still is under the control of the Receiver [8] appointed by the Court under the provisions of the BIA and consequently, to repossess it?

[16] Alternatively, are Unisson and Liftket entitled to seek judicial resolution of all their sales retroactively to February 2022 despite the provisions relating to " *Non-interference with the Receiver, the Debtor and the Assets* " found in paragraphs 22 [9] and 23 [10] of the Sequestration Order of 8 August 2022?

[17] Finally, is Liftket entitled to claim possession of all Liftket Equipment sold and delivered under Invoice 1629 in accordance with the provisions of Article 81.1 LFI relating to the rights of suppliers of unpaid goods?

[18] The Unisson and Liftket Applications must necessarily be assessed, among other things, in the light of the circumstances and the factual context which prevailed at the time which concerns us.

CONTEXT and ANALYSIS

[19] On July 4, 2022, at the request of BNC, the Debtor's secured creditor, the Court issued an order (the " **Interim Receivership Order** ") pursuant to section 47 BIA appointing Raymond Chabot Inc. as interim receiver of the Highpoint Property [11] **(the " Interim Receivership Order** "). The Interim Receivership Order was issued by the Court on the basis of " *particular facts* " 1 that made the issuance of this order " *necessary and appropriate* " 2 in order to allow, on an " *urgent* " basis, the " *prot* [ection]" and " *preserv* [ation]" *of the Debtor's assets* ":

> **WHEREAS** the Applicant is about to provide notice pursuant to subsection 244(1) of the BIA and notice of exercise of a hypothecary right;
>
> **WHEREAS** the urgency of proceeding with the hearing of the *ex parte* Motion has been demonstrated and that it is appropriate in the circumstances to grant the Motion without having first notified Solution Highpoint Inc. (the " **Debtor** ") or any other party;
>
> **CONSIDERING** the Debtor's behavior which led it to, in particular:
>
> > (i) transfer, without the Applicant's knowledge, a sum totaling at least $895,000 to Pierre Gaston, to the detriment of its working capital and its cash position;
> >
> > (ii) to place itself in a situation of serious liquidity crisis;
> >
> > (iii) to use credits advanced by the Applicant for purposes other than those for which they were intended without the Applicant knowing to date what they were actually used for;
> >
> > (iv) to sell outside the ordinary course of business recently purchased equipment at prices likely below fair market value; and

(v) to attempt to hide the true commercial and financial situation of the Debtor from Raymond Chabot and the Applicant;

CONSIDERING the worrying practices denounced and which are currently being verified by Raymond Chabot;

CONSIDERING the particular facts of this case;

WHEREAS each insolvency case must be subject to a tailor-made approach adapted to its particular facts;

WHEREAS it is expedient in order to preserve the assets of the Debtor that the interim receiver be granted broad powers, including the power to question certain representatives of the Debtor and Pierre Gaston and all powers necessary to recover the assets belonging to the Debtor;

WHEREAS the powers sought are necessary for the preservation of the Debtor's assets and the preservation of the rights of all creditors;

WHEREAS all the powers sought are of a conservative nature;

CONSIDERING the representations of the Applicant's lawyers, the testimonies of a representative of the National Bank of Canada and the representative of Raymond Chabot;

CONSIDERING the provisions of the LFI and the urgency of the situation, as described in the Request;

WHEREAS it is appropriate and necessary to appoint an interim receiver for the Debtor's assets;

[20] Thus, as of July 4, 2022, the Unisson and Liftket Equipment were part of the Assets under the control and in the possession of the Interim Receiver.

[21] On July 26, 2022, the BNC served a Request for the appointment of a receiver (the " **Request for Receiver** "), requesting, in particular:

(a) the appointment of RCI as receiver of the Debtor's Property pursuant to section 243 LFI;

(b) the approval of interim financing (the " **Interim Financing** ") secured by a super-priority charge over all of the Debtor's Property, to enable the Debtor to continue its operations, under the supervision of the Receiver, and to conduct a solicitation process in respect of the Debtor's assets (the " **Solicitation Process** ");

(c) the approval of a Solicitation Process; and

(d) a stay of all proceedings or enforcement measures against the Debtor and its Assets as of the date of the Interim Sequestration Order – *including any attempt to exercise a right of rescission and/or reclamation* .

[22] On August 8, 2022, the Court issued the Sequestration Order granting the Motion for Sequestration as well as the conclusions sought above, all in the presence and without opposition from Unisson's lawyer and Liftket.

[23] Since then, by means of the Interim Financing, the Receiver has maintained and continued the operations of the Debtor in parallel with the Solicitation Process, all in the hope of being able to sell the business and/or assets of the Debtor, as *a going concern* and to preserve some 40 jobs.

[24] The Receiver informed the Court that the issues raised by the Unisson and Liftket Applications have a significant impact on the Solicitation Process due to the uncertainty surrounding the fate of the Unisson and Liftket Equipment.

[25] It is now appropriate for the Court to consider the steps taken by Unisson and Liftket to arrive at the Claims which are the subject of this judgment.

1. THE CIRCUMSTANCES LEADING TO THE SUBMISSION OF THE UNISSON APPLICATION

[26] According to the Unisson Application of July 22, 2022, Unisson describes itself as a company specializing in the creation and construction of aluminum and steel structures and components designed for industrial construction, shows, immersive experiences, architectural projects, outdoor events (artistic, sporting, corporate) and field activations. [12]

[27] In the Unisson Application, Unisson describes the extent of its business relationship with Highpoint and the reasons leading to the conclusions sought:

> and
>
> 3. Between April 1 June 23, 2022, the Applicant sold and delivered equipment (the " **Equipment** ") to the Debtor for an amount of $856,931.69, as shown on the invoices and delivery notes, **Exhibit R-3;**
>
> 4. The debtor is in default of paying the sums owed to the applicant, which are due and payable;
>
> 5. The debtor refuses or neglects to pay the amounts owed to the applicant;
>
> 6. The Debtor is insolvent and, on July 4, 2022, at the request of its secured creditor the National Bank of Canada, an interim receiver was appointed under the *Bankruptcy and Insolvency Act* with power to take possession of the Debtor's assets, as appears from the Order appointing an interim receiver issued on July 4, 2022 in this file;
>
> 7. Given its insolvency, the debtor has lost the benefit of the term and is in default by operation of law ;
>
> 8. In view of the default and the delay, the applicant exercised the right to consider the sale of the Equipment terminated automatically ;
>
> 9. On July 5, 2022, the applicant notified the debtor of the extrajudicial resolution of the sale and demanded the return of the Equipment, as appears from the applicant's letter of July 5, 2022 sent by email to the debtor , **Exhibit R-4;**
>
> 10. The debtor did not respond to the applicant's letter Exhibit R- 4 ;
>
> 11. Given the resolution of the sale of the Equipment, the applicant is the owner of the Equipment mentioned in the invoices **Exhibit R-3** , and the applicant is entitled to claim them;
>
> 12. The applicant requests the Court to declare the extrajudicial resolution of the sale of the Equipment, alternatively to resolve the sale of the Equipment, to declare the applicant the owner of the Equipment, and to order that the Equipment be returned to the applicant.
>
> [Emphasis added]

[28] On July 6, 2022, following the issuance of the Interim Sequestration Order issued on July 4, 2022, Unisson, through its attorney, sent the Interim Sequestration Officer by

email [13] a *Request for Repossession of Goods* under Section 81.1(1) BIA [14] (the " **Unisson 81.1 BIA Request** ").

[29] In Claim 81.1 LFI Unisson, Unisson surprisingly claims possession of *all goods* sold and delivered by Unisson to Highpoint between April and June 2022 by providing the Interim Receiver with invoices [15] (the " **Unison Invoices** ") and corresponding delivery notes [16] (the " **Unison Delivery Notes** "), all of which are attached to Claim 81.1 Unisson.

[30] Even before the Interim Receiver could take a position on Claim 81.1 LFI Unisson, the latter's lawyer contacted the Interim Receiver's lawyer on July 8, 2022 to demand the issuance of a release, failing which he was preparing to *seize Équipements Unisson before judgment* without prior authorization from the Court, because there was no stay of proceedings against the Debtor in the Interim Receivership Order.

[31] The July 8, 2022 call is followed by an email from Unisson's lawyer stating that the Unisson Invoices transmitted total " *$503,468.64 in invoices delivered within 30 days of our Request* " [17] and that according to him, the " *proof* [was] *clear* ", and "[Unisson] [was] *entitled to seize* [all] *the* [Unisson Equipment] before judgment *and that procedures to this effect* [were] *ready* ". [18]

[32] On July 12, 2022, the Interim Receiver sent Unisson's lawyer a letter (the " **Letter of July 12, 2022** ") advising him that the latter was unable to grant Claim 81.1 LFI Unisson. [19]

[33] From the outset, Claim 81.1 LFI Unisson was based on the provisions of section 81.1(1) LFI which read as follows under the heading " *Right of the unpaid supplier* " setting out the criteria which must be satisfied to give rise to the remedy offered:

> 81.1 (1) Subject to this section, a supplier who has sold to a buyer, but has not paid for them in full, goods intended for use in the buyer's business and has delivered them to the buyer or his agent may have access to the goods , and the buyer, trustee, receiver or agent shall be required to release them, and may repossess them at his own expense, if the following conditions are met :
>
> (a) within fifteen days after the date on which the purchaser becomes bankrupt or subject to receivership , he submits to the purchaser, the trustee or the receiver, in the prescribed form, a written request to that effect containing details of the transaction;
>
> (b) the goods were delivered within thirty days preceding that date ;
>
> (c) at the time of the presentation of the application, the goods are in the possession of the buyer, trustee or receiver, can be identified as those delivered by the supplier and have not been paid for in full, are in the same condition as when delivered, have not been resold to an arm's length person and are not the subject of a promise of sale to an arm's length person;
>
> (d) neither the purchaser, nor the trustee, nor the sequestrator has, upon presentation of the request, paid the outstanding balance.
>
> [Emphasis added]

[34] Given the events and subsequent findings made by the Interim Receiver, it is important to clarify the latter's position as set out in the Letter of July 12, 2022 addressed to Unisson's lawyer.

[35] First, given that Claim 81.1 LFI Unisson was based on section 81.1 LFI, the Interim Receiver had to conduct an analysis to determine — based on the documents provided by Unisson — which of the Unisson Equipment could have been delivered to Highpoint during the thirty days preceding the issuance of the Interim Receivership Order (i.e. between June 4 and July 4, 2022) – assuming that such a time limit was applicable (which is not the case since an interim receivership is not covered by section 81.1 LFI).

[36] However, of the twenty-six Unisson Invoices transmitted to the Interim Receiver in support of Claim 81.1 LFI Unisson [20] , which had been issued between April and June 2022, only nine of them appeared to concern Unisson Equipment sold and delivered during the thirty days preceding the issuance of the Interim Receivership Order. All the other Unisson Invoices concerned Unisson Equipment sold and delivered to the Debtor beyond this thirty-day period.

[37] The Court questions why Unisson, which was only claiming the Equipment sold and delivered in the last thirty days, took the trouble to attach several invoices which were clearly not relevant to the purposes then sought.

[38] In any event, the Interim Receiver consulted the Debtor's records and in doing so was able to locate a copy of certain Delivery Notes that were in Highpoint's possession. However, in comparing the Unisson Delivery Notes with those in the Debtor's possession, the Interim Receiver noted several irregularities.

[39] At the hearing, the representative of the Receiver, Mr. Guillaume Landry (“ **Landry** ”) testified, among other things, on this subject.

[40] Thus, although some of the Unisson Delivery Orders did *not* appear to have been initially dated at the time of their signature by a Highpoint representative, signature dates appear to have been *added* by hand—subsequently—by an individual whose identity remains unknown —so as to indicate that the Unisson Equipment listed in those Unisson Delivery Orders would have been delivered to the Debtor within the *thirty* -day period preceding the issuance of the Interim Sequestration Order.

[41] Although some of these Unisson Delivery Orders in Highpoint's possession had been signed and dated in all likelihood by a representative of Highpoint, and the dates on them were clearly beyond the thirty-day period preceding the issuance of the Interim Sequestration Order, these same dates on the Unisson Delivery Orders appear to have been manually *altered - presumably subsequently - by a person whose identity remains unknown - so as to simulate the fact that the Equipment described therein was delivered to the Debtor within* the thirty-day period preceding the issuance of the Interim Sequestration Order.

[42] Ultimately, based on the Unisson Delivery Notes traced to Highpoint's place of business by the Interim Receiver, out of twenty-six Unisson Invoices, only five of them appeared to relate to Unisson Equipment actually delivered between June 4 and July 4, 2022 (Invoices Nos. 11135, 11137, 11143, 11149 and 11150) [21] , i.e. within thirty days prior to the issuance of the Interim Receivership Order of July 4, 2022.

[43] In any event, according to section 81.1 LFI, only *goods* sold and delivered to the Debtor by a *supplier* within thirty days preceding the issuance of a sequestration order (and not an interim sequestration order [22]) can potentially be the subject of a request for repossession under this section.

[44] Section 81.1(12) LFI is, for its part, clear in that the “ *sequester* ” mentioned in section 81.1(1) LFI refers to the sequester appointed under section 243(2) LFI, and not to

the Receiver appointed under section 47 LFI:

> **81.1(12)** The following definitions apply in this section.
>
> ***receivership*** In speaking of a person, placing any of his property in the possession or under the responsibility of a receiver. (*person who is subject to a receivership*)
>
> ***receiver Receiver*** within the meaning of subsection 243(*2*) .
>
> [Emphasis added]

[45] Moreover, by signing Request 81.1 LFI Unisson [23] , its representative acknowledged this state of affairs in the text of the signed form.

[46] In short, it must be concluded that in all probability, the modifications and additions to the Unisson Delivery Notes were all made on the Unisson Delivery Notes provided by Unisson in support of Application 81.1 LFI Unisson [24] in contradiction to the Delivery Notes provided and kept by Highpoint at the time of each delivery.

[47] Before realizing that the appointment of an interim receiver had no impact on section 81.1 BIA to trigger the right of a *supplier* of unpaid *goods* to claim the goods so sold commonly referred to as " *thirty-day goods* ", in all likelihood, Unisson attempted, at the time, to extend without right the number of Unisson Equipment actually sold and delivered to Highpoint before June 4, 2022, even though Unisson would only subsequently realize that this date was in no way relevant for the purposes of such an exercise.

[48] Unisson made no attempt to contradict this evidence except to specify through its lawyer that its client had withdrawn Application 81.1 LFI Unisson and that there was no need to dwell on it any longer.

[49] This first incident, which Unisson tried to ignore once confronted with the uncontradicted facts, nevertheless caught the attention of the Court.

[50] Counsel for the Receiver then brought to the Court's attention the development of Unisson's position.

[51] Realizing that Unisson could not use the provisions of article 81.1 LFI, it chose to modify its strategy.

[52] Instead of claiming the few Unisson Equipment sold and delivered in the thirty days preceding the issuance of the Sequestration Order of August 8, 2022, still pursuant to article 81.1 LFI,Unisson instead took the position that it was now entitled to the restitution of all Unisson Equipment sold to Highpoint between April and June 2022 , invoking the extrajudicial resolution that could take place without any legal action under Articles 1605 et seq. CcQ.

[53] According to Unisson's lawyer, the appointment of the Interim Receiver noting its insolvency on July 4, 2022, Highpoint would have immediately lost the benefit of the term granted by Unisson for the payment of each of its invoices totaling $856,931.69.

[54] Unisson therefore considered Highpoint to be in default by operation of *law* without further formalities, thus giving rise to the remedy of resolution without legal action (extrajudicial) of all sales concluded until then, all by virtue of article 1605 C.cQ.

[55] Thus, given the failure to pay its invoices, several of which included terms not yet due on July 4, 2022, and especially given the automatic default *that* occurred when the Interim Sequestration Order was issued, Unisson says it was able to unilaterally exercise the

right to consider the sale of all Unisson Equipment as automatically resolved, without further formalities.

[56] Notwithstanding the foregoing, Unisson alleges that it sent Highpoint a letter dated 5 July 2022 [25] announcing that it had exercised the right to consider the " *sale of the goods* " as automatically terminated, and that it " *claims immediate possession of the goods* ".

[57] The Court notes in this letter that Unisson has already concluded the resolution without legal action of all sales concluded with Highpoint without ever having requested payment of a sum of $856,931.69 mentioned therein which was supposedly due and payable without even having indicated that Highpoint had lost the benefit of the term which it nevertheless enjoyed on the face of several of its invoices.

[58] In other words, Unisson unilaterally terminated all sales without Highpoint's knowledge without even first requesting payment of the sums of money allegedly due and payable on the grounds of its insolvency given the appointment of the Interim Receiver on July 4, 2022.

[59] Furthermore, although Unisson's lawyer specifically mentions the Interim Receiver, the letter of July 5, 2022 was never sent at the time to the Interim Receiver, who was unaware of its existence until the filing of the Unisson Application on July 22, 2022, which was part of the exhibits relied on in its support.

[60] However, concurrently with this letter, the Interim Receiver was rather concerned by Request 81.1 LFI Unisson which was at odds with the position adopted by Unisson in the letter of July 5, 2022.

[61] Unisson's lawyer explained at the hearing that he was not obliged to provide a copy of his letter to the Interim Receiver even though he mentioned him in his letter…

[62] The lawyer undoubtedly knew that if the Interim Receiver had been alerted to the situation in good time, he would have immediately requested the intervention of the Court which is responsible for the specific management of this file, as Receiver Landry confirmed at the hearing.

2. THE CIRCUMSTANCES LEADING TO THE SUBMISSION OF THE LIFTKET APPLICATION AND ITS EVOLUTION

[63] For its part, Liftket filed the Liftket Application on July 25, 2022, three days after Unisson's.

[64] At the time, Liftket's position was identical to Unisson's new approach based exclusively on the extrajudicial resolution of articles 1605 et seq . CcQ .

[65] Like Unisson, invoking the extrajudicial resolution of all sales made from February 11, 2022 to June 29, 2022, which were recorded by means of 14 invoices [26] , Liftket then claimed possession of a range of equipment described in more detail in the Liftket Application.

[66] In paragraphs 3 et seq. of the Liftket Application, the latter essentially formulates (word for word with a few exceptions) the same allegations as Unisson, that Highpoint is in default of paying the total sum of $653,280.06 for sales made between February 11, 2022 and June 29, 2022:

> 3. Between February 11, 2022 and June 29, 2022, the Applicant sold and delivered equipment (the " **Equipment** ") to the Debtor for which an amount of

$653,280.06 is due, as appears from the statement of account and invoices, **Exhibit R-3** ;

4. The debtor is in default of paying the sums owed to the applicant, which are due and payable;

5. The debtor refuses or neglects to pay the amounts owed to the applicant;

6. The Debtor is insolvent and, on July 4, 2022, at the request of its secured creditor the National Bank of Canada, an interim receiver was appointed under the *Bankruptcy and Insolvency Act* with power to take possession of the Debtor's assets, as appears from the Order appointing an interim receiver issued on July 4, 2022 in this file;

7. Given its insolvency, the debtor has lost the benefit of the term and is in default by operation of law;

8. In view of the default and the delay, the applicant exercised the right to consider the sale of the Equipment terminated automatically;

9. Subject to the situation of automatic default, on July 22, 2022, the applicant formally notified the debtor to pay the amounts due by 4:00 p.m. on July 25, 2022, failing which the applicant would consider the sale of the Equipment to be automatically terminated, as appears from the applicant's letter of July 22, 2022 sent by email to the debtor, **Exhibit R-4** ;

10. The debtor did not respond to the applicant's letter **Exhibit R-4** ;

11. Given the resolution of the sale of the Equipment, the applicant is the owner of the Equipment mentioned in the invoices Exhibit R-3, and the applicant is entitled to claim them;

12. The applicant requests the Court to declare the extrajudicial resolution of the sale of the Equipment, alternatively to resolve the sale of the Equipment, to declare the applicant the owner of the Equipment, and to order that the Equipment be returned to the applicant;

[Emphasis added]

[67] On August 31, 2022, Liftket amended the Liftket Application (the " **Amended Liftket Application** ").

[68] On the one hand, the amount of Highpoint's debt decreases from $653,280.06 to $481,486.18 . This reduction results from the unexplained withdrawal of 10 of the 14 invoices initially invoked [27] and by the addition of an invoice #1629 dated June 1 , 2022 [28] (the " **Invoice 1629** ").

[69] Furthermore, in addition to the existing conclusions, Liftket adds a *Request for repossession of goods* based on article 81.1 of the LFI (the " **Request 81.1 LFI Liftket** ").

[70] Although the Liftket Request was dated July 25, 2022, Liftket produced on August 31, 2022 Invoice #1629 dated June 1 , 2022 to support its claim to have delivered to Highpoint the Equipment described therein on June 30, 2022, within the thirty days provided for in Article 81.1 LFI from the date of appointment of the Receiver, namely August 8, 2022.

[71] It should be noted that by an Order dated July 26, 2022 with the consent of the parties concerned [29] , the undersigned had suspended the starting date of the 30-day

period of art. 81.1 LFI between July 26 and August 8, 2022, the date on which he appointed the Receiver under art. 243 LFI:

> [1] **ORDERS** that the 30-day Period provided for in subsection 81.1(1)(b) BIA is suspended in respect of Liftket only, for the period between July 26, 2022 and August 8, 2022 (the " **Interim Period** "), such that the Interim Period will not be counted in the calculation of the 30-day Period to the extent that Liftket is entitled to rely on section 81.1 BIA;
>
> [2] **DECLARES** that this Order and the aforementioned suspension of time limit are made without admission or prejudice to the respective rights and means of the parties, including, without limitation, the right of the Debtor, the National Bank, Raymond Chabot Inc. and/or any other party to contest Liftket's claim against the Debtor as well as Liftket's right to rely on section 81.1 LFI (if applicable);
>
> [the " **Suspension Order** "]

[72] On the day of the appointment of the Receiver, August 8, 2022, Liftket filed with the Receiver the Liftket 81.1 LFI Application using Form 75 entitled *Application for Repossession of Goods* under Section 81.1 LFI [30] .

[73] Request 81.1 LFI Liftket is accompanied by Invoice 1629 for the total amount of $438,035.79 including taxes.

[74] Invoice 1629 is dated June 1, 2022 and includes the indication of June 30, 2022 2022 as the delivery date and July 1, as the end of the 30-day period (*Terms Net 30 days*) to pay this invoice although the so-called delivery was apparently not going to take place until June 30, 2022, which has not been established in a preponderant manner [31] .

[75] The Court notes that the equipment described in Invoice 1629 is identical to that of Invoice 1453 [32] of February 11, 2022 except that in certain cases, the quantities differ somewhat.

[76] By letter dated August 24, 2022 [33] , the Receiver's counsel dismisses Liftket's Application 811 LFI on the grounds, *inter alia* , that Liftket is not a " *supplier* " of " *goods* " within the meaning of section 81.1 LFI.

[77] Furthermore, the Receiver's lawyer introduces a new, highly relevant element which had never been disclosed by Liftket to the Receiver until then.

[78] Counsel draws to the attention of Liftket's counsel that the Receiver discovered that Highpoint made two deposits in February 2022 totaling $393,418.48:

- Invoice 1453 dated February 11, 2022 containing a deposit of $221,621.25 on a total cost of $886,485.02 [34] ;
- Invoice 1454 dated February 11, 2022 containing a deposit of $171,797.23 on a total cost of $687,188.91 [35] ;

[79] The Receiver also notes that no equipment covered by Invoice 1454 was delivered, which would explain its absence in the Liftket Application.

[80] Furthermore, the Liftket Application is completely silent as to the deposits of $393,418.48 paid by Highpoint, including the second deposit of $171,797.23 for goods that were never delivered to Highpoint.

[81] It must be noted that under the Liftket Application of July 25, 2022, invoking an unpaid debt of $653,280.06 recorded by a statement of account and 14 invoices including

Invoice 1453 [36] , Liftket is still claiming all the equipment sold, although Invoice 1453 [37] was the subject of a payment of $221,621.25 in February 2022 when this equipment order was placed.

[82] Furthermore, Liftket claims all the equipment sold under thirteen other invoices described therein without ever denouncing, at the very least, that it had received another deposit of $171,797.23 for equipment that was never delivered.

[83] Faced with the “discoveries” of the Sequestrator and in total contradiction with the allegations of the Liftket Application, the latter is obliged to “ *correct course* ”, which would probably explain the amended Liftket Application.

[84] Suddenly, the facts related to Invoice 1453 and those related to the deposits of $393,418.48 “evolve” with the amended Liftket Request of August 31, 2022.

[85] Ten of the fourteen invoices disappear. Only Invoices 1560, 1566, 1585 and 1586 remain, to which the new Invoice 1629 is added.

[86] The outstanding debt of $653,280.06 is reduced to $481,486.18. The difference of $171,793.88 suggests that Liftket ultimately decided to partially offset the $171,797.23 deposit from Invoice 1454, without providing any explanation for this in the Amended Liftket Application.

[87] As for the new Liftket Application 81.1 LFI, it is strictly based on the new Invoice 1629 without Liftket providing any explanation of its origin and the circumstances surrounding its issue, which clearly had to take place after the filing of the Liftket Application of July 25, 2022. Otherwise, why would Liftket have failed to mention it before?

[88] However, in an email dated August 16, 2022 [38] , Liftket's lawyer had informed the lawyers of the Receiver and the BNC with the following laconic remarks:

> Please note that invoice #1453 has been cancelled and replaced by invoice #1629. Invoice #1629 is also the subject of our proof of claim under art. 81.1 LFI.

[89] On September 2, 2022, the Receiver filed a written challenge to the Unisson and Liftket Claims, the content of which is very detailed (the “ **Receiver Challenge** ”).

[90] In addition to the irregularities that the Court has just addressed with respect to Liftket, the Receiver raises, among other things, not only the irregularities noted with respect to certain Delivery Notes produced by Unisson in support of Application 81.1 LFI Unisson, but also Unisson's failure to disclose that it had received deposits from Highpoint totaling $349,722.63 for equipment that was never sold and delivered.

[91] The Receiver is seeking, among other things, full reimbursement of the deposits made by Highpoint, which were not disclosed and accounted for by either Liftket or Unisson in their legal proceedings. These deposits total $393,418.48 for Liftket and $349,722.63 for Unisson.

[92] Back at Liftket, at the hearing, Receiver Landry testified that after checking with Highpoint employees, Invoice 1629 dated June 1, 2022 was never received by Highpoint until it first discovered its existence among the exhibits of the amended Liftket Application of August 31, 2022. Despite his requests, other than mentioning that Invoice 1629 replaced Invoice 1453, he was never offered explanations as to the justification for such a change and the sudden appearance of a new invoice.

[93] Rather, the rationale is offered in the *Applicants' Joint Response to the Sequestration's Challenge to the Applicants' Application for Resumption of Assets* dated September 9, 2022 (the " **Joint Response** "):

> 35. As for Liftket, the Receiver erroneously states that Liftket must return the sum of $393,418.48 paid and allocated to invoices numbered 1453 and 1454 (respectively, "Invoice 1453" and "Invoice 1454") filed in the Court file, in bundle, as Exhibit R-3;
>
> 36. In fact, Invoices 1453 and 1454 were related to a Highpoint automation project. The amount received from Highpoint by Liftket had been recorded as deposits on said Invoices 1453 and 1454 for purely accounting and administrative purposes by Liftket ;
>
> 37. However, Highpoint advised that it could not carry out its automation project in its full scope, so Invoices 1453 and 1454 were cancelled ;
>
> 38. At that time, Highpoint was indebted to Liftket for a sum in excess of $XX [39] (*sic*) under previous invoices which were due and payable, such that;
>
> 39. The payments were allocated as follows (the invoices below are under Liftket Exhibit R-3):

Bill	Date	Amount	Payment
1494	01/04/2022	394.36	394.36
1502	06/04/2022	291.47	291.47
1503	06/04/2022	870.07	870.07
1531	03/05/2022	304.11	304.11
1532	03/05/2022	161.42	161.42
1546	20/05/2022	67260.38	67260.38
1547	05/24/2022	345.52	345.52
1552	05/30/2022	29980.90	29980.90
1553	05/30/2022	224775.20	224775.20
1560	08/06/2022	107520.02	69035.05
			$393,418.48

> 40. Highpoint subsequently confirmed the order for part of its automation project as reflected in Liftket Invoice 1629 , the goods referred to therein having been delivered to Highpoint and are still in its possession, including, although dated 1 June 2022, **it was in fact issued by Liftket on or about 30 June 2022** , as evidenced by its sequential number, at the time Highpoint confirmed that it was proceeding with part of its automation project;
>
> 41. Highpoint never applied the sum of $393,418.48 to Liftket in payment of any particular Liftket invoice, in particular invoice 1629, so that Liftket could apply this sum to Highpoint's oldest debts under the rules of application of payments;
>
> 42. Thus, the Receiver has no right to claim the restitution of these amounts;

[Underlining and bold added]

[94] At the hearing, counsel for Unisson and Liftket informed the Tribunal that he did not intend to call any representatives of his clients to testify, preferring instead to limit his evidence to their sworn statements in the Unisson Application and in the Liftket Applications (original and amended) as well as those attached to the Joint Response.

[95] Incidentally, these sworn statements add nothing to the allegations in the Requests and as for those attached to the Joint Response, they only refer to specific paragraphs [40] and also add nothing to the allegations contained in these proceedings.

[96] With respect, it is implausible that the facts and circumstances surrounding 2022 Invoice 1629 dated June 1, — if it actually existed at the time of its issuance *on or about June 30, 2022* — were never disclosed in a timely manner by Liftket in the Liftket Application of July 25, 2022. These highly relevant facts and circumstances must necessarily have been known to Liftket at the time, unless, of course, they likely never occurred before July 25, 2022 and Invoice 1629 did not exist before that date.

[97] In all probability, there is every reason to believe that Liftket attempted to " *rewrite history* " following the unexpected investigations and discoveries made by the Receiver.

[98] It is therefore not surprising that Liftket's representative chose not to testify at the hearing in order to be cross-examined, preferring to stick to his few paragraphs of explanations which were improbable and obvious in the eyes of the Tribunal.

[99] The Tribunal simply does not believe the new amended version of the facts offered by Liftket to explain *ex post facto* its use of the deposits of $393,418.48 which were not mentioned at all in the Liftket Application while the latter was demanding the return of all equipment sold and delivered since February 11, 2022.

[100] The Landry Receiver testified that in early 2022, Highpoint, a company that specialized in the rental and installation of rigging equipment used in the film industry, particularly in the installation of high-rise infrastructure, had decided to launch a new range of services in the rental of equipment in the events sector.

[101] The equipment ordered and acquired for this specific purpose by Highpoint from Unisson and Liftket from February 2022 was specifically going to be used and is still being used for this new service offering.

[102] To the knowledge of the Landry Receiver, there was never any question of so-called " *pro forma* " invoices involving the payment of deposits totaling $393,418.48 to Liftket. In fact, there is nothing " *pro forma* " in Invoices 1453 [41] and 1454 [42] officially issued by Liftket on February 11, 2022, which recorded commercial transactions that had to be duly recorded and reported to the tax authorities (GST and QST).

[103] It is clear that Invoice 1453 dated February 11, 2022 for the total amount of $886,485.02 including a payment of $221,621.25 with a balance of $664,863.77 was unilaterally and subsequently replaced by Liftket to justify Liftket Application 81.1 LFI filed with the Receiver on August 8, 2022.

[104] In doing so, Liftket had to establish that, as a *supplier* within the meaning of section 81.1 BIA, it sold and delivered merchandise *to* Highpoint in the thirty days preceding the appointment of the Receiver on August 8, 2022. Due to the Suspension Order of July 26, 2022, the thirty-day period began to run retroactively from that date — and not from August 8, 2022 — until June 26, 2022.

[105] Liftket therefore had to establish that the equipment ordered and purchased on February 11, 2022 as noted by Invoice 1453 were " *goods* " delivered after June 26, 2022 to be eligible for the claim under section 81.1 LFI.

[106] Clearly, the new Invoice 1629 aimed to attempt to meet *ex post facto* the requirements of article 81.1 LFI.

[107] However, the preponderance of evidence convinces the Tribunal otherwise. Liftket has not satisfied the burden of proof incumbent upon it with respect to Application 81.1 LFI Liftket, which must be dismissed for the following reasons.

[108] From the outset, Liftket was required to act towards Highpoint, the Receiver and the Court in good faith and with transparency, which it failed to do by attempting to unilaterally fill in the factual gaps that it had failed to disclose in a timely manner at the start of its proceedings.

[109] In light of the allegations in the Joint Response to the Dispute by the Receiver and in light of Invoice 1629, all of the new facts previously omitted as well as Invoice 1629 dated 2022 June 1, must necessarily have existed to Liftket's knowledge well before the filing of the Liftket Application of July 25, 2022.

[110] The Court believes that in all probability, these " *new* " facts as well as Invoice 1629 were concocted by Liftket *ex post facto* after it realized that the Receiver had discovered the existence of payments totaling $393,418.48 which did not appear anywhere in the Liftket Application.

[111] Furthermore, why formulate Request 81.1 LFI Liftket after the fact if the latter had already "legitimately" resolved all equipment sales out of court, as evidenced by the conclusions of the amended Liftket Request?

[112] But, there is more.

[113] There is no doubt that all the equipment appearing in Invoice 1453 was found in its entirety in Invoice 1629. Only certain quantities were reduced, but the equipment is exactly the same.

[114] So how can we explain Liftket's failure to apply the payment of $221,621.25 made by Highpoint to Liftket on February 11, 2022 as a deposit for the purchase of the equipment covered by Invoice 1453, to the amount of Invoice 1629 which covered the same equipment?

[115] If, in addition to a reduction in certain quantities, the equipment sold under Invoice 1629 is exclusively that ordered under Invoice 1453 in February 2022, Liftket would necessarily have to apply this initial payment of $221,621.25 as a reduction in the sale price of Invoice 1629 of $438,035.79, thus leaving an unpaid balance of $216,414.54.

[116] In such circumstances, how could Liftket reasonably claim all of the equipment in Invoice 1629 (at a pre-tax price of $380,983.50) when at least half of their purchase price ($221,621.25) had already been paid by Highpoint?

[117] Surprisingly, in the Joint Response to the Receiver's Challenge, Liftket offers an implausible, even surreal, explanation by indicating that after having supposedly cancelled Invoices 1453 and 1454, Highpoint simply failed to apply the deposits of $221,621.25 and $171,797.23 to the other invoices issued by Liftket and in particular, to Invoice 1629 (of which Highpoint was clearly unaware). This would then have allowed Liftket to apply these amounts to the older invoices while avoiding " *touching* " Invoice 1629.

[118] This position defies understanding.

[119] Given the obvious link between Invoices 1453 and 1629, Liftket was required to charge the sum of $221,621.25 as payment for equipment initially ordered under Invoice 1543 which was apparently subsequently delivered using Invoice 1629. This sum was required to be charged to Invoice 1629.

[120] There could not have been a more obvious indication of imputation on the part of Highpoint, who was unaware of the existence of Invoice 1629, just like the Receiver.

[121] Furthermore, Liftket could hardly claim from the Receiver the return of all the equipment described in Invoice 1629 if it had allocated — as it should have done — the payment of $221,621.25 to the amount of the new Invoice 1629 which was clearly created only for the purpose of justifying Liftket Claim 81.1 LFI.

[122] It was much more convenient and advantageous for Liftket to charge the $221,621.25 to other invoices to enable it to attempt to recover all the equipment covered by Invoice 1629 when it knew full well that it could not legally do so.

[123] Furthermore, the other difficulty faced by Liftket with respect to Liftket Claim 81.1 LFI is its failure to prove conclusively that the equipment covered by Invoice 1629 was in fact delivered to Highpoint after June 26, 2022.

[124] Let us recall that this evidence is essentially limited to Exhibit **R-5L** and the laconic allegation in paragraph 40 of the Joint Response to the Dispute by the Sequestrator which reads as follows:

> 40. Highpoint subsequently confirmed the order for part of its automation project as reflected in Liftket Invoice 1629, the goods referred to therein having been delivered to Highpoint and are still in its possession, including, although dated 1 June 2022, it was in fact issued by Liftket on or about 30 June 2022 , as evidenced by its sequential number, at the time Highpoint confirmed that it was moving forward with part of its automation project;
>
> [Emphasis added]

[125] Again, the evidence offered by Liftket is vague, imprecise and inconclusive.

[126] Nowhere in this allegation can it be seen at what precise moment the equipment supposedly sold under Invoice 1629 was actually delivered by Liftket to Highpoint.

[127] Furthermore, by stating under oath that *in fact* [Invoice 1629 was] *issued by Liftket on or around June 30, 2022* , it must be noted that the declarant Jacques Richard was not even capable of stating with a minimum of precision when Invoice 1629 dated June 1, 2022 was actually issued and when the equipment was actually delivered to Highpoint.

[128] Furthermore, the bill of lading dated June 30, 2022 attached to Invoice 1629 [43] does not in any way establish or confirm that the 5 pieces apparently delivered to Highpoint on June 30, 2022 are actually linked to Invoice 1629, which for its part lists 93 pieces of equipment. The bill of lading does not provide any description of the equipment delivered that would allow it to be adequately identified and linked to Invoice 1629 in any way.

[129] In short, Liftket failed to prove conclusively that the equipment described in Invoice 1629, which it claims possession of under section 81.1 LFI, was indeed delivered to Highpoint within the statutory period of 30 days, which is fatal.

[130] On the one hand, Liftket attempted to mislead the Receiver (and the Court) by falsely leading it to believe that Highpoint had failed to pay the purchase price of $438,035.79 for the equipment sold by means of Invoice 1629 which supposedly replaced Invoice 1453 by failing to apply the initial payment of $221,621.25 made in February 2022 for the purchase of the same equipment.

[131] Incidentally, not only does Invoice 1629 contain no indication of the payment of $221,621.25, but it also does not reveal that it was actually intended to replace Invoice 1453 which had been supposedly cancelled by Liftket without the knowledge of Highpoint and the Receiver.

[132] Liftket's bad faith is obvious.

[133] In this case, the blatant dishonesty displayed by Liftket in pulling out all the stops to achieve its ends and thus attempting to recover without right all the equipment sold since February 2022, also constitutes abusive procedural behavior within the meaning of Articles 51 et seq. CPC which deserves sanction and which is fatal to the granting of its request.

[134] The Court considers that the fair and reasonable sanction in the current circumstances is the pure and simple rejection of the Liftket Application in accordance with the provisions of Article 53 CCP.

[135] Although the finding reached by the above Court is sufficient to dispose of, among other things, Application 81.1 LFI Liftket, the Court wishes to clarify that it fully shares the opinion of the lawyers for the Receiver and the BNC that in the present proceedings, Liftket does not correspond to the *supplier* of *goods* referred to in Article 81.1 LFI.

[136] Although section 81.1 LFI does not expressly specify what may be considered to be " *merchandise* " sold by a " *supplier* ", the Tribunal adopts the position of the Honourable Claudette Tessier Couture in *Recyc RPM inc. (Syndic de)* **[44]** , that these terms imply " *successive deliveries that are more associated with inventory than with a piece of equipment* ":

> [17] [...] Comment from the Tribunal: the definition given to "supplier" suggests successive deliveries, which is more associated with inventory than with a piece of equipment such as that sold by Équipement de plastique Barway inc., identified at the hearing as a pump.

[137] In the present case, the Liftket Equipment which Liftket claims possession of essentially constitutes consoles and other electronic equipment, as well as accessories connected thereto (eg " *variable motion chain hoist* ", " *variable motion controller* ", " *network master e-stop distribution box* ", " *network distribution box* ", " *console* ", " *power distribution unit* ", " *power multicore-hybrid cable connectors* ", " *network data connection cable* ", " *data base server to connect 2 remote desks and additional diagnostic PC – database backup* ").

[138] Incidentally, in both Liftket Applications, the latter only speaks of equipment.

[139] This equipment can hardly be considered as being " *goods* " sold by a " *supplier* " within the meaning of article 81.1 LFI (or even in the usual meaning of these terms), the Court retaining from the evidence in particular:

> (a) their nature;
>
> (b) the fact that the equipment sold by Liftket to Highpoint differed with each purchase, depending on the needs of and/or the projects in which the Debtor was involved;

(c) the fact that these purchases were not made on a regular basis, but were rather made on an ad hoc basis, depending on the needs of and/or projects in which the Debtor was involved; and, ultimately,

(d) the fact that the equipment sold by Liftket to Highpoint was not intended for resale, or even for strict rental to third parties. Indeed, as part of its operations, Highpoint rented Liftket's equipment to third parties, but only in the context of projects and shows in which the Debtor was called upon to participate and use (itself) this equipment. Highpoint thus charged its customers not only fees for the rental of Liftket's equipment, but also for the labor required to install and use it punctually according to the customer's needs.

[140] Furthermore, the Court notes that none of the equipment listed in Invoice 1629 attached to Application 81.1 LFI Liftket appears to appear in the other invoices filed as exhibits in support of the amended Liftket Application, thereby strengthening the argument that these goods do not constitute " *merchandise* " within the meaning of Article 81.1 LFI.

[141] Furthermore, according to the Landry Receiver, the equipment listed in Invoice 1629 was purchased by Highpoint for the first and only time in February 2022, as evidenced by Invoice 1453. These were not recurring purchases.

[142] The Court also shares the opinion of counsel for the Receiver that an analysis of the objectives of section 81.1 BIA shows that this section was adopted with the objective of protecting " *suppliers* " of vulnerable " *goods* " who, in most cases, are not in a position to demand securities or other guarantees from companies purchasing these " *goods* ", given, in particular, their nature and the fact that they are usually sold in the normal course of business of these companies:

> The 30-day rule was introduced to protect suppliers—who are often unable to require security for the transaction—from insolvent debtors who order excessive volumes of goods just before bankruptcy to inflate the value of the assets to satisfy secured creditors . The rule may also help distressed businesses because if suppliers are given the opportunity to recover their goods in certain circumstances, they may be more willing to continue supplying their customers. [45]
>
> [Emphasis added]

[143] It must be noted that in this case:

(a) Liftket was not and still is not part of such a category of vulnerable suppliers, given that it had the possibility of requiring from Highpoint certain securities or other guarantees as a condition of the sale of its equipment (e.g. retention of title, mortgages, etc.), which it did not do; and

(b) this is not a situation where Highpoint ordered an excessive volume of " *goods* " just prior to its bankruptcy in order to " *inflate* " the value of its assets. Recall that this is rather a situation where BNC, the Debtor's secured creditor, made an *ex parte* application for the appointment of an Interim Receiver in " *very particular* " and " *worrying* " circumstances in order to protect and preserve the value of Highpoint's assets. At that time, the Debtor was presumably unaware that such an application was going to be made before the Court.

[144] Added to this is the fact that Article 81.1 LFI clearly constitutes an exception to the *pari passu* rule , such that it must be interpreted restrictively, so as to protect only the

vulnerable creditors of a debtor company specifically identified and referred to in this article, and in the circumstances specifically provided for therein:

> [7] Section 81.1 provides an exception to the general policy of the BIA (a *pari passu* sharing among unsecured creditors) by giving a right to reclaim property to certain unsecured creditors (suppliers) of a bankrupt which is not available to the general body of unsecured creditors . Thus, the court is required to narrowly construe such an exception to the fundamental policy of the BIA . […] I also agree that it is an established canon of statutory interpretation that when legislation confers a right or benefit on persons whom they would not have had at common law, the conditions which the legislation prescribes for the acquisition of that right or benefit are mandatory . [46]

[145] In short, in addition to the reasons already stated above, the Court is of the opinion that Liftket was (and remains), neither more nor less, than an ordinary creditor, not qualifying as a " *supplier* " of " *goods* " within the meaning of section 81.1 LFI.

[146] As for the other conclusions sought by Liftket, they must be rejected not only for the reasons already stated regarding Liftket's abusive conduct, but also for the reasons set out below which justify the dismissal of the Unisson Application relating to the extrajudicial resolution and the judicial resolution of the sales concluded by Unisson. These reasons apply equally to Liftket's situation.

3. THE RECOURSE FOR RESOLUTION AND EXTRAJUDICIAL CLAIM UNDER ARTICLES 1605 ET SEQ. CCQ

[147] As a preliminary comment, the Court shares the opinion of the Receiver's counsel that the remedies based on articles 81.1 LFI and 1605 CcQ are **incompatible** since an ordinary creditor (such as Unisson and Liftket) cannot:

> (a) On the one hand, claim — **as supplier of goods and ordinary creditor** — to be able to repossess certain equipment sold and delivered to a debtor under section 81.1 LFI; and
>
> (b) On the other hand, claim — **as owner** — to be able to repossess the same equipment, on the basis that the sales of this equipment were previously resolved, extrajudicially under article 1605 C.cQ.

[148] In fact, either the sales of the equipment in question were legally resolved, or they were not legally resolved, thus giving rise to the appeal based on article 81.1 LFI.

[149] Although the Tribunal has already concluded that the Liftket Application should be dismissed, it is important to recall that the following analysis and the conclusions drawn from it by the Tribunal regarding the out-of-court resolution [47] of the sales made by Unisson also apply *mutatis mutandis* to Liftket's situation.

3.1 Unisson's position

[150] Let us recall that Unisson claims that Highpoint became in default by *operation of law* as soon as its insolvency was established by the appointment of the Interim Receiver on July 4, 2022, causing it to immediately lose the benefit of the term.

[151] Highpoint being immediately in default by *operation of law* and having failed to pay the sum of $856,931.69 - a sum which would prove to be incorrect - Unisson therefore had the right to proceed unilaterally to the resolution of all sales made without legal action within the meaning of article 1605 C.cQ which reads as follows:

> **1605.** The resolution or termination of the contract may take place without legal action when the debtor is in default by operation of law to perform his obligation or has not performed it within the time limit set by the formal notice.

[152] Incidentally, in the Joint Response, Highpoint's debt is suddenly reduced from $856,931.69 to $528,285.15 without reducing the number of claimed facilities.

[153] Like Liftket, Unisson apparently forgot to mention and account for in the Unisson Application deposits totaling $349,722.63 made by Highpoint in February 2022 [48] for equipment that has never been sold and delivered to date.

[154] In any event, clearly in reaction to this other “discovery” of the Sequester mentioned in the Sequester’s Dispute, Unisson makes the following comments in the Joint Response, which also refers to *pro forma* invoices :

> 28. As for Unisson, in January and February 2022, Highpoint announced a project to acquire equipment from Unisson, hence the issuance by Unisson of “invoices” #7361-7362-7363 submitted by the Receiver as Exhibit RCI-7;
>
> *29. These “invoices” are in fact pro forma* invoices issued at the request of Highpoint for its future project of acquisition of Unisson equipment, which project was never carried out;
>
> 30. On February 21, 2022, Unisson received a payment from Highpoint in the amount of $355,432.87;
>
> 31. On June 1, 2022, when Highpoint owed it more than $800,000 in unpaid invoices past due, Unisson applied this sum of $355,432.87 against the invoices unpaid at that date by Highpoint, as it was entitled to do;
>
> 32. On or about June 14, 2022, Mr. Claude Dubé of Highpoint verbally requested that Unisson reverse Unisson's accounting entry and record the sum of $355,432.87 as a "deposit" for future orders. Unisson then agreed to accommodate him ;
>
> 33. However, when the acquisition project did not materialize, Unisson simply reinstated the accounting entry of June 1 , 2022 ;
>
> 34. As of June 23, 2022, Highpoint is indebted to Unisson for an amount of **$528,285.15** , as appears from Unisson's Statement of Accounts, Exhibit R-5 ;
>
> [Underlining and bold added]

[155] It must be noted that under the Unisson Application, claiming to have sold to and Highpoint between April 1 June 23, 2022, equipment for the total sum of $856,931.69, as of July 22, 2022, Unisson alleges to have resolved extrajudicially all the sales concluded and requests the restitution and possession of all the equipment then sold while it had received $349,722.63 and that by its own admission, Highpoint only owed $528,285.15 since June 23, 2022.

[156] Unlike Liftket, Unisson does not amend the Unisson Application in any way to reflect the payments it claims to have charged to the Unisson Invoices.

[157] Surprisingly, although Unisson now acknowledges having received $349,722.63 from Highpoint in February 2022, it persists in claiming possession of all equipment sold and

delivered under the Unisson Invoices [49] while categorically refusing to reimburse Highpoint for the said sum of $349,722.63.

[158] Here is another position that defies understanding.

[159] In any event, under the *Civil Code of Quebec* , a creditor, if he does not exercise the right to force, in cases which permit it, the specific performance of the contractual obligation of his debtor, has the right, in theory, to proceed with the resolution of the contract in question, and to demand the restitution of the services received.

[160] The termination of the contract (and the request for restitution of services) may take place without legal action only when the debtor is in default by *operation of law* to perform his obligation or when he has not performed it within the time limit set by the formal notice.

[161] Otherwise, any termination of the contract (and request for restitution of services) under articles 1605 et seq. CcQ must be made with the approval of the Court.

[162] In this case, it appears from paragraphs 4-9 of the Unisson Application [50] that the latter takes the position that it would have, apparently, already proceeded with the extrajudicial resolution of each and every sales of Unisson Equipment made between the months of April and June 2022.

[163] Unisson further alleges that it was entitled to proceed with such an out-of-court resolution given that Highpoint was allegedly in default by *operation of law* at the time of this out-of-court resolution, for the reasons set out in the formal notice which was apparently sent to it on July 5, 2022 [51] (the " **Unison Formal Notice** ").

[164] However, the Unisson Formal Notice of July 5, 2022 addressed to the president of Highpoint, Mr. Jean-François Dubé, reveals the following:

> We are the attorneys for Les Enceintes Acoustiques Unisson Inc. and have been instructed to send you this formal notice.
>
> Our client advises us that you are currently indebted to her for goods sold and delivered for an amount of $856,931.69, which is due and payable. Copies of the unpaid invoices are attached hereto.
>
> Further, it appears that you are insolvent and that an interim receiver has been appointed against your assets .
>
> You have therefore failed to comply with your obligations and you are in default by operation of law .
>
> In view of the foregoing, you are hereby notified that our client has exercised the right to consider the sale of the goods as automatically terminated . Consequently, our client claims immediate possession of the goods , and reserves all other rights and remedies.
>
> Please let us know where our customer's goods are located so that they can collect them.
>
> [Emphasis added]

[165] From the outset, although Unisson claims to have sent the Unisson Formal Notice to the Debtor dated July 5, 2022, the following observations are necessary:

- There is no evidence that the Unisson Formal Notice was actually sent to Highpoint on July 5, 2022; the letter only states that it was sent by email without

indicating to which email address it was allegedly sent; furthermore, Exhibit **R-4U** is not accompanied by any evidence whatsoever attesting that the email transmission actually took place and that the email was received by its recipient;

- No copy of the Unisson Formal Notice or any other notice, including any notice of termination of the sales of the Unisson Equipment, was transmitted by Unisson to the Interim Receiver or the Receiver at any time; yet, Unisson was fully aware, at the time of signing the Unisson Formal Notice, that Raymond Chabot had been appointed as Interim Receiver of the Debtor's Property on the previous day (i.e. July 4, 2022), as confirmed in this formal notice.

[166] Until July 22, 2022, the date of notification of the Unisson Application, neither Unisson nor its attorney had believed it relevant or appropriate to notify or transmit a copy of the Unisson Formal Notice to the Interim Receiver and/or its attorneys with whom they were already communicating in connection with Application 81.1 LFI Unisson.

[167] In all the exchanges between the lawyers, only the equipment sold and delivered within 30 days of the appointment of the Interim Receiver in connection with Application 81.1 LFI Unisson is discussed. There is never any mention of the Unisson Formal Notice and the extrajudicial resolution of all sales already made by Unisson under article 1605 C.cQ , a position that was at odds with Application 81.1 LFI Unisson.

[168] The Landry Receiver indicated that if Unisson or its attorney had disclosed this otherwise highly relevant information to him, he would have immediately exercised his rights accordingly in a context where Highpoint was still in continuity of operations. He would have contacted the Court to request the establishment of a stay of proceedings, from that moment on.

[169] At the hearing, Unisson's lawyer simply retorted that he had no obligation to notify the Interim Receiver of the position adopted by his client even though the claimed Unisson Equipment was therefore in the possession and control of the Interim Receiver, to Unisson's clear knowledge given the express wording of the Unisson Formal Notice.

[170] Such a surprising response coming from an officer of the Court challenges the Court in the highest degree. The requirement to act in good faith applies as much to the lawyer as to his client.

[171] What particular benefit or advantage was Unisson attempting to gain by knowingly failing to inform the Interim Receiver of the legal position adopted in parallel (or even secretly) with Application 81.1 LFI Unisson?

[172] In any event, to the knowledge of the Landry Receiver, Highpoint never received from Unisson this letter nor any demand or formal notice to pay, within any time period whatsoever, the amounts outstanding under the Unisson Invoices - *some of which were not even yet due at the time of transmission of the Unisson Formal Notice* .

[173] It is clear from the Unisson Formal Notice that the out-of-court resolution had already taken place without any other prior requests or other formalities and that this letter was only intended to inform Highpoint of the decision already taken unilaterally by Unisson.

[174] In fact, the only request made by Unisson was that Highpoint advise it of the location of the Unisson Equipment so that it could recover it without making such a request to the Interim Receiver who had possession and control of the equipment in question.

[175] In short, Unisson chose to secretly proceed with a so-called unilateral extrajudicial resolution concurrently with Request 81.1 LFI Unisson.

[176] However, in any case, to demonstrate that Highpoint was in default by *operation of law* , as Unisson claims, the latter had to prove the occurrence of one of the cases provided for in article 1597 C.cQ [52] :

> 1597. The debtor is in default by operation of law, solely by the effect of the law, when the obligation could only be usefully performed within a certain time which he allowed to elapse or when he did not perform it immediately when there was an emergency.
>
> He is also in default by operation of law when he has failed to fulfil an obligation not to do something, or when he has, through his fault, made the specific performance of the obligation impossible; he is also in default when he has clearly indicated to the creditor his intention not to perform the obligation or, if it is an obligation requiring successive performance, when he refuses or neglects to perform it repeatedly.

[177] What about this case?

[178] Counsel for the Receiver rightly notes that not only was no evidence presented by Unisson in this regard, but in addition, under the terms of the Unisson Formal Notice, the only defaults alleged by Unisson and on which Unisson apparently relied to declare Highpoint in default by *operation of law* were the following:

> […] Our client advises us that you are currently indebted [sic] to her for goods sold and delivered for an amount of $856,931.69, which is due and payable. Copies of the unpaid invoices are attached hereto.
>
> Additionally, it appears that you are insolvent and a Receiver has been appointed against your assets.
>
> You have therefore failed to comply with your obligations and you are in default by operation of law. [53]

[179] From the outset, the allegation that the sum of $856,931.69 was due and payable was false, because as of June 23, 2022, the sum was instead $528,285.15 [54] . It should be recalled that according to the payment terms of the Unisson Invoices, several of them were not even yet due and payable at the time of the so-called transmission of the Unisson Formal Notice on July 5, 2022. [55]

[180] Unisson retorts that despite the payment terms set out in the said invoices, on the basis of article 1514 [56] CCQ , Highpoint would have lost the benefit of the term as soon as its insolvency was noted when the Order appointing the interim receiver was issued.

[181] Even admitting the above, the fact that the Debtor may have lost the benefit of the term and that it did not pay the amounts owed to Unisson at the end of the applicable term did not mean that the latter was therefore in default by *operation of law* within the meaning of article 1597 C.cQ .

[182] Indeed, the occurrence of a default caused by the failure of a debtor to pay a debt or a purchase price in a term does not allow its creditor to unilaterally consider it to be in default by *operation of law* . It is simply a default, nothing more and nothing less:

> […] There is a distinction between failure to comply with an obligation and a 'clearly manifested' refusal not to perform it [within the meaning of article 1597 C.cQ]. The plaintiff concludes that 'the defendant refuses or fails to pay,' adding:
>
> "none of his promises to pay have been honoured."

It is the failure to meet an obligation at term, nothing more, nothing less. [57]

[183] The fact that Highpoint was considered insolvent by Unisson and that an Interim Receiver had been appointed to its Property on 4 July 2022 could not in itself constitute a default, considering the express wording of paragraph 30 of the Interim Receivership Order providing as follows:

> [30] **DECLARES** that the Order , the Petition and the affidavits in support thereof do not , in themselves , constitute a default by the Debtor or an omission on its part to comply with any law, regulation, license, permit, contract , permission, promise, agreement, commitment or any other writing[s] or requirement [s].
>
> [Emphasis added]

[184] Thus, in addition to the absence of convincing evidence establishing the transmission of the Unisson Formal Notice to Highpoint, Unisson has not discharged its burden of proving that the Debtor was in default by *operation of law* on July 5, 2022. In fact, none of the conditions set out in article 1597 C.cQ were met, either on that date or to this day.

[185] Furthermore, Unisson is not in a position to claim that Highpoint's obligation to pay constituted an obligation to be performed successively (each of the 26 sales made between April and June 2022 constituting a separate contract), or that the Debtor (or even the Receiver) had clearly expressed its intention not to pay the Unisson Invoices within the meaning of article 1597 C.cQ , Unisson having never claimed payment of its Invoices, as mentioned above.

[186] In this regard, counsel for the Receiver brought to the Court's attention the decision rendered by Justice Clément Gascon, while he was sitting in the Superior Court, in the case of *Les Boutiques San Francisco* ***[58]*** in 2004, in which the same arguments were raised by vendors attempting to claim the goods they had sold to the debtor on the basis of article 1605 C.cQ , while these vendors did not qualify *under* articles 81.1 LFI or 1741 [59] CcQ :

> [82] In any event, on that issue of the alleged right to repossession of these suppliers, the Court notes that the resolution or resiliation of a contract without judicial proceedings as invoked by L'Oréal and Make Up For Ever only applies where the debtor , namely the BSF Group, is in default by writing or by operation of law .
>
> [83] The BSF Group was apparently not put in default in writing by these suppliers and article 1597 C.cQ describes the situation where a debtor is in default by operation of law :
>
> > '1597. A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he does so.
> >
> > A debtor is also in default by operation of law where he has violated an obligation not to do, or where specific performance of the obligation has become impossible through his fault, and also where he has made clear to the creditor his intention not to perform the obligation or where, in the case of

> an obligation of successive performance, he has repeatedly refused or neglected to perform it.'
>
> [84] Here, there is only one instance where BSF Group would potentially be in default by operation of law towards these two suppliers: because it would have 'made clear to (these) creditors (its) intention not to perform (its) obligations '.
>
> [85] However, it does not appear that this is the case yet.
>
> [86] When a creditor avails itself of the protection that the law offers, and as [a] result is afforded it with a corresponding stay of proceedings, one cannot conclude that this debtor then makes it clear to its creditors that it intends not to perform its obligations. As a matter of fact, under the CCAA, the objective of this debtor is rather to propose an arrangement to these creditors for the compromise of these obligations and this may include a partial and even a total performance of these obligations in some cases.
>
> [Emphasis added]

[187] In this judgment, Judge Gascon went further by mentioning that not only was it highly doubtful that the sellers in question then met the conditions set out in article 1605 C.cQ (given that their debtor was not in default by operation of law), but that even if these sellers had met the applicable statutory conditions, it was also highly doubtful that their request for repossession of the goods sold under article 1605 C.cQ was justified (or reasonable) in the circumstances:

> [87] Therefore, it is far from obvious that L'Oréal and Make Up For Ever even qualify here for the application of article 1605 CCQ If this were so, then their position would be even less justified under the circumstances.

[188] The Court fully shares the opinion of the Receiver's counsel that ultimately, whether under the regime of articles 1741 , 1605 and 1606 or 1604 of the CCQ , the law is unequivocal: Highpoint had to be in default at the time of the alleged extrajudicial resolution by Unisson, which is not the case in this instance.

[189] As recognized by case law, the default is *the "core element "* which must be satisfied in advance before the exercise of remedies by any creditor:

> Whether under the regime of articles 1741 , 1605 and 1606 , or 1604 of the *Civil Code of Quebec* , the general statement of article 1590 and, in particular, of articles 1605 and 1741, is unequivocal: the debtor must be in default.
>
> […]
>
> Under article 1595 of the *Civil Code of Québec* , the formal notice becomes a means of notifying the debtor that the normal time provided for performance has expired and that sufficient additional time is in principle granted to him to do so, subject only to the cases of automatic default provided for by law or cases where the contract stipulates that the mere passage of time to perform will have this effect .
>
> […]
>
> As we can see, the stay is the core element among these choices of measures available to the creditor of an obligation not performed by his debtor.
>
> The plaintiff has not established its right in a preponderant manner. It has not discharged its burden of proof and therefore loses its case. [60]

[Emphasis added]

[190] Furthermore, let us recall that, in the alternative, Unisson is asking the Court to judicially resolve the sale of all Unisson Equipment and to declare it the owner thereof, thereby ordering the Receiver to return possession of the Equipment to it.

[191] Contrary to the extrajudicial resolution discussed above, Unisson is subsidiarily requesting the judicial resolution of all sales made from April to June 2022 of all Unisson Equipment and is therefore claiming ownership and possession thereof, still pursuant to articles 1605 et seq . CcQ

[192] Such a judicial request must necessarily be part of the context that currently prevails, which necessarily implies that the Unisson and Liftket Requests were submitted of their own choice after the issuance of the Sequestration Order of August 8, 2022, the date on which their lawyer had requested that they be postponed *sine die* . The discovery of "new facts" revealed by the Receiver is undoubtedly not unrelated to these *sine die* postponements .

[193] However, on August 8, 2022, the Court issued, in the presence and without any dispute from Unisson's (and Liftket's) counsel, the Sequestration Order under which the Court ordered, among other things, the following:

> [22] **ORDERS** that, subject to any further order of the Court, which may not be made without prior notice being duly given to the Receiver and the Applicant, no proceedings , seizures, claims or other enforcement measures, including any right of termination or extrajudicial resolution , may be instituted or enforced against the Debtor or against the Property.
>
> [Emphasis added]
>
> [the " **Suspension Order** "]

[194] Let us recall that the term " *Property* " is defined as follows in the Sequestration Order:

> [6] (a) [...] all property acquired by the Debtor as of the date of the Interim Sequestration Order , of whatever nature, wherever and in whomsoever held, including, for greater certainty, all equipment, stock, inventories, accounts receivable and receivables of the Debtor (the " **Property** ") [...]
>
> [Emphasis added]

[195] With respect to the contrary opinion, in the current context, Unisson (and Liftket) could not simply request the judicial resolution of the sales of Unisson Equipment made between April and June 2022 and thus claim the Unisson Equipment, without first requesting the lifting of the Suspension Order of August 8, 2022, which Unisson (and Liftket) did not do.

[196] Unisson (and Liftket) is bound by the Sequestration Order of August 8, 2022, especially since it was issued in the presence of its lawyer without the latter raising any objection as to the content and content of this order, and this, after having postponed *sine die* the presentation of its two Requests.

[197] In any event, even assuming that Unisson (and Liftket) made such a request to have the Stay Order lifted against it, it must be kept in mind that in July 2022, the BNC's Request for the issuance of the Interim Sequestration Order was intended to put a stop to the Debtor's " *worrying practices* " [61] *and to " preserve the rights of all creditors* " [62] of Highpoint.

[198] In order to fulfill these objectives, and ultimately, in order to attempt to find a purchaser for all of the Debtor's business and/or assets as a *going concern* in order to maximize the recovery of its creditors and to preserve these operations as well as the jobs of its employees, it was necessary (and still is) that all remedies and other enforcement measures against the Debtor and its Property be suspended.

[199] A stay of proceedings under a Sequestration Order is not only standard, but it is also consistent with the fundamental objectives of the BIA, which seeks, among other things, to prevent a premature run on the assets of a debtor company – something that Unisson is clearly attempting to do:

> The *Bankruptcy and Insolvency Act* (BIA) provides a mechanism for the orderly liquidation of a bankrupt's estate and the distribution of the value of the assets in that estate to the bankrupt's creditors. In this respect, the BIA assists with the collective action problems that creditors face in trying to realize on their claims and prevents a premature race to the debtor's assets . Creditors are paid in accordance with their place in the hierarchy of claims set out in the statute . »
>
> [Emphasis added]

[200] Indeed, in any insolvency case, including any case where a receiver is appointed, a stay of proceedings is "crucial" in order to preserve the *status quo* , allow for an orderly sale of the debtor's assets and, more importantly, prevent the debtor's creditors from attempting to exercise certain rights or take certain positions with a view to obtaining an advantageous position with respect to the debtor's other creditors:

> [72] The imposition of a stay of proceedings against the debtor is the insolvency regime's primary tool for establishing order. The stay is intended to preserve the status quo; it is "crucial to the orderly administration of the estate and ensures that a creditor will not benefit or improve his or her position at the expense of other th creditors": F. Bennett, *Bennett on Bankruptcy* , 19 ed. (Toronto: LexisNexis, 2016), at p. 377. See, also, RJ Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at p. 152; JP Sarra, *Rescue! The Companies' Creditors Arrangement Act* , 2nd ed. (Toronto: Carswell, 2013), at p. 57. [63]

[201] Thus, in the context of an application to lift such a suspension order, any applicant must " *convince* " and " *persuade* " the Court that the criteria set out in section 69.4 LFI (which remain applicable in a sequestration file, according to case law) are satisfied, namely:

> (a) the continuation of the stay of proceedings is likely to cause serious prejudice to the creditor requesting the lifting of the stay of proceedings; or
>
> (b) there are other equitable grounds for making an order lifting the stay of proceedings. [64]

[202] This exercise necessarily implies that the Court analyses the request for lifting of the suspension order in light of the principles recognized in matters of bankruptcy and insolvency, as well as in accordance with the order of priority established in the BIA.

[203] In this case, ordering the lifting of the Stay Order in order to allow Unisson (and Liftket) to exercise its recourse for judicial resolution and to claim the Unisson Equipment is simply not justified or reasonable in the circumstances, considering the principles applicable to insolvency proceedings.

[204] Such an order would put Unisson (and Liftket) in a better position than all other creditors (secured and unsecured) of Highpoint – although it is not disputed that Unisson is an ordinary creditor who does not benefit from any security interest, retention of title or priority rights whatsoever in respect of the Debtor's Property.

[205] In short, lifting the Stay Order and granting the Unisson Application (and the Amended Liftket Application) would give the latter (and Liftket) a significant advantage over Highpoint's other creditors (secured and unsecured) in a premature race for its Assets.

[206] Moreover, such an authorization would have the effect of granting Unisson (and Liftket) a form of super-priority with respect to a portion of the Highpoint Property (in contravention of the order of priority established and recognized by the BIA), or, at the very least, an advantageous and preferential position with respect to all of the following creditors (who must for their part comply with certain conditions in order to benefit from the various exceptional protection regimes provided for in the BIA):

(a) " *suppliers* " of " *goods* " benefiting from the exceptional protection regime provided for in article 81.1 LFI, provided that they comply with the conditions set out therein – **which is not the case for Unisson** ;

(b) other sellers of movable property benefiting from the exceptional protection regime provided for in article 1741 C.cQ , provided that they comply with the conditions set out therein – **which is not the case for Unisson** ;

(c) other creditors of the Debtor benefiting from a super-priority under the BIA (eg employees) – **which do not include Unisson** ;

(d) the Debtor's other creditors enjoying super-priority under the Interim Sequestration Order and/or the Sequestration Order – **which do not include Unisson** . Rather, these creditors include:

(i) the beneficiaries of the Administration Charge granted under the Interim Sequestration Order of 4 July 2022 (before the (apparent) transmission of the Unisson Formal Notice of 5 July 2022), as well as under the Sequestration Order of 8 August 2022, in the presence and without opposition from Unisson's lawyer and Liftket. These beneficiaries of the Administration Charge (i.e. the professionals) benefit from a super-priority in respect of all of the Debtor's " *Property* ", and have provided significant work in reliance on the super-priority charge granted to them and ordered by the Court. Are they not entitled to rely on the predictability of the Court's orders in this regard? [65]

(ii) the beneficiary of the Interim Lender Charge (i.e. BNC) granted under the Sequestration Order dated August 8, 2022, in the presence and without opposition of counsel for Unisson and Liftket. BNC, as the interim lender, benefits from a super-priority in respect of all of the Debtor's " *Property* ", ranking *ahead* of the beneficiaries of the Administration Charge granted under the Interim Sequestration Order. The interim lender provided temporary financing to the Debtor and the Receiver, in reliance on the super-priority charge granted to it and ordered by the Court. Is it not entitled to rely on the predictability of the Court's orders in this regard? [66]

(e) other instalment sellers who have published a reservation of ownership in accordance with the provisions of the *Civil Code of Québec* – **which do not include Unisson** . In an insolvency context, instalment sellers are considered

secured creditors under section 2 of the BIA, and must have published their respective reservation of ownership in accordance with the provisions of the *Civil Code of Québec* and have sent all notices of exercise before being able to exercise any right whatsoever with respect to the property sold instalment to the debtor, failing which they have no right of repossession; [67]

(f) other creditors benefiting from a mortgage or other security interest published against the debtor's assets before the commencement of the insolvency proceedings (eg the BNC) – **which do not include Unisson** ; and

(g) other creditors benefiting from a priority under article 136 LFI – **which do not include Unisson.**

[207] The Court endorses the very appropriate remarks of counsel for the Receiver that the legislature could neither conceive nor intend such a result in an insolvency context. To claim otherwise would amount to saying that the Quebec creditors of an insolvent company would be in a better position than all the other creditors of that same insolvent company because of articles 1605 et seq . CCQ

[208] This reasoning is based, among other things, on the teachings of the Supreme Court of Canada in *Husky Oil Operations* ***[68]*** :

32. […]

(1) the provinces cannot create priorities among creditors or modify the distribution plan in bankruptcy matters , provided for in s. 136(1) of the Bankruptcy *Act* ;

(2) although a *provincial* law may validly modify the order of priority in a context other than that of a bankruptcy, as soon as there is a *bankruptcy* , it is s. 136(1) of the *Bankruptcy Act* which determines the status and order of priority of the claims expressly referred to therein;

(3) if the provinces could create their own order of priority or modify that established under the Bankruptcy *Act* , *this* would have the effect of encouraging the establishment, *in* bankruptcy *matters* , of a distribution plan that differs from one province to another, which is unacceptable ;

(4) in bankruptcy matters , expressions such as ' *secured creditor* ', when defined in the *Bankruptcy Act* , must be interpreted in accordance with the definition given to them *by* the federal legislature and not *as* given to them by the provincial legislatures. The provinces cannot change the way in which these expressions are defined for the purposes of the Bankruptcy Act.

[…]

39. Finally, while I recognise that the four propositions mentioned above summarise the reasoning adopted in the quartet of judgments, I am of the view that this list would be more complete if the following fifth and sixth propositions were added:

(5) in determining the relationship between a provincial law and the *Bankruptcy Act* , the form of the law created by the province must not prevail over the substance. Provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6) for the provincial law to be inapplicable, it is not necessary that the province intended to encroach on exclusive federal bankruptcy jurisdiction and to be in

conflict with the *Bankruptcy Act* . It is sufficient that the provincial law has that effect.

[209] The Court is also very sensitive to the practical, even chaotic, consequences that a judgment acquiescing to the Unisson Request (and the Liftket Request) would entail in the current very particular context.

[210] Thus, to the extent that the Court were to grant the Unisson Application (and the Liftket Application), the Receiver would be well within his rights to fear that such a judgment would give rise to a cascade of claims from several other unsecured creditors of Highpoint, who would be tempted to make claims similar to those of Unisson (and Liftket) against the Debtor, which would ultimately cause total chaos in the context of these proceedings.

[211] In the *Les Boutiques San Francisco* case , Judge Gascon shared exactly the same fears:

> [35] Even though no other similar motions are now pending, the Court cannot simply close the eyes or look in the opposite direction and just pretend not to see the obvious . In a business such as that of the BSF Group, which is involved in the retail sale of men's, women's and children's apparels and accessories, it is clear that there are many other suppliers in a situation similar to that of L'Oréal and Make Up Forever .
>
> [36] It is also clear that if the requests of L'Oréal and Make Up For Ever are granted, there will be many others presented to the Court . **Opening this door would create a chaotic situation that will strike at the very heart of the going concern and continued operations objectives that the CCAA aims at protecting** . [69]
>
> [Underlining and bold added]

[212] Although the *Les Boutiques San Francisco* case involved the *Companies' Creditors Arrangement Act* , the concerns and comments expressed by Justice Gascon are also applicable to situations covered by the BIA , especially when the Receiver is making significant efforts to allow the continuity of Highpoint's operations and the maintenance of some 40 jobs.

[213] Counsel for the Receiver is correct in arguing that to the extent that such a fear were to be realised, the remedies which would potentially be undertaken by other ordinary creditors who had sold Property (and not just " *goods* ") to Highpoint would inevitably lead to its immediate bankruptcy and the liquidation of its assets, since such remedies:

> (a) would affect all third party customers of Highpoint who have legally leased the goods and equipment acquired by the latter - which third party customers have not otherwise been served with the Unisson Application or the Liftket Application;
>
> (b) would prevent Highpoint from continuing its equipment rental operations (through the Receiver, all under the supervision of the Court), and would significantly reduce the revenues associated with those operations;
>
> (c) would prevent Highpoint from obtaining any interim financing, since: (i) a default would immediately be created under the interim loan granted to the Debtor, and (ii) no other interim lender would agree to advance any sum to the Debtor or the Receiver if the basis of the security available to secure such loan was uncertain; and

> (d) would prevent the Receiver from completing the solicitation process, the objective of which is and has always been to find a party interested in acquiring the business and/or assets of the Debtor as a going concern , with a view to attempting to maximize the recovery of its creditors and other stakeholders, while ensuring the continuity of its business and the preservation of the jobs of its employees. As mentioned above, the Receiver has already been advised by certain parties that they would be interested in acquiring the business and/or assets of the Debtor, as a going *concern* , only if the assets to be purchased include the Unisson Equipment (and the Liftket Equipment).

[214] Such an outcome would have the effect of frustrating the Receiver's efforts to pursue the solicitation process authorized by the Court with a view to finding a purchaser for all of Highpoint's business and/or assets as a going concern (" *as a going concern* ").

[215] In this case, there is simply no valid reason why Unisson (and Liftket), an ordinary creditor, should enjoy a preferential position over Highpoint's other creditors.

[216] As in the *Les Boutiques San Francisco* case , there is simply no serious and distinct prejudice that would justify lifting the Stay of Proceedings Order and granting preferential treatment to Unisson (and Liftket):

> [73] In summary, L'Oréal and Make Up For Ever are alleging that they are suffering a serious and distinct prejudice because the stay of proceedings will result in them losing a right to repossess goods that they have under article 1605 CCQ, hence their justification to lift the stay.
>
> [74] To emphasize their prejudice, they are also asserting that an arrangement under the *CCAA* must give creditors something more than what they would otherwise receive in the context of a bankruptcy. Since they will end up, in all likelihood, receiving less in the context of an arrangement under the *CCAA* than in a bankruptcy process under the *BIA* , they consider that their motions should be granted.
>
> [75] The Court disagrees with these arguments. [70]

[217] In short, as in the case of *Les Boutiques San Francisco ,* in the instant case there is no valid reason to treat certain vendors and ordinary creditors of Highpoint differently from others. A lifting of the stay of proceedings in favour of Unisson (and Liftket) would run counter to the objectives pursued by the federal legislature in matters of bankruptcy and insolvency.

[218] The Unisson Application must therefore be rejected.

[219] Had it not been for the Tribunal's decision to dismiss the Amended Liftket Application for the reasons set out earlier in this judgment, that Application would in any event have suffered the same fate as the Unisson Application.

[220] The fact that the letter dated July 22, 2022 [71] signed by Liftket's lawyer includes a request for payment of the sum of $1,101,732.64 payable before 4:00 p.m. on July 25, 2022, while in the Liftket Application of the same day, July 25, 2022, Liftket mentions an amount due and payable of $653,280.06 [72] which was reduced again to $481,486.18 [73] by means of the amended Liftket Application of August 31, 2022, does not change the result, except to establish the lack of seriousness brought by Liftket to the requests and procedures emanating from it against Highpoint and to confirm the little credibility and probative value to be given to them.

[221] Furthermore, the time limit was clearly unreasonable in the circumstances (article 1595 C.cQ).

[222] Finally, given the conclusions reached by the above Court and without ruling on the right of Unisson and Liftket to retain the sums of money paid by Highpoint as deposits for equipment that was never sold and delivered, there is no need to dwell on the Receiver's request to order the restitution of these deposits made by Highpoint in favor of Unisson and Liftket in February 2022 in the event of resolution of the sales concluded by the Applicants.

[223] In any event, if the Court had ruled in favor of Unisson and Liftket by confirming the extrajudicial or judicial resolution of all sales concluded with Highpoint, it could not have ignored article 1606 C.cQ providing that the consequence of any such resolution implies the restitution of the services of both parties. This would necessarily have meant, on the one hand, the restitution of the Unisson Equipment and the Liftket Equipment, but also, on the other hand, that of the sums paid by Highpoint to Unisson ($349,722.63 [74]) and to Liftket ($393,418.48 [75]).

[224] Nor is it necessary for the Court to consider the issue rightly raised by counsel for BNC that the restitution of the Unisson Equipment and the Liftket Equipment could not have been made to the detriment of BNC's rights as a secured creditor benefiting from a movable mortgage encumbering all of Highpoint's movable assets and the Temporary Lender's Charge.

[225] Indeed, acts performed for the benefit of a third party in good faith (BNC) by the person who must return (Highpoint), such as encumbering his Property in favor of the BNC to secure the financing offered, are enforceable against the person (Unisson or Liftket) to whom the restitution is due (article 1707 [76] CcQ). [77]

FOR THESE REASONS, THE COURT:

[226] **REJECTS** the Request for repossession of property of the Applicant Les Enceintes Acoustiques Unisson inc.;

[227] **DISMISSES** the Amended Application for Repossession of Property of the Applicant Liftket Entertainment Inc.;

[228] **DECLARES** to be abusive within the meaning of Articles 51 et seq. of the *Code of Civil Procedure* , the procedure *Amended Application for Resumption of Possession* and the procedural conduct of the Applicant Liftket Entertainment Inc.;

[229] **ALL** with legal costs.

MICHEL A. PINSONNAULT, JCS

Mr. Danny Vu
Mr. William Rodier-Dumais
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Me Hugo Anthony Babos-Marchand
McCarthy Tétrault sencrl, srl
National Bank of Canada Lawyers

Hearing date: September 15, 2022

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[1] As defined below in Note 11.
[2] And alternatively, to the judicial resolution.
[3] Form 75 (**R-5L**).
[4] **R-5L**.
[5] As defined in the Order Appointing a Receiver dated August 8, 2022.
[6] As defined below.
[7] Unisson and Liftket did not oppose each other either.
[8] Previously under the control of an Interim Receiver since July 4, 2022.
[9] [22]**ORDERS**that, subject to any further order of the Court, which may not be made without prior notice being duly given to the Receiver and the Applicant, no proceedings, seizures, claims or other enforcement measures, including any right of termination or extrajudicial resolution, may be instituted or enforced against the Debtor or against the Property.
[10] [23]**ORDERS**that no person shall interrupt, modify, terminate or cease to perform its obligations under any right, contract, agreement, license or permit entered into with the Debtor without the prior consent of the Receiver, or with the authorization of the Court.

[11] The term “Property” is defined in the Interim Sequestration Order as follows:
[7] (a) all powers necessary to take possession of all the Debtor's property, of whatever nature, wherever and in whomsoever situated, including for greater certainty, all the Debtor's equipment, stocks, inventories, accounts receivable and receivables (the " **Property** ") and to exercise over it the powers enumerated in this Order in place of the Debtor; [Emphasis added]

[12] **R-1U**.
[13] **RCI-1A**.
[14] **RCI-1B**.
[15] **RCI-1C**.
[16] **RCI-1D**.
[17] Incidentally, Claim 81.1 LFI Unisson did not specify the amounts involved. The Interim Receiver literally had to rummage through the Unisson Invoices and Delivery Notes.

[18] **RCI-2**.
[19] **RCI-3**.
[20] **RCI-1C**.
[21] **RCI-1C**.
[22] *Bruce Agra Foods Inc. v.Proposal of Everfresh Beverages Inc.(Receiver of)*,1996 CanLII 8278 (ONSC), at paras.4 and 5.
[23] **RCI-1B**.
[24] **RCI-5**.
[25] "We are the attorneys for Les Enceintes Acoustiques Unisson Inc. and have received instructions to send you this formal notice.
Our client advises us that you are currently indebted to her for goods sold and delivered for an amount of $ 856,931.69 , which is due and payable. Copies of the unpaid invoices are attached hereto.

Further , it appears that you are insolvent and that an interim receiver has been appointed against your assets.

You have therefore failed to comply with your obligations and you are in default by operation of law.

In view of the foregoing , you are hereby notified that our client has exercised the right to consider the sale of the goods as automatically rescinded . Consequently, our client claims immediate possession of the goods, and reserves all its other rights and remedies .

Please let us know where our customer's goods are located so that they can collect them." (**R-4U**).

[26] **R-3L**.
[27] **R-3AL**.
[28] **R-5L**.
[29] Email from Me Jean-Yves Simard dated July 26, 2022:Your message was well understood and we have agreed on a practical business solution. Indeed, we have agreed to ask you to pronounce the suspension of the 30-day period of section 81.1 LFI to apply between July 26, 2022 (today) and August 8, 2022 (date scheduled for the hearing of the various applications before you), and this, with respect to my client Liftket only.
[30] **R-5L**. Incidentally, while Liftket produces a*Request for Repossession of Goods*dated August 5, 2022 under the exhibit **R-5L**, the "same" document submitted to the Receiver on August 8, 2022 has a blank date (*Dated August ____, 2022, in Quebec*) (**RCI-9**).
[31] **R-5L**.
[32] **R-3L**.
[33] **RCI-10**.
[34] **R-3L**.
[35] **RCI-13**.
[36] **R-3L**.
[37] **In fact, the R-3L**account statementsuggests that the amount of Invoice 1453 is $438,032.44 while the actual amount was $886,485.02 before applying the payment of $221,621.25.
[38] **RCI-12**.
[39] At the hearing, Liftket's lawyer requested that the "XX$" be replaced by the sum of $890,051.16.

[40] Mr. Olivier Jobin : 1.I am the representative of the applicant Les Enceintes Acoustiques Unisson Inc.,
2. All of the facts alleged in paragraphs 5 and 28 to 34 of the *Applicants' Joint Response to the Receiver's challenge* to *the Applicants' request for repossession of property* are true.
Mr. Jacques Richard : 1. I am the representative of the applicant Liftket Entertainment Inc.;
2. All of the facts alleged in paragraphs 15 and 35 to 42 of the *Applicants ' Joint Response to* the *Receiver's challenge to the Applicants' application for repossession of* property *are* true.
[41] **R-3L**.
[42] **RCI-13**.
[43] **R-5L**.
[44] 2015 QCCS 541.
[45] DEBTORS AND CREDITORS MUST SHARE THE BURDEN, Review of the *Bankruptcy and Insolvency Act* and the*Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, Chair: The Honourable Richard H. Kroft, Deputy Chair: The Honourable David Tkachuk, November 2003, p. 117 of the French version.
[46] *Thomson Consumer Electronics Canada, Inc.*v.*Consumer Distributing Inc.(Receiver of)*,1996 CanLII 8271 (ONSC).
[47] As well as the subsidiary conclusions sought by Unisson and Liftket relating to the judicial resolution.
[48] **RCI-7**.
[49] **R-3U**.
[50] See paragraph 26 above.
[51] **R-4U**.
[52] *Marcelle Landry v. Carmen Gauthier*, (CQ, 1996-01-22),SOQUIJ AZ-96031053,JE 96-429 :
In order to be in default by operation of law, under articles 1597 and 1598 of the Civil Code of Quebec , the plaintiff 'must prove the occurrence of one of the cases where there is default by operation of law, despite any declaration or stipulation to the contrary .
[53] **R-4U**.
[54] **R-5U**.
[55] Invoices no. 11124, 11135, 11137, 11143, 11148 and 11150 (**RCI-4**).
[56] **1514.**The debtor loses the benefit of the term if he becomes insolvent, is declared bankrupt, or reduces, by his own actions and without the consent of the creditor, the securities which he has granted to the latter.
He also loses the benefit of the term if he fails to respect the conditions in consideration of which this benefit was granted to him.
[57] *Marcelle Landry v. Carmen Gauthier*, (CQ, 1996-01-22), SOQUIJ AZ-96031053, JE 96-429.
[58] 2004 CanLII 16649(QCCS).
[59] **1741.**When the sale of a movable property has been made without a term, the seller may, within 30 days of delivery, consider the sale as cancelled and claim the property, if the buyer, while in default, fails to pay the price and if the movable property is still whole and in the same condition, without having passed into the hands of a third party who has paid the price or of a mortgage creditor who has obtained the abandonment of the property.
Seizure by a third party, while the buyer is in default of payment of the price and the property is in the conditions prescribed for resolution, does not preclude the seller's right.
[60] *Marcelle Landry v. Carmen Gauthier*, (CQ, 1996-01-22), SOQUIJ AZ-96031053, JE 96-429.

[61] See the preamble to the Interim Sequestration Order.
[62] *Ibid*.
[63] *Romspen Investment Corporation v. Courtice Auto Wreckers Limited* , 2017 ONCA 301 .
[64] *PeoplesTrustCompany v. Rose of Sharon (Ontario)Retirement Community*,2012 ONSC 7319, at para. 5;*RomspenInvestmentCorporationv.CourticeAutoWreckersLimited,*2017 ONCA301, para.76.

[65] *Canada v. Canada North Group Inc.*,2021 SCC 30, para.29.
[66] *Sun Indalex Finance, LLC v. United Steelworkers*,2013 SCC 6.
[67] *Ouellette (Trustee of)*,2004 SCC 64, para.15.
[68] 1995 CanLII 69 (SCC).
[69] 2004 CanLII 16649(QCCS).
[70] 2004 CanLII 16649(QCCS).
[71] **R-4L**. This letter was allegedly sent by email by Liftket's lawyer to the president of Highpoint without the Receiver receiving a copy and without any proof being presented as to its actual transmission, just like the letter from Unisson.
[72] **R-3L**.
[73] **R-3AL**.
[74] **RCI-7**.
[75] **RCI-13**.
[76] **1707.**Acts of alienation for consideration made by the person who has the obligation to return, if they have been carried out for the benefit of a third party in good faith, are enforceable against the person to whom restitution is due. Those made free of charge are unenforceable, subject to the rules relating to prescription.
Other acts carried out for the benefit of a third party in good faith are enforceable against the person to whom restitution is due.
ed
[77] *Les Obligations*, 7th ., Nathalie Vézina and Pierre-Gabriel Jobin, Cowansville, Yvon Blais, 2013, EYB2013OBL135, paragraph 934: "[A]*cts other than acts of alienation (for example, the creation of a mortgage or a servitude), carried out for the benefit of a third party in good faith, are also enforceable against the person who is entitled to restitution*";
Chénier v. Pétrole M. Miron , [1997] RDI 595 (CS), AZ-97023036, pages 6-7 : " *The creation of a mortgage on the property that is the subject of the restitution is subject to the conditions of the second paragraph of article 1707 CcQ* […] *The restitution had the effect of making the mortgage* […], *and the debt to which it is attached, enforceable against the creditor of the restitution* […].";
ed
Jean Pineau and Serge Gaudet, Theory of Obligations, 4th ., Montreal, Thémis, 2001, paragraphs 413-414;
Pierre-Gabriel Jobin and Michelle Cumyn, *The Sale* , 4th ed., Cowansville, Yvon Blais, 2017, EYB2017VEN20, paragraph 275.

CITATION*:* Unity Health Toronto v. 2442931 Ontario Inc., 2024 ONSC 1333
COURT FILE NO.: CV-18-00610995-00CL and CV-22-0067938-00CL
DATE: 20240313

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE RECEIVERSHIP OF 2442931 ONTARIO INC.

UNITY HEALTH TORONTO

-and-

2442931 ONTARIO INC.

AND RE: BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

-and-

UNITY HEALTH TORONTO

BEFORE: KIMMEL J.

COUNSEL: *Sarit Batner and Andrew Kalamut*, for the Unity Health Toronto

Harvey Chaiton, Stephen Schwartz and Darren Marr, for Bank of Montreal as Administrative Agent

HEARD: September 15 and November 24, 2023

ENDORSEMENT
(UNITY'S MOTIONS TO LIFT STAY AND TO DISMISS THE TIC APPLICATION AND LENDERS' MOTION FOR ASSIGNMENT OF PROJECT AGREEMENT RIGHTS)

[1] These (and other related) proceedings arise out of the St. Michael's Hospital ("SMH", now Unity Health Toronto or "Unity") redevelopment project (the "Project").

[2] Bondfield Construction Company Limited ("Bondfield") was granted a design-build-finance construction contract to build the Project following a public procurement process. Bank of Montreal, as Administrative Agent (the "Agent") for a syndicate of lenders (the "Lenders"), agreed to finance Bondfield. By April 2018, the Lenders had advanced the $230 million construction loan to Bondfield's affiliate that was under contract to build the Project, 2442931 Ontario Inc. ("ProjectCo").

[3] ProjectCo was contractually obligated by both SMH and the Lenders to obtain a Performance Bond and Labour & Materials Payment Bond for the Project (collectively referred to as the "Surety Bonds") that were obtained from Zurich Insurance Company ("Zurich").

[4] Bondfield became insolvent in August 2018, after which ProjectCo was unable to fulfill its obligations and went into default. ProjectCo was eventually put into receivership by the Lenders by order dated December 21, 2018 (the "Receivership Order"). Following the Receivership Order, the Receiver called upon the Surety Bonds and Zurich honoured its obligations to fund certain Project costs until March 2020, when it claims to have discovered fraud and collusion between representatives of SMH and Bondfield in the contract procurement process. Upon making this discovery, Zurich stopped funding Project costs under the Surety Bonds and in April 2020 it commenced an application to rescind them (the "Rescission Action").

The Motions

[5] Three motions in these proceedings were timetabled to be heard together, as follows:

a. Motion by Unity to lift the stay of proceedings (the "Stay") against ProjectCo put in place by the Receivership Order, so as to enable Unity to exercise its contractual right to terminate the Project Agreement dated January 27, 2015 between SMH and ProjectCo (the "Project Agreement" or "PA") (the "Lift Stay Motion");
b. Motion by the Lenders[1] seeking an order authorizing and directing the Receiver of ProjectCo to assign to the Agent all of ProjectCo's existing rights under the Project Agreement to enforce payment and recovery from Unity of the "TIC Payment" (a contractually prescribed payment to be made by Unity to ProjectCo upon the achievement of Tower Interim Completion, or "TIC"), and in the alternative, seeking an order joining the Receiver as a co-applicant in the TIC Application and, if necessary, authorizing the Agent to exercise all of ProjectCo's rights under the Project Agreement to determine whether TIC has been achieved in accordance with the dispute resolution process set out in Schedule 27 of the Project Agreement (the "Assignment Motion");
c. Motion by Unity to quash and/or dismiss the Application with Court File No. CV-22-00679388-00CL brought by the Agent on behalf of the Lenders, in which the Agent seeks a declaration that TIC has been achieved, or to compel Unity to take all remaining steps to achieve TIC, and for declaratory relief concerning the amount of the TIC Payment to be made under the Project Agreement (the "TIC Application") or, alternatively, an order directing that the TIC Application be converted into an action and be stayed.[2] (the "Motion to Dismiss"). Unity also seeks an order dismissing the Lenders' Assignment Motion in this same motion.

[1] The Lenders act through their Agent. References throughout this endorsement to the "Lenders" also include positions taken or asserted on behalf of the Lenders by their Agent.

[2] This alternative relief for the conversion of the TIC Application to an action is agreed to by the Lenders, if the TIC Application is not otherwise rendered moot or dismissed.

[6] There was only enough time for the parties to make their submissions on the Lift Stay Motion when the matter first came before the court on September 15, 2023. The Assignment Motion and the Motion to Dismiss were provisionally adjourned to November 7, 2023 for a further half day. Those motions were subsequently scheduled and heard on November 24, 2023.

[7] The court was asked not to deliberate or consider its decision on the Lift Stay Motion until the other two motions had been argued due to the potential for overlap in the relevant procedural steps, facts and issues across the three motions. Hence, the court's decision on all three motions is contained in this single endorsement.

[8] As summarized by Unity, by the time the three motions were heard the parties were in agreement that: (i) Unity is contractually entitled to terminate the Project Agreement; (ii) but for the Stay arising from ProjectCo's defaults under the Project Agreement, Unity could exercise its contractual right without the court's permission; (iii) if the Stay is lifted and Unity terminates the Project Agreement as it has said it intends to do, the TIC Application, the Assignment Motion and the Motion to Dismiss will be rendered moot; and (iv) TIC has not been achieved in the manner that is specified under the Project Agreement.

The Related Proceedings

[9] By the time the TIC Application was commenced in April 2022, the Tower was occupied and had been in use for approximately three years. The Lenders assert that TIC had been achieved or substantially achieved under the Project Agreement and that they are entitled to the TIC Payment, less permitted set-offs, under the Irrevocable Direction that they received from ProjectCo. They seek, in the alternative, an order directing Unity to take all remaining steps to achieve TIC. To the extent that the amount of the TIC Payment is disputed, they ask for the court to direct a reference for it to be determined.

[10] The Lift Stay Motion was brought on July 20, 2022. In it, Unity asks that the Stay be lifted so that Unity can terminate the Project Agreement due to ProjectCo's defaults. This would mean that Unity would not make any TIC Payment, but would pay the specified compensation due on termination of the Project Agreement, if any (the "Compensation on Termination"). Unity maintains that TIC has not been achieved and challenges the Lenders' standing to bring the TIC Application.

[11] To address concerns that had been raised by Unity (dating back to April 2022) about the Lenders' standing to bring the TIC Application, the Lenders brought the Assignment Motion on August 8, 2022, seeking an order, *inter alia*, authorizing the Receiver:

a. to assign to BMO all of ProjectCo's rights to enforce payment and recovery of the TIC Payment from Unity under the Project Agreement; or

b. in the alternative, an order joining the Receiver on behalf of ProjectCo, as a co-applicant in the TIC Application.

[12] On October 26, 2022, the Lenders amended the relief sought in their Assignment Motion to add further alternative relief, including;

a. if necessary, an order authorizing BMO in the name of or on behalf of ProjectCo to exercise ProjectCo's rights under the Project Agreement to have the Independent Certifier (the "IC") determine whether TIC has been achieved in accordance with the dispute resolution process set out in Schedule 27 of the Project Agreement.

[13] The court's endorsement of September 12, 2022 determined that the Lift Stay Motion, the Assignment Motion and Unity's then intended motion to dismiss/quash the TIC Application be heard together. If was further directed that the TIC Application would be heard later if not determined to be moot or quashed.

[14] Unity's Motion to Dismiss both the TIC Application (for lack of standing on the part of the Agent/Lenders, among other grounds) and the Lenders' Assignment Motion was initiated by Notice of Motion dated December 9, 2022.

The Economics of the Project

[15] All parties recognize that Unity has had, and will continue, to incur costs significantly in excess of the original Project's Guaranteed Price (defined below) to complete the patient Tower and the remainder of the St. Michael's Hospital redevelopment. That redevelopment work is still ongoing under a new construction contract that Unity entered into with Ellis Don Construction Services Inc. ("ED" or "Ellis Don"), albeit with a different scope of work and different specifications and milestones than existed under the Project Agreement with ProjectCo. Ellis Don is currently completing the St. Michael's Hospital redevelopment under a new construction management contract CCDC[3] 5B Contract entered on February 16, 2022 (the "ED Contract") at an additional contract cost to Unity of $277 million.

[16] There is no work being done under the Project Agreement. The Project envisioned by that agreement has not been completed. If the TIC Application (or some variation of it) proceeds, the Lenders will be seeking a TIC Payment. If the Lenders' position prevails, the permitted set-offs against the TIC Payment will not fully account for the total amount of additional costs that Unity will have incurred to achieve TIC.

[17] All parties also recognize that, if the Stay is lifted and Unity is permitted to terminate the Project Agreement, there will be no interim TIC Payment and the Lenders will not receive any Compensation on Termination of the Project Agreement because of the contractually permitted set-offs against that payment. Under this scenario, it is anticipated that the Lenders will only be repaid if Zurich Insurance Company does not succeed in its Rescission Action. Even then, the amount that the Lenders will be repaid (out of their original Construction Loan advance of $230 million) will

[3] Standardized by the Canadian Construction Documents Committee

depend on the actual cost to complete the redevelopment of St. Michael's Hospital and any permitted set-offs upon completion.

[18] Needless to say, both Unity and the Lenders are economically worse off as a result of ProjectCo's inability to complete the Project and the subsequent positions taken by Zurich.

Summary of Outcome

[19] For the reasons that follow,

a. The Lift Stay Motion is granted;

b. The Assignment Motion is dismissed; and

c. The Motion to Dismiss the TIC Application is granted.

The Project

[20] The basic chronology of the Project and its background is not disputed and is summarized as follows:

a. In 2012, SMH and the Ontario Infrastructure and Lands Corporation began planning for the Project. The Project included the construction of a new 17-story patient care tower (the "Tower"), the construction of a new Shuter Wing and the renovation of other existing hospital wings.

b. The Project is a Public-Private Partnership ("P3") project that uses the Design-Build-Finance ("DBF") model. Under the DBF model, ProjectCo was responsible for the design and construction of the Project, and for obtaining financing from the private sector, which was obtained from the Lenders.

c. On January 27, 2015, ProjectCo and SMH entered into the Project Agreement for the design, build and financing of the Project for a guaranteed fixed price of $301,189,863 (the "Guaranteed Price"). Subject to set-offs, the Guaranteed Price was to be paid by SMH to ProjectCo upon the achievement of two milestones: Tower Interim Completion (or TIC) and Substantial Completion.

d. Construction under the Project Agreement (and the related P3 DBF construction contract) was financed by a syndicate comprised of the Lenders. On January 27, 2015, ProjectCo and the Agent entered into a Credit Agreement (the "Credit Agreement") pursuant to which the Lenders agreed to advance an approximately $230 million construction loan (the "Construction Loan") to ProjectCo for the Project.

e. On January 27, 2015, ProjectCo also entered into:

i. a Construction Contract with Bondfield, the builder of the Project and an affiliate of ProjectCo; and

ii. a Lenders' Direct Agreement (the "LDA") with Unity and the Lenders.

f. The Project Agreement and the Credit Agreement both required ProjectCo to obtain and maintain a Performance Bond in the amount of approximately $156 million and a Labour & Material Payment Bond in the amount of approximately $142 million (collectively, the "Surety Bonds") until the Project was completed. Zurich Insurance Company issued these Surety Bonds.

g. Under the terms of the Credit Agreement, the Construction Loan was to be advanced in stages as construction progressed. By April 2018, the Lenders had fully advanced a $230 million Construction Loan to ProjectCo.

h. Pursuant to the terms of the Project Agreement and the Credit Agreement, SMH agreed to make the TIC Payment (of $173,274,150 less permitted set-offs) to ProjectCo upon the achievement of the Tower Interim Completion milestone (or TIC). TIC was originally scheduled to be achieved by November 27, 2017 (the "TIC Date"). The remainder of the Guaranteed Price under the Project Agreement was to be paid upon the achievement of the Substantial Completion.

i. In August 2017, ProjectCo served a notice that TIC would be completed by November 2017.

j. On November 8, 2017, SMH and ProjectCo entered into a new Tower Interim Completion Agreement ("TIC Agreement") to address certain delays at the Project. The TIC Agreement provided, among other things, for a deferral of certain work from TIC to the next phases of the Project and a revised TIC Date of February 1, 2018.[4]

k. TIC was not achieved on the November 27, 2017 TIC Date.

l. On November 30, 2017, the Lenders' technical advisor, Pelican Woodcliff Inc. ("Pelican") reported that approximately 83% of the work towards TIC had been completed.

m. Work continued at the Tower after November 2017. ProjectCo remained on site and continued to work on the Tower after November 2017 and into 2018, as did various subtrades.

[4] The parties confirmed that this revised TIC Date and TIC Agreement are not relevant to any of the issues on the present motions.

n. TIC was not achieved on the February 1, 2018 revised TIC Date.

o. By August 2018, Bondfield had become insolvent and ProjectCo was unable to continue to perform its obligations under the Project Agreement.

p. Following ProjectCo's default under the Project Agreement in August 2018, Zurich became involved in the Project as surety and engaged Ellis Don and Perini Management Services Inc. to work with Bondfield.

q. On November 2, 2018, Unity delivered a default notice to ProjectCo and to the Lenders declaring ProjectCo to be in default under the Project Agreement. This also served as the LDA default notice. There had been no certification that TIC was achieved at the time of the delivery of this notice (nor has there been since then).

r. On December 6, 2018, Unity delivered an Indebtedness Notice to the Lenders in the sum of $65,922,936.61. This represented the Direct Losses claimed to be associated with unperformed or underperformed obligations of ProjectCo. The Notice triggered the 90-day Notice Period under the LDA during which time Unity was precluded from terminating the Project Agreement and the Lenders had the right to step-in to cure the defaults (the "Step-in Rights"), which would have required them to pay the amount in the Indebtedness Notice.[5]

s. On December 21, 2018, the Agent for the Lenders made an application to put ProjectCo into receivership. The Receivership Order was granted that day. Alvarez & Marsal Canada Inc. was appointed as Receiver for among other purposes, to make demand on Zurich for payment under the Performance Bond. Unity supported the Lenders' request for the Receivership Order.

t. The Receiver did not take possession of any of ProjectCo's property under the Receivership Order. The Receiver was provided with limited funding from the Agent and was directed to demand performance under the Performance Bond. The Receivership Order expressly states that it did not constitute an exercise of the Lenders' Step-in Rights, nor did it affect the ability of ProjectCo to perform its obligations under the Project Agreement or its agreement with Bondfield.

u. The Stay was included in the Receivership Order and was not opposed.

[5] According to Unity, the amount of that indebtedness would now be in excess of $100 million.

v. After the Receivership Order was granted on December 21, 2018, the Receiver called on the Performance Bond and Zurich began performing ProjectCo's obligations under the Project Agreement.

w. The Lenders' step-in period ended on January 31, 2019. The Lenders did not exercise their Step-in Rights.

x. Zurich had an election to: remedy the defaults of ProjectCo, make arrangements to complete the contract, or to pay the lesser of the remaining balance of the bond amount or the reasonable estimate to complete the contract. Initially, Zurich elected to work towards completion of the Project.

y. Over approximately the next twelve months, Zurich made payments to trades under the Surety Bonds to continue construction at the Project. In this timeframe, the parties were working towards achieving TIC.

z. However in August 2019, Zurich's then lawyers wrote to Unity advising that the estimated cost to complete the Project would exceed the outstanding balance of the Performance Bond. On August 22, 2019, Zurich advised it was electing to pay the remaining balance of the Bond Amount and to cease its involvement in the Project.

aa. There had been no certification that TIC had been achieved when Zurich made its election.

bb. The Project was not substantially completed by the Scheduled Substantial Completion Date of September 27, 2019.

cc. Following Zurich's advice of its intention to terminate its involvement in the Project, SMH elected to exercise its remedial rights pursuant to s. 34.4(d) of the Project Agreement and engaged Ellis Don as construction manager, still with the intention of progressing the Project to achieve TIC.

dd. Ellis Don produced a Design Compliance Audit dated October 15, 2019 (the "ED Compliance Audit") in which it attempted "to illuminate the design compliance issues to help provide a road map toward final acceptance and certification of the current Phase Completions as well as Tower Interim Completion." The ED Compliance Audit identified a number of outstanding items in the phase 1 and phase 2 work, including outstanding items to achieve TIC. There were 937 items listed on the PDC July 22, 2019 Compliance Log (the "Compliance Log") and a further 55 items listed on the Supplemental Compliance Log. These Compliance Logs were not prepared to track compliance with TIC specifically, although they do address some items that were then outstanding and required for TIC Certification.

ee. On December 20, 2019 Conway J. made an order (the "Conway Order") lifting the Stay to permit Unity to exercise its remedies pursuant to s. 34.4(d) of the Project Agreement to engage and directly make payment to, at ProjectCo's risk and expense,

various contractors and trades to, among other things, achieve TIC. This was without prejudice to Unity's other remedies, expressly including Unity's right to apply to the court to exercise its right to terminate the Project Agreement.

ff. On December 21, 2019, Unity and Ellis Don entered into an agreement that included work relating to the Tower. The scope of work did not include all of the Project Agreement's requirements to achieve TIC. This contract excluded, among other things, certain non-compliant design items identified in the Compliance Log and Supplementary Compliance Log prepared in connection with the ED Compliance Audit.

gg. On January 3, 2020 the Altus Group Limited, in its capacity as the IC, indicated a revised target TIC Date of August 17, 2020 (delayed from a previous target TIC Date of May 11, 2020).

hh. In March 2020, Zurich claimed to have discovered collusion in the procurement process between Vasos Georgiou, who was the executive Vice President and Chief Administration Officer of SMH with primary responsibility for the Project within SMH, and John Aquino, the President of Bondfield.

ii. On April 16, 2020, Zurich announced it was no longer going to pay the balance of the Performance Bond (despite its August 22, 2019 election) and commenced the Rescission Action seeking, amongst other relief, rescission of the Surety Bonds. Zurich has, to date, not paid the full outstanding balance of the Performance Bond to the Lenders.

jj. In the late spring of 2020 when Zurich ceased to provide funding, construction had slowed and construction costs began to escalate with the uncertainty of the COVID-19 pandemic. The Lenders and Unity began to discuss the possibility of an "interim" "good faith" advance payment from Unity (the "Advance Payment").[6] These discussions continued until the winter of 2022, but no agreement was reached, due in part to disagreements about how to account for the additional costs that Unity was incurring in connection with the Project.

kk. On February 16, 2022, with input from the Lenders, Unity entered into direct agreements with contractors to progress the hospital redevelopment, including the

[6] In those negotiations, this payment was not referred to as the TIC Payment. While the parties each suggest that the court can draw certain inferences from the fact of these negotiations and what they were each willing, and not willing, to agree to, in the absence of any agreement having been reached, the court places no reliance upon the evidence about the back and forth in these negotiations.

ED Contract with Ellis Don. Some of the preparatory work covered by this construction contract had begun in June 2021.

ll. Unity says that, notwithstanding Zurich's Rescission Action and refusal to fund any further Project costs, it continued to rely upon, or seek to preserve reliance upon, insurance coverage tied to the Project Agreement to complete certain scope of work that was nearing completion during this intervening period.

mm. The Lenders commenced the TIC Application in April 2022, shortly after Unity entered into the ED Contract and after the parties had failed to reach an agreement regarding any Advance Payment by Unity to the Lenders.

nn. On May 16, 2022, Unity gave notice that it intended to exercise its right to terminate the Project Agreement and sought the Receiver's consent to the lifting of the Stay for this purpose.

oo. On May 18, 2022, the Receiver advised that it was the Agent's position that the termination of the Project Agreement could adversely affect the Lenders' rights (particularly those asserted in the TIC Application) and that the Agent had requested that the Receiver not consent to lifting the Stay. In light of its limited scope mandate, the Receiver advised that it would defer to the court's judgment. The Receiver suggested that Unity should bring a motion to lift the Stay, which it did.

pp. The procedural steps that followed (the Lift Stay Motion, the Assignment Motion and the Dismissal Motion) are described earlier in this endorsement.

The Relevant Contracts

[21] ProjectCo was a shell company by design. ProjectCo had the responsibility to perform and complete all of the work to be done under the Project Agreement at its own cost and expense (see s. 10.3 of the Project Agreement). Under this P3 DBF financing model, the Lenders funded the Project and they could only look to the Guaranteed Price payable by SMH (now Unity) under the Project Agreement for repayment.

[22] The Project Agreement and the Credit Agreement both required ProjectCo to obtain and maintain the Surety Bonds until the Project was completed and the Construction Loan was repaid.

[23] The Project Agreement contains provisions relevant to the determination of the present motions.

a. The definition of Tower Interim Completion (or "TIC") in s. 1.329 of the Project Agreement is as follows:

> "Tower Interim Completion" means the point at which (i) the Tower has been completed in accordance with the Project Agreement; (ii) the Tower Occupancy Permit has been issued; and (iii) all requirements for

Tower Interim Completion described in the Tower Interim Completion Commissioning Program, other than in respect of Tower Interim Completion Minor Deficiencies, have been satisfied.

b. The definition of Substantial Completion in s. 1.315 of the Project Agreement is tied to the completion of the entire Facility (Project).

c. Pursuant to s. 4.4(a) of the Project Agreement, ProjectCo irrevocably directed SMH to pay to the Agent any TIC Payment that ProjectCo is entitled to under the Project Agreement once the conditions for payment set out in the Project Agreement, if any, have been satisfied (the "Irrevocable Direction").

d. Section 23B.4 of the Project Agreement sets out the procedure for requesting and obtaining a Tower Interim Completion Certificate from the designated IC and the process for Dispute Resolution if any party disagrees with the Independent Certifier's report and decision about whether or not to issue the Certificate.

e. Sections 34.3 and 34.4 set out the remedy provisions in the event of a default by ProjectCo, which include termination rights at 34.3(a) and 34.4 (a)–(c). The remedy provisions also include (at s. 34.4(d)), without prejudice to any other rights of SMH under these remedy provisions (which include the right to give notice of default and eventually terminate the Project Agreement), that SMH may, at any time when a ProjectCo Default is continuing "at ProjectCo's risk and expense, take such steps as SMH considers appropriate, either itself or by engaging others (including a third party) to take such steps, to perform or obtain the performance of ProjectCo's obligations under this Project Agreement or to remedy such ProjectCo Event of Default."

f. In the event of a default by ProjectCo, Unity had the right to terminate the Project Agreement under s. 34.3(a). Pursuant to s. 4.9(1)(i) of the Project Agreement, upon any such termination by SMH it is required to pay ProjectCo any applicable Compensation on Termination in accordance with Schedule 23. ProjectCo irrevocably directed SMH to make any such Compensation Payment to the Lenders' Agent under s. 4.9(b) of the Project Agreement.

g. Rights of set-off at law or in equity by SMH are limited under s. 4.12 of the Project Agreement to amounts due to SMH by ProjectCo, which expressly include any indemnity amounts payable to SMH in accordance with Article 44, such as losses incurred as a result of ProjectCo's failure to achieve TIC by the Scheduled TIC Date.

h. Section 37.02 of the Project Agreement stipulates that a failure to exercise a right upon default, including a right of termination, is not a waiver of that right for any continuing or subsequent breach.

i. Section 47.1 of the Project Agreement restricts ProjectCo from assigning all or any part of any interest, whether legal or beneficial, in the Project Agreement without the

> prior written consent of SMH, which may be withheld in the sole discretion of SMH. However, this section exempts any security for any loan made to ProjectCo covered by the LDA.

[24] Section 7 of the LDA provides for what is to happen if SMH terminates the Project Agreement.

[25] Section 8 of the LDA allows the Lenders to step-in and assume all of ProjectCo's rights under the Project Agreement (the previously referred to "Step-in Rights") when ProjectCo is in default, and s. 9 of the LDA allows the Lenders to step-out of this role (the "Step-out Rights"). Section 11 deals with transfers and assignments where Step-in and Step-out rights are exercised.

[26] The CCDC 5A Contract that Unity entered into with Ellis Don in December 2019 defines Tower Substantial Completion as follows:

> Tower Substantial Completion means August 17, 2020 and completion of the scope of Services set out in Section 4 of Appendix A to the Contract, which for clarity does not include the scope of Services set out at Sections 5 and 6 Appendix A and which may be adjusted in accordance with the Agreement, including GC 5.1.5.

[27] Tower Substantial Completion under this CCDC 5A Contract does not include everything that was required for TIC under the Project Agreement. Further, certain items in Schedule A to the CCDC 5A Contract that are to be completed after Tower Substantial Completion are matters that would have had to be completed for TIC under the Project Agreement. According to Unity, not all of these items have yet been completed. The Lenders say that this would be determined in the TIC Application.

The Receivership

[28] The non-possessory Receivership Order was granted on December 21, 2018 in respect of ProjectCo. The Receiver was appointed with limited powers and authority designed, in particular, to allow ProjectCo to call on Zurich's Performance Bond.

[29] Specifically, the Receiver was not granted the authority and power to step into ProjectCo's shoes and take over the Project and did not assume ProjectCo's rights and obligations under the Project Agreements. The Receiver was granted certain limited rights and obligations under specific contracts that permitted the Receiver to take steps in connection with the Surety Bonds. The Lenders did not fund the Receiver for a broader purpose.

[30] If this had been a full blown receivership the Receiver could have stepped in to complete the Project and apply for TIC Certification, but that did not happen.

[31] As is customary in receivership orders, a stay of proceedings and of the exercise of all rights and remedies against ProjectCo (or the Receiver) or affecting its property was granted. This Stay was expressly stated not to prevent SMH from asserting set-off rights against ProjectCo arising

under the Project Agreement, if any. However, the Stay does not exempt the exercise of termination rights. Thus, the Stay must be lifted for Unity to now exercise those rights.

[32] On December 20, 2019, Unity, with the support and consent of the Lenders' Agent, brought a motion and obtained the Conway Order lifting the Stay against ProjectCo for the purpose of allowing Unity to exercise certain of its remedial rights under s. 34.4(d) of the Project Agreement and perform ProjectCo's obligations under the Project Agreement.

[33] The preamble to the Conway Order states that the motion was for "an Order lifting the stay of proceedings granted pursuant to the Receivership Order, to allow Unity to exercise certain remedial rights under the Project Agreement, on an interim basis, to facilitate the orderly continuation of the St. Michael's Hospital Redevelopment Project, in circumstances where the Cost to Complete the Bonded Obligations has not yet been determined."

[34] At that time, Unity believed that TIC was still achievable and sought the lifting of the Stay to facilitate its efforts to continue the progress of the Project. Unity's goal since ProjectCo defaulted had been to progress the Project to the point where it could be useful clinically to the hospital. In December 2019 when the Conway Order was obtained, Unity acknowledges that goal included carrying out the works required to achieve TIC, the first milestone in the completion of the Project.

[35] In support of the motion before Conway J., SMH filed evidence which stated, *inter alia*, that "SMH has identified EllisDon as an appropriate entity to take on the role of construction manager through to Tower Interim Completion ..." The parties appear to be in agreement that, if TIC had been achieved, Unity would have been required to make the TIC Payment to the Lenders.

[36] Paragraph 3 of the Conway Order states as follows.

> 3. THIS COURT ORDERS that the stay of proceedings against ProjectCo, granted pursuant to the Receivership Order, is hereby lifted for the purpose of permitting Unity to exercise the remedy pursuant to Section 34.4(d) of the Project Agreement to engage and directly make payment to, at ProjectCo's risk and expense, and by taking commercially reasonable steps to mitigate such costs: (i) the Construction Manager, pursuant to and in accordance with the Construction Management Contract; (ii) NORR, pursuant to and in accordance with the Payment Certifier Agreement; (iii) NORR and/or an engineering firm pursuant to and in accordance with Design Agreements; and (iv) Trades, pursuant to and in accordance with any Trade Agreement which may be necessary to enter into to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Tower Interim Completion all in accordance with the Project output specifications and executed change orders.

[37] The Conway Order permitted SMH to take steps towards the achievement of TIC in accordance with the Project Agreement (at ProjectCo's risk and expense), incorporated certain protections for SMH if it did so, preserved SMH's rights of set-off and was expressly stated in paragraph 10 to be "without prejudice to the right of any party to apply to the Court for further or other directions or relief, which application may include to exercise any rights or remedies under any of the Redevelopment Project Agreements, and including, without limitation, Unity's right to apply to the Court to exercise its right to terminate the Project Agreement."

Issues to be Decided

[38] The following issues are raised for the court's consideration on the three motions:

The Lift Stay Motion

a. Should the Stay be lifted to permit Unity to exercise its contractual right to terminate the Project Agreement?

The Assignment Motion — the Lenders' Standing to Bring the TIC Application

b. Have the Lenders already received a legal or equitable assignment of ProjectCo's right to have TIC determined and enforce its payment, or do they have the right to do so as third party beneficiaries?

c. Should the Receiver be authorized and directed to assign to the Lenders all of ProjectCo's existing rights under the Project Agreement to enforce payment and recovery from Unity of the TIC Payment?

    i. Does ProjectCo have any rights under the PA that it can assign to the Lenders?

    ii. Can there be any such assignment without Unity's consent?

d. Should the Receiver be added as a co-applicant to the TIC Application to "solve" the Lenders' lack of standing, or regardless of the standing issue?

e. Should the Agent be authorized to exercise ProjectCo's right to have the IC determine whether TIC has been achieved in accordance with Schedule 27 of the Project Agreement?

The Motion to Dismiss the TIC Application

f. Should the TIC Application be struck/dismissed for lack of standing and/or as an abuse of process?

Follow-on or Ancillary Relief

g. If the TIC Application is permitted to proceed, should it be converted to an action?

h. If the TIC Application (or TIC Action) is permitted to proceed, should it be stayed pending (i) the process for ascertaining TIC provided for in the Project Agreement, which requires a determination by the IC, as opposed to by the court; and (ii) the disposition of the Zurich Action.

Analysis

[39] Each of the three motions and the issues raised by them will be considered in turn.

A.The Lift Stay Motion

The Test to Lift the Stay

[40] The parties agree on the legal principles applicable on a motion to lift the stay of proceedings in a receivership. As the Court of Appeal articulated in *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.*, 2017 ONCA 301, at para 30:

> [30] In determining whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides: *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, [2012] O.J. No. 6219, 2012 ONSC 7319, 97 C.B.R. (5th) 303 (S.C.J.), at para. 5. While not strictly applicable, a court may take guidance from the jurisprudence addressing the lifting of stays under s. 69.4 of the *BIA*: see *Peoples Trust Co.*, at para. 5; and Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *The 2016-2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016), at p. 1085.

[41] The onus is on Unity to satisfy the court that lifting the Stay is appropriate in this case. The Section 69.4(1) jurisprudence is clear that the granting of a lift stay order is not a routine matter. Under s. 69.4(1), the court must be satisfied that the moving party has established "sound reasons" for the court to exercise its discretion to relieve against the stay. Such reasons include that (a) the creditor is "likely to be materially prejudiced by [its] continued operation; or (b) that it is equitable on other grounds to make such a declaration". See *Ma v. Toronto-Dominion Bank* (2001), 143 OAC 52 (Ont. C.A.), at paras. 2 and 3.

[42] The court must also consider the impact of lifting the stay on other stakeholders, especially on other creditors, if doing so would prejudice their interests and risk their recovery. See *Hood (Re)* (2008), 49 CBR (5th) 209 (Ont. S.C.), at paras. 10–12 and *Mondetta Telecommunications Inc., Re* (2001), 24 CBR (4th) 222 (Ont. S.C.), at para. 21.

[43] The court has a broad discretion in deciding whether to lift the Stay, part of which is to control its process and prevent an abuse of its process. See *Cetin v. Percival et al*, 2022 ONSC 2057, at para. 9.

The Positions of the Parties on the Lift Stay Motion – Perspectives on Prejudice and Equities

a) Unity's Position

[44] Unity asks that the Stay be lifted so that it can exercise its contractual right to terminate the Project Agreement. No work is continuing under the Project Agreement. The St. Michael's Hospital redevelopment is being completed under the new ED Contract. The Stay is all that is preventing Unity from exercising its termination rights under the Project Agreement.

[45] Unity acknowledges that terminating the Project Agreement will render the TIC Application moot and eliminate any TIC Payment that might be found to be owing if the Lenders were to succeed on the TIC Application. Instead, Unity will be obligated to pay the contractually specified Compensation on Termination, if any. Unity argues that this is precisely what the parties bargained for under their contractual framework: Unity has the right to enter into a new construction contract and terminate the Project Agreement as a result of ProjectCo's incurable defaults, triggering the payment of any compensation due upon termination instead of the TIC Payment.

[46] Unity maintains that waiting to bring this Lift Stay Motion (which it acknowledges could have been brought as early as January 2019) was not a delay tactic. Rather, it has been consistently pursuing its stated objective of completing the St. Michael's Hospital redevelopment. At first, it was thought that could be done by keeping the Project Agreement in place, continuing to work with the trades and authorizing the Receiver to call on the Surety Bonds. The Conway Order permitted it to do that. However, circumstances changed after Zurich stopped paying under the Surety Bonds and commenced the Rescission Action. Unity had to pivot and eventually entered into the ED Contract to complete the redevelopment of the hospital. Ellis Don was not prepared to assume responsibility for the full scope of work under the Project Agreement, including all that was required to achieve TIC.

[47] Unity says that it is entitled to exercise its contractual rights and remedies under the Project Agreement and it will be prejudiced if the court does not lift the Stay to allow it to do so. Not lifting the Stay not only deprives Unity of its ability to exercise its contractual remedy to terminate but it will mean that Unity will be required to defend the TIC Application in which the Lenders seek to have the court determine and enforce rights of ProjectCo. The Lenders seek to do so without regard to ProjectCo's defaults and without assuming any responsibility for ProjectCo's obligations under the Project Agreement. The Lenders seek, by the TIC Application, to achieve what they could have done through the exercise of their own contractual remedy (pursuant to their Step-in Rights to perform and enforce the Project Agreement) while avoiding the burdens of that remedy, since exercising their Step-in Rights would have required them to assume ProjectCo's obligations.

[48] Unity argues that preventing it from terminating the Project Agreement and requiring it to continue to bear the burden of funding the excess costs to achieve TIC with uncertainty around its set-off rights materially changes the bargain that the parties struck, which squarely placed the financial risk of completing the Project within the Guaranteed Price on ProjectCo (and, thus, its Lenders who funded ProjectCo's work) by clearly specifying the circumstances under which the Lenders could exercise their Step-in Rights upon assuming responsibility for ProjectCo's obligations.

[49] When ProjectCo defaulted, the Lenders made the strategic and financially-based decision not to exercise their Step-in Rights because, among other things, they did not want to take on the indeterminate liability of doing so. This choice meant that Unity had the right, but not the obligation, to move the Project forward itself - at ProjectCo's risk and expense — while maintaining its termination right. That was the bargain struck between the parties that the Lenders seek to alter and that Unity seeks to uphold. Depriving Unity of its contractual rights and remedies as negotiated and agreed (not only with ProjectCo but the Lenders as well) is a material prejudice that it claims will suffer as a result of the continued operation of the Stay.

[50] Conversely, Unity contends that the economic consequences to the Lenders of lifting the Stay flow from the provisions of the relevant contracts, the Lenders' election not to exercise their Step-in rights under the LDA and take over the Project (a risk that the Lenders were not prepared to take on and that Unity has had to endure as a result) and their decision not to fund a full-blown receivership and appoint a receiver-manager to complete the Project (at their expense). This is not the sort of "prejudice" to the Lenders' interests or risk to their recoveries that the court should be concerned with when considering whether to lift the Stay. Unity says that the Lenders' position on these motions, if successful, would put them in the unfair position of preserving ProjectCo's rights under the Project Agreement divorced from its obligations and put the Lenders in a better position than they bargained for under the relevant contracts.

[51] Unity also contends that the Lenders are not prejudiced by not being able to pursue an interim TIC Payment when TIC has not been achieved. Nor is it unfair for them to have to wait until the Rescission Action has been decided and the full extent of the Project cost overruns are known before determining how much money ProjectCo is entitled to receive from Unity (which ProjectCo has, in turn, directed be paid to the Lenders to pay down their loan).

[52] Unity argues that the allegations of its own misconduct and involvement in the alleged fraud underlying the Rescission Action are the subject of separate proceedings in which the Lenders are seeking damages. While these allegations are denied, Unity recognizes that the other proceedings are an avenue of recourse for the Lenders if their allegations can be proven.

[53] Unity asks the court to find that, on balance, it is more prejudiced by the Stay remaining in place than the Lenders will be by the Stay being lifted, having regard to the respective contractual rights and remedies that these sophisticated parties bargained for.

b) The Lenders' Position

[54] The Lenders argue that Unity has not established that it is suffering any relevant or material prejudice as a result of the continued operation of the Stay. The Lenders say that there is no harm or prejudice to keeping the Project Agreement in place even if it is no longer the construction contract under which the work is being done. Unity has already entered into the ED Contract and the continuing work under that contract is not being impeded by the continued co-existence of the Project Agreement. Further, all of the legitimate set-offs for cost overruns and/or insurance reimbursements in respect of the cost to complete the St. Michael's Hospital redevelopment will be determined in the TIC Application and/or the Rescission Action.

[55] They argue that the loss of a contractual remedy that is stayed in a receivership is not the type of prejudice that would justify the lifting of the Stay as that prejudice is a "given" and would exist in any stay situation. The loss of this type of contractual remedy should not tip the balance in Unity's favour.

[56] Conversely, the Lenders say that it is unfair and prejudicial to them to allow the Project Agreement to be terminated by Unity after the Lenders' funds were used to build much of the patient Tower at St. Michael's Hospital that has been open and in use for at least three years. They maintain that ProjectCo should be paid the interim TIC Payment, which it has, in turn, irrevocably directed be paid to them.

[57] The Lenders contend that, having now achieved, or substantially achieved, TIC (or putting itself in a position where TIC cannot be achieved by engaging a new contractor under a different contract with different specifications, i.e., the ED Contract), Unity is tactically attempting to terminate the Project Agreement to avoid having to make the TIC Payment. They contend that they will prevail on the TIC Application and that the interim TIC Payment owing will not be subject to set-off of future Project completion costs incurred after, and not yet expended when, that payment came due.

[58] The Lenders further argue that Unity supported the Stay and sought leave of the court to exercise its other remedies to enable it to work towards TIC and eventual Project completion, and Unity should be required to stay on that path. Unity is only now moving to Lift the Stay and terminate the Project Agreement because the Lenders are taking steps to enforce the TIC Payment.

[59] Although not a party to the Project Agreement, the Agent claims to have standing to enforce ProjectCo's right to seek the TIC Payment under the Project Agreement (assuming it is not terminated) as an assignee. The Agent maintains that it received a legal or equitable assignment from ProjectCo of the TIC Payment as part of the security for the Construction Loan that entitles it to enforce the TIC Payment.

[60] The Lenders also seek to implicate Unity in the fraudulent conduct underlying Zurich's Rescission Action as a further ground for denying Unity's Lift Stay Motion and Motion to Dismiss, because Unity is alleged not to be coming to court with clean hands. At this stage, the Lenders argue that Unity should not be entitled to lift the Stay and terminate the Project Agreement so as to benefit from the alleged wrongdoing of one of its senior executives.

[61] The Lenders say that it is fundamentally unfair for the TIC Application to be rendered moot by Unity's termination of the Project Agreement and that the court should not exercise its equitable discretion in favour of Unity's request for the Stay to be lifted in circumstances where:

a. One of Unity's senior executives (Vasos Georgiou, who was the executive Vice President and Chief Administration Officer of SMH with primary responsibility for the Project within SMH) is at the heart of the fraud allegations that are the subject of the Rescission Action and that have resulted in Zurich's refusal to pay the remaining balance of the Performance Bond. Unity does not have clean hands and should not benefit from the court's exercise of discretion in the face of this alleged wrongdoing

of one of its senior executives that is what led Zurich to change its position and refuse to advance funds under the Surety Bonds that formed part of the Lenders' security.

b. Unity supported the grant of the Stay originally and represented to the court at the time of the Conway Order that it believed TIC could be achieved and that it was working towards that. It now wants to instead terminate the Project Agreement (and any possibility of achieving TIC if it has not been achieved already) and the court should not exercise its discretion to permit it to do so.

Analysis: The Totality of the Circumstances and the Relative Prejudice to the Parties

a) The Circumstances and Context of the Lift Stay Motion

[62] The economic implications of this dispute (described earlier in this endorsement) come down to the timing and extent of Unity's set-off rights with respect to the amounts it has expended, or will have to expend, to complete the Project as a result of ProjectCo's defaults. This, in turn, impacts Unity's short and long term obligations regarding any remaining payments to be made under the Project Agreement, which the Lenders will receive pursuant to the Irrevocable Direction.

[63] If the Project Agreement is terminated, there is no real dispute about Unity's set-off rights against the contractual Compensation on Termination payment (that will, in turn, be paid to the Lenders under the Irrevocable Direction). These set-offs will in all likelihood reduce that payment to nil and mean that the Lenders will have to wait until the Project is completed and the Rescission Action has been decided to be repaid anything (from Zurich under the Surety Bonds). Depending on the outcome of the Rescission Action, they face the risk of being repaid nothing.

[64] However, if the Project Agreement cannot be terminated (because the Stay remains in place), there will eventually have to be a determination of the parties' dispute about whether a TIC Payment is owing and the extent to which the total amounts expended by Unity can be set-off against the TIC Payment. Depending on the outcome of the TIC Application, Unity could be required to make a TIC Payment (that will, in turn, be paid to the Lenders under the Irrevocable Direction) in the interim, while Unity is still trying to complete the St. Michael's Hospital redevelopment under the new $277 million ED Contract that it is funding from other sources. Further, it will remain uncertain what, if any, amounts for ProjectCo's work initially funded by Zurich Unity may have to repay to Zurich (depending on the outcome of the Rescission Action).

[65] This is a somewhat unique situation in that there are only two economic stakeholders in the ProjectCo receivership, Unity and the Lenders, who not only both contracted with ProjectCo but also with each other (and ProjectCo) under the LDA. They both rely on their contracts, for different purposes.

b) Unity's Prejudice

[66] Starting first with whether Unity has established that it will suffer any material prejudice by the continued operation of the Stay, I find that it will.

[67] ProjectCo has been in default of the Project Agreement for years. It is insolvent. It has not taken steps to remedy its defaults. In addition to failing to achieve TIC by the TIC Completion Date, ProjectCo failed to achieve Substantial Completion within 180 days of the Scheduled Substantial Completion Date. ProjectCo is not in a position to cure any of these defaults. The contractual framework, which was formed within the context of the P3 DBF model, intentionally placed all of the risk of construction cost overruns on ProjectCo (and ultimately ProjectCo's Surety and the Lenders, subject only to their negotiated security and other contractual rights such as their Step-in rights).

[68] The Lenders supported Unity's efforts to obtain the Conway Order so that Unity could exercise its remedial rights under the Project Agreement, expressly specified to be at ProjectCo's risk and expense. Through the exercise of its remedial rights, Unity awarded contracts for completion of the Project, including the $277 million ED Contract. But for the Stay, Unity would have the contractual right to terminate the Project Agreement.

[69] The Court of Appeal has held in the labour context that a stay should not be allowed to remain in place to indefinitely suspend the legal rights and remedies enjoyed by unions and employees. See *Romspen Investment Corporation*, at para. 39. Unity asks for the same consideration to be given to the contractual rights and remedies it enjoys under the Project Agreement and the LDA, now that there is no reason to keep the Project Agreement in place since Unity has had to enter into a new contract with Ellis Don to complete the St. Michael's Hospital redevelopment. This case is not directly analogous since, unlike in Romspen, the legal rights and remedies Unity seeks to exercise are to terminate, rather than to continue acting under the relevant agreement.

[70] There are other cases, decided under the BIA, in which stays have been lifted to permit a party to exercise its "clear contractual right" where those rights are not subject to the security of the debtors' creditors. In the fairness analysis, these cases suggest that what the court should be concerned about is allowing the stay to amount to an appropriation of a clear contractual right for the benefit of a creditor. See *Bank of Montreal v. Bumper Developments Corporation Ltd.*, 2016 ABQB 363, 38 C.B.R. (6th) 118, at paras. 17–23 and 27.

[71] Here, neither the Irrevocable Direction[7] nor the Surety Bonds (which comprise the Lenders' security) are affected by the exercise of Unity's right to terminate the Project Agreement. The Irrevocable Direction applies to any payments made by Unity to ProjectCo, both under the Project Agreement and upon its termination. No party has suggested that the termination of the Project Agreement will have any effect upon the obligation of Zurich under the Surety Bonds, which is dependent upon proof of an alleged fraud that predates all of the contracts. To the contrary, the

[7] The Lenders' characterization of the Irrevocable Direction as a legal or equitable assignment of ProjectCo's right to TIC determined and enforcement the TIC Payment and the implications of that are considered later in this endorsement.

parties have indicated that there is virtually no overlap in the issues to be decided in the Rescission Action and those to be decided on the TIC Application or these motions.

[72] In this case, the only clear contractual right that is being appropriated is Unity's right to terminate the Project Agreement (that the Stay is preventing). It is Lenders that seek to benefit from the Stay granted under the Receivership Order to prevent Unity from exercising its clear contractual right to terminate the Project Agreement so that the Lenders can try to extract an interim TIC Payment from Unity, while Unity continues to incur the additional expense of completing the hospital redevelopment under its new ED Contract.

[73] The Lenders rely on other cases involving the lifting a stay of proceedings in the bankruptcy context to support their contention that the mere fact that the existence of the stay results in a denial to one party of its right to exercise a particular contractual remedy which would otherwise be available does not necessarily constitute a material prejudice such as is necessary for a lift stay order. See *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148, 608 A.R. 292, at para. 44, and *Alberta Treasury Branches v. COGI Limited Partnership*, 2018 ABQB 356, 60 C.B.R. (6th) 138, at paras. 52–53. The Lenders argue that Unity's loss of the contractual right to terminate the Project Agreement should not be the deciding factor on this motion.

[74] In the two BIA cases the Lenders cite, the court declined to lift a stay to allow a creditor to exercise a contractual right where doing so would give that creditor a "leg up" on another creditor, or to permit a creditor to satisfy its own claims at the expense of other creditors' claims. See *Alberta Treasury Branches*, at paras. 50 and 55, and *Alignvest*, at para. 47. The circumstances and potential outcomes that were of concern in these other cases in which the court declined to lift a BIA stay of proceedings do not arise in the context of Unity's Lift Stay Motion. If anything, the opposite is true in this case where: not lifting the Stay will put the Lenders in a better position than they bargained for if Unity cannot terminate the Project Agreement for ProjectCo's defaults and the Lenders are permitted to pursue the TIC Application, in which they seek to determine and enforce ProjectCo's rights and remedies under the Project Agreement without assuming responsibility for ProjectCo's obligations.

[75] Nor has it been suggested that the continued existence of the Project Agreement (that Unity seeks to terminate once the Stay is lifted) itself represents any value for ProjectCo or its body of creditors. See *Alberta Treasury Branches*, at para. 56.

[76] While a loss of a contractual right is not determinative in every case, Unity's contractual right to terminate under the Project Agreement in this case is a fundamental right that is intertwined with the remedies that Unity had no choice but to pursue when the Lenders elected not exercise their Step-in Rights and Zurich stopped paying under the Performance Bond. Unity is not seeking to lift the Stay here to interfere with the Lenders' security or other rights. Lifting the Stay in this case puts these parties in the positions that they contracted for, both with ProjectCo and as between themselves under the LDA.

[77] As summarized above, the court must be satisfied that the moving party has established "sound reasons" for the court to exercise its discretion to relieve against the stay. Such reasons

include that (a) the creditor is "likely to be materially prejudiced by [its] continued operation; or (b) that it is equitable on other grounds to make such a declaration." See *Ma*, at paras. 2 and 3.

[78] Even if this deprivation of a contractual remedy was not on its own found to constitute "material prejudice", the court must still consider whether it would be equitable on other grounds to make such a declaration. The fact that the contractual right of termination was negotiated among sophisticated parties, the fact that the contractual regime was designed to put the entire risk of the cost of the Project onto ProjectCo (and its Surety Bonds), and the fact that this was all known to the Lenders and factored into the risk assessment around their decision not to exercise their Step-in Rights, is itself another ground upon which the court could (and I would) exercise its discretion to lift the Stay. It is significant to this decision (and perhaps somewhat unique to this case) that the only two parties affected by the Stay (Unity and the Lenders) were both not only aware of, but integral parties to, this contractual regime, including having contracted with each other. The overall context of the contractual arrangements supports the lifting of the stay.

c) The Lenders' Prejudice

[79] The Lenders will suffer an economic consequence as a result of the lifting of the Stay. The TIC Payment that the Lenders seek to pursue in their TIC Application will be replaced by the Compensation on Termination Payment that would be owing by Unity to ProjectCo (and by its irrevocable direction, payable to the Lenders) upon the termination of the Project Agreement, subject to set-off of the past and continuing costs that Unity has been and will continue to incur to remedy ProjectCo's defaults.

[80] That consequence is the result of the terms of the contracts that the Lenders agreed into. But for the Stay, Unity would have a contractual right to terminate the Project Agreement. This is not disputed by the Lenders. That right arises from not only ProjectCo's pre- and post-receivership defaults and Zurich's election not to take-on ProjectCo's obligations, but also the Lenders' election not to exercise their Step-in Rights, which would have precluded Unity from exercising its right to terminate. They chose not to. They did not want to pay the $65,922,936.61 Indebtedness Notice amount, nor take on the financial risk of attempting to remedy ProjectCo's defaults (which would come from Lenders' funds, not Project funds).

[81] The Lenders' affiant explained that because the scope of the liability of a lender who has exercised step-in right had never been tested in a Canadian court, the Agent and Lenders were unwilling to assume indeterminate liability by taking over ProjectCo's obligations under the Project Agreement. He acknowledged that the Lenders understood that if they did step-in they could have fulfilled ProjectCo's obligations under the Project Agreement, and exercised its rights, and eventually applied for TIC Certification. In that case, Unity would not be in a position to terminate the Project Agreement. He also acknowledged that, among the various factors that were considered when the Lenders decided not to exercise their step-in rights was that, if they did not step-in, Unity could terminate the Project Agreement. These considerations were all factored into their risk assessment.

[82] The negative economic effects upon the Lenders have been compounded by Zurich's decision not to fund any further Project costs under the Performance Bond and its Rescission Action which have eroded the Lenders' security. However, lifting the Stay will have no impact on Zurich's Rescission Action, which is proceeding, or upon Zurich's unwillingness to fund further construction costs. Nor will the Lenders suffer any loss or diminishment of their security due to the lifting of the Stay. Their security was comprised of the Irrevocable Direction, which is not dependent upon the Stay remaining in place. It is dependent upon conditions for payment having been satisfied, such as those that will trigger the compensation due upon Unity's termination of the Project Agreement.

[83] The only direct prejudice that the Lenders will suffer if the Stay is lifted is the loss of their ability to pursue the TIC Application to require Unity to complete what is required and apply for TIC Certification and then, if TIC is certified, to require Unity to make the TIC Payment under the Project Agreement that ProjectCo has not been operating under, and has been in default of, for years.

[84] The Lenders say that the very fact that the TIC Application is outstanding and remains to be determined (subject to the court's determination of the Dismissal Motion and the Assignment Motion, including the alternative relief sought to have the IC decide if TIC has been achieved or what would be required for it to be achieved, and an order that those items be completed), is sufficient to defeat the Lift Stay Motion.

[85] For reasons discussed in the next sections of this endorsement dealing with the Assignment Motion and the Motion to Dismiss, this prejudice is diminished by the court's findings that: (i) the Lenders do not have standing to bring the TIC Application, (ii) ProjectCo's entitlement and right to enforce any TIC Payment has not been previously assigned (legally or equitably) to the Lenders, and (iii) an assignment of ProjectCo's rights under the Project Agreement without the corresponding burdens of ProjectCo's obligations will not be ordered over Unity's objections when the contract requires its consent to any such assignment.

[86] The identified prejudice to the Lenders that will arise if the court lifts the Stay is contractually prescribed and circumscribed.

d) Relative Prejudice and Equitable Considerations

[87] For reasons indicated earlier in this endorsement, I am satisfied that Unity is likely to be materially prejudiced by the continued operation of the Stay, which is preventing it from exercising its contractual right to terminate the Project Agreement as part of its bundle of remedies for ProjectCo's persisting defaults, now that it has engaged another contractor under the ED Contract, at its expense, to complete the St. Michael's Hospital redevelopment.

[88] In the balancing of relative prejudices, I find that the prejudice that Unity will suffer if the Stay is not lifted is more direct and material than the contractually prescribed economic consequences for the Lenders and the loss of their theoretical ability to pursue the TIC Application (that they had no standing to bring in the first place, for reasons indicated later in this endorsement) if the Stay is lifted.

[89] The Lenders have raised various other arguments in equity as part of their opposition to the court exercising its discretion to lift the Stay.

[90] First, the Lenders argue that Unity has strategically brought the Lift Stay Motion and seeks to terminate the Project Agreement to avoid having to make the TIC Payment.

[91] The Lenders contend that Unity delayed bringing the Stay Motion while it exercised other contractual remedies under the Project Agreement under the pretext of working towards TIC, and now seeks to terminate the Project Agreement to strategically avoid having to make the TIC Payment.

[92] The delay in Unity's decision to seek to lift the Stay to exercise its right to terminate the Project Agreement (as well as the Lenders' delay in commencing the TIC Application and various other legal positioning that the parties have engaged in over the past year) is explained in part by their initial common interest in having ProjectCo pursue payment under the Surety Bonds and by their negotiations that ultimately failed to result in an agreement on any Advance Payment (precisely because of their divergent views about Unity's set-off rights).

[93] The Receivership Order in which the Stay was granted had a narrow objective that both Unity and the Lenders had a common interest in achieving, which was to call on the Performance Bond and require Zurich to fund the Project with a view to achieving TIC and the eventual completion of the Project. That objective was achieved initially, but later undermined by Zurich's refusal to continue to fund the Surety Bonds and its Rescission Action.

[94] By late Spring 2020, some months after the Conway Order, the Project landscape had materially changed. First, Unity had better visibility into the extent of the deficiencies in the construction of the Tower, some of which were so significant that they would prevent Unity from ever obtaining what it bargained for under the Project Agreement. Second, Zurich refused to make the payment under the Performance Bond and commenced the Rescission Action seeking, among other things, reimbursement of amounts previously funded under the Surety Bonds and putting at risk the Surety Bonds as a source to fund the Project. Third, the COVID-19 pandemic began, resulting in materially increased Project costs and delays.

[95] Unity has explained how the timing of its decision to terminate the Project Agreement was driven by the evolving circumstances, and I accept that explanation. The Project Agreement contains a non-waiver provision in any event.

[96] The Lenders go a step further in their assertion that the Conway Order obligated Unity to complete the Project and apply for TIC Certification. A plain reading of the Conway Order does not support that interpretation. It simply permitted Unity to do so. It is expressly stated to be without prejudice to Unity's right to terminate the Project Agreement (and its right to exercise other contractual remedies). The Lenders response to the without prejudice language is to say that the Conway Order is not determinative of the issues on the Lift Stay Motion, which must be adjudicated by applying the governing principles. That is, for all intents and purposes, a concession that the Conway Order is not material to the court's decision on the Lift Stay Motion.

[97] In a related argument, the Lenders suggested that the Project Agreement remedy provisions under s. 34.4 require Unity to complete all of the requirements to achieve TIC once they have elected to take on ProjectCo's work (at its expense). This is not consistent with the clear wording of this section of the Project Agreement that expressly states that Unity can both issue termination notices and exercise its other remedies. The remedies are not mutually exclusive.

[98] The Lenders argue that, even if the Conway Order did not require Unity to achieve TIC Certification, they relied on Unity's representation at the time of that order that it was working towards TIC Certification. They say that Unity should be estopped from terminating the Project Agreement to avoid having to do so.

[99] Unity counters that there is no evidence from the Lenders that they detrimentally relied upon any indication at the time of the Conway Order that TIC was achievable and that it was being worked towards. The entire Construction Loan was advanced long before the ProjectCo defaults. The Lenders have never said that they would have exercised their Step-in Rights or done anything differently if they had known that the Project Agreement would be terminated by Unity before any TIC Payment was made. In the meantime, the landscape changed and Unity has been bearing the entire responsibility for the continued work on the St. Michael's Hospital redevelopment.

[100] These questions (whether Unity can be compelled to complete the Project and apply for TIC Certification, even if the Conway Order does not require that, and whether Unity should be estopped from opposing the Lenders' efforts to have TIC certified) are matters that the Lenders say will all have to be determined on the TIC Application. This is part of the prejudice that they say they will suffer if the Stay is lifted to allow Unity to terminate the Project Agreement before those determinations can be made in their TIC Application.

[101] The relative prejudice has already been determined to weigh in Unity's favour (above). The delay and estoppel arguments have been sufficiently answered by Unity and do not present an impediment to the court's exercise of discretion in favour of Unity to lift the Stay.

[102] In terms of strategy, for their part, the Lenders say that they are simply trying to preserve the *status quo* by keeping the Stay in place (including the continued work on the Project under the ED Contract which is not impeded by the Stay) pending the determination of the TIC Application on its merits. The Lenders suggest it would be more equitable to defer Unity's ability to terminate the Project Agreement until Zurich's obligations are known so that the full extent of the uncovered cost overruns for the Project are known.

[103] However, the Lenders do not simply want to defer this risk allocation, they want to pursue the TIC Application and, if successful, require an interim TIC Payment from Unity (subject only to any permitted set-offs that are currently in dispute but to be determined at the same time). The ability of the Lenders to pursue the TIC Application is itself in dispute (the subject of the Motion to Dismiss addressed later in this endorsement). In other words, they are not simply looking to protect their position; they too want to be able to exercise contractual rights (belonging to ProjectCo) in the interim.

[104] The Lenders want the court-imposed Stay to remain in place as a means of altering the pre-receivership contractual rights as between these two sophisticated creditors, not to protect the debtor which is a shell company with no continuing purpose irrespective of whether the Project Agreement is terminated. They are using the Stay as a sword in an attempt to achieve an outcome in the TIC Application (which they commenced when the negotiations towards an Advance Payment failed) that they could have achieved by exercising their contractual Step-in Rights. Through this mechanism, they seek to avoid the burdens of their contractual remedy (at the time the cost would have been $65 million according to Unity's Indebtedness Notice) while enjoying the same benefits that the contract required them to pay for.

[105] The Lenders should not be permitted to use the stay, and equity, to shift the financial risk of the Project from ProjectCo and the Lenders to Unity. A court-imposed stay was lifted in similar circumstances in *Canadian Sahara Energy Inc. v. Sonde Resources Corp*., 2010 ABQB 730, 73 C.B.R. (5th) 135, wherein the court stated, at para. 12:

> I must balance the benefits to Sahara in allowing it time to finalize its agreement with Petroceltic with the benefits to Sonde in allowing it to terminate its relationship with Sahara so that it can pursue other partners. I begin with the obvious: these parties agreed to the contractual provisions in the various agreements. While one party to a contract may, in certain circumstances, be entitled to relief from the harshness of contractual provisions, in most cases the need for contractual certainty must prevail and the contract must be enforced. Both Sahara and Sonde knew what their respective rights and obligations were.

[106] I find similarly here that the Stay should be lifted so that the contracts can be played out as the parties provided for. Unity's decision to exercise its right to terminate the Project Agreement provides greater certainty and immediacy to its rights regarding the set-off of cost overruns and losses associated with the rising cost of construction and construction delays. Lifting the Stay (and allowing Unity to terminate the Project Agreement) will result in negative economic consequences that were known to and factored into the Lenders' risk assessments both at the time their Agent entered into the relevant agreements in 2015 and when they decided not to exercise their Step-in Rights that were available upon ProjectCo's default in late 2018 and early 2019.

[107] The fact that the Lenders will not be able to pursue the TIC Application if the Stay is lifted, in circumstances where they chose not to exercise their contractual remedy of exercising their Step-in Rights that could have prevented Unity from terminating the Project Agreement, is not an unjust or inequitable outcome.

[108] All else being equal, the balancing of prejudices favours lifting the Stay. However, the Lenders have raised one further equitable argument against the exercise of the court's discretion in favour of Unity's request to lift the Stay.

[109] The court must still consider whether Unity has come to court with clean hands when asking for a discretionary order in its favour to lift the Stay. The Lenders urge the court to focus on the alleged fraudulent actions of Unity's senior executive in charge of the Project at the time of its procurement. It is these fraud allegations, first raised by Zurich, which led Zurich to refuse to fund under the Surety Bonds and to bring the Rescission Action, thereby defeating the primary goal of the Receivership Order (which was to demand satisfaction of the Surety Bonds).

[110] The Surety Bonds were part of the Lenders' security for the Construction Loan. That security will be lost if the Rescission Action is successful and the actions of Unity's former executive are implicated. The Surety Bonds were undisputedly part of the consideration for the Construction Loan. Had the Surety Bonds been available, their proceeds would have been used to satisfy amounts that Unity seeks to set-off against amounts payable by it under the Project Agreement, thereby increasing the amounts available to be used to repay the Construction Loan (pursuant to the Irrevocable Direction). Indeed, paragraph 6 of the Conway Order expressly contemplates that the proceeds of the Performance Bond would be used to reimburse Unity or pay amounts to achieve TIC.

[111] The Lenders used the Surety Bonds to transfer their risks under the P3 DBF model Project Agreement to a third party insurer. The alleged fraud by Unity's then senior executive has, at least for the time being and until the Rescission Action has been determined, deprived the Lenders of their contractual safeguards, and they argue that Unity should not be permitted to take advantage of its contractual remedies when Unity is implicated in the fraud that has interfered with the Lenders' protection. If Unity is responsible for the loss of this security and source of funding, the Lenders maintain that its "bad conduct" taints its entitlement to the discretionary remedy it seeks.

[112] "The conduct of the party which seeks the exercise of an equitable discretion by the court on its behalf is relevant." See *Hood (Re)*, at para. 5.

[113] Unity argues that its conduct and the question of whether it has clean hands must be measured in relation to its conduct after the Receivership Order, not in relation to the prior conduct of a former executive. In *Hood*, the court was concerned with the requesting party's actions taken in breach of the s. 69 (1) BIA stay of proceedings. In contrast, the alleged misconduct here is nothing more than unproven allegations of fraud. Lastly, the unavailability of the Surety Bonds is equally as prejudicial to Unity as it is to the Lenders. It is not the case that Unity acted badly and has gained some advantage as a result.

[114] The Lenders have commenced a claim against Zurich seeking enforcement of Zurich's payment obligations under the Performance Bond. Subject to the funding needs of the Project, any amounts Zurich is obligated to pay will flow to the Lenders. They have also commenced a claim against Unity seeking damages in the sum of $230,563,776, the amount of the entire Construction Loan advanced by the Lenders.

[115] The Lenders have recourse in other proceedings and through the pursuit of other claims against Unity if the fraud allegations are eventually proven and Unity is found to be responsible for the alleged fraud of its senior executive. However, the as-of-yet unproven fraud allegations relating to historic activities of a former executive of Unity that long pre-dated the receivership do not "sully"

Unity's hands so as to deprive it of the benefit of the court's discretion to lift the Stay in circumstances where, as here, the court is otherwise satisfied that it is appropriate to do so.

Decision on the Lift Stay Motion

[116] The Stay is ordered to be lifted to permit Unity to exercise its remedy under s. 34.3(a) to terminate the Project Agreement.

B. The Assignment Motion

The Lenders' Standing: Existing Rights

[117] Unity argues that the Lenders have no standing to bring the TIC Application, by which they seek to first establish and then enforce a TIC Payment they say is owing to ProjectCo under the Project Agreement. Unity's position regarding the Lenders' standing is simple: they are not party to the Project Agreement; they have not assumed responsibility for ProjectCo's defaults under the Project Agreement and have no standing to enforce any right that ProjectCo may have to insist that its (disputed) entitlement to the TIC Payment determined.

[118] The contractual mechanism by which the Lenders could have exercised ProjectCo's rights and remedies under the Project Agreement (including with respect to the determination of any entitlement to and the amount and enforcement of the TIC Payment) was to exercise their Step-in Rights. That would have required them to assume ProjectCo's obligations and responsibilities under the Project Agreement in order to take the benefits of that agreement. They elected not to exercise those rights.

[119] The Lenders say that their decision not to exercise their Step-in Rights does not detract from the distinct and separate security that they were granted by the Irrevocable Direction. The Step-in Rights were granted under s. 8 of the LDA without prejudice to their rights to enforce their security.

a) The Irrevocable Direction

[120] Relying upon the Irrevocable Direction, the Lenders argue that their Agent received a legal or equitable assignment of ProjectCo's rights in respect of the TIC Payment under the Project Agreement, which gives them the right to enforce ProjectCo's entitlement to a TIC Payment.

[121] Section 4.4(a) of the Project Agreement contains the Irrevocable Direction pertaining to the TIC Payment:

> ProjectCo hereby irrevocably directs SMH to make any Tower Interim Completion Payment, together with applicable HST, to the Lenders' Agent or as the Lenders' Agent may direct, as security for the Financing.

> SMH shall pay the Tower Interim Completion Payment as directed by Project Co and shall not accept any redirection without the consent of the Lenders' Agent. SMH will pay the amounts that Project Co is entitled to hereunder once the conditions for payment set out in this Project Agreement, if any, have been satisfied…

b) Legal or Equitable Assignment or as Third Party Beneficiaries

[122] The Irrevocable Direction is not an absolute assignment of a debt or chose in action such as is required to constitute a legal assignment under s. 53(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c C.34 ("CLPA"). See *1124980 Ontario Inc. v. Liberty Mutual Insurance Company and Inco Ltd*. (2003), 33 B.L.R. (3d) 206 (Ont. S.C.), at paras. 43–44.

[123] Future rights may the subject of an assignment, provided that those future rights must themselves be choses in action, such as the unfunded portion of the holdback portion under a mortgage, which is a chose in action or a right to property. See *Gateway Mortgage Investment Corp v. 1384125 Alberta Ltd.*, 2014 ABQB 45, 589 A.R. 93, at paras. 28 and 29.

[124] However, to be considered a legal or equitable assignment, there must be a clear intention to transfer a right. *First v. Fillion*, 2020 ONCA 451, at para. 20. See also *Nadeau v. Caparelli*, 2016 ONCA 730, at para. 19. In *Gateway Mortgage*, such intention was not in dispute. The mortgagor in that case assigned its right to the holdback payment under the first mortgagee as security to a second mortgagee. It executed documents that purported to "irrevocably assign" future mortgage proceeds from the first mortgagee to the second mortgagee.

[125] The Irrevocable Direction in the immediate case, in contrast, is simply a direction about to whom the TIC Payment should be remitted if and when the conditions for its payment have been satisfied such that the TIC Payment would otherwise be payable to ProjectCo. The text of 4.4(a) does not use the word "assign" and there is no other assignment language upon which to ground a finding of the required intent.

[126] Nor does the Irrevocable Direction express a clear intention that any contractual right, other than the right to receive any TIC Payment that may be owing, was to become the property of the Agent (alleged assignee). *Fillion*, at para. 20. See also *Nadeau v. Caparelli*, 2016 ONCA 730, at para. 19.

[127] While there are no magic words required to effect an assignment, the context of this Irrevocable Direction falls short of demonstrating an intention to transfer ProjectCo's right to enforce the TIC Payment to the Lenders. All three parties, ProjectCo, Unity and the Lenders, participated in the same contractual regime together. Each of the Lenders (through their Agent) and Unity signed their own agreements with ProjectCo (in the case of the Lenders, the Credit Agreement and in the case of Unity the Project Agreement), and they all signed one agreement together, the LDA. It is

that agreement, signed by all three parties, which provides the mechanism for the Lenders to enforce ProjectCo's rights and remedies, by exercising their Step-in Rights.

[128] Unlike in *Gateway Mortgage* where the two mortgagees contracted separately with the mortgagor/assignor for separate rights, in this case, the parties contracted for rights and obligations that arise under various agreements entered into at the same time that must be read together and with the overarching purpose of a P3 DBF Contract in mind. If the parties had intended the Irrevocable Direction to be an assignment of the TIC Payment and corresponding right to enforce it, as an alternative to the Lenders exercising their full Step-in Rights and allowing them to do so without having to undertake the obligations associated with stepping in, they could (and I venture to say, would) have said so. These sophisticated parties chose not to use the language of assignment and they contracted for another remedy that would afford the Lenders enforcement rights. They should be taken to have chosen their words intentionally. These textual or contextual clues detract from, rather than support, any finding of a clear intention for the Irrevocable Direction to be interpreted or construed as an assignment.

[129] The same considerations arise to the Lenders' assertion that there was an equitable assignment. It is only where "the intention of the assignor clearly is that the contractual right shall become the property of the assignee, then equity requires him to do all that is necessary to implement his intention. The only essential and the only difficulty is to ascertain that such is the intention." See Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 16th ed. (Oxford: Oxford University Press, 2012), at p. 636. The intention to assign ProjectCo's right to receive and enforce the TIC Payment, and cause its requirements to be satisfied, is equally lacking for purposes of an equitable assignment as it is for a legal assignment under the CLPA.

[130] The Irrevocable Direction does not constitute either a legal or equitable assignment of ProjectCo's right to seek TIC Certification or to invoke the provisions of the Project Agreement by which any dispute about TIC Certification is to be determined.

[131] In the further alternative, the Lenders ask the court to conclude that the Lenders' Agent has standing to commence the TIC Application as a third-party beneficiary to the Project Agreement under the "principled exception" to the common law doctrine of privity of contract. If the principled exception applies, a third party has standing to enforce the contractual agreement including the right to commence a claim seeking enforcement of the agreement to which they claim rights under and to seek a remedy for the breach of said agreement. *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, 245 N.R. 88, at pp. 122–25; *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at paras. 95–100, and *Seelster Farms et al. v. Her Majesty the Queen and OLG*, 2020 ONSC 4013, 8 B.L.R. (6th) 266, at para. 91.

[132] The principled exception does not apply here, for the same reasons as the court has found that there was no legal or equitable assignment. It cannot be said that there was a clear intention of the parties to extend the benefit in question (e.g. the right to determine the entitlement to, and demand payment of, the TIC Payment) to the Lenders who seek to rely upon it, by virtue of the Irrevocable Direction or otherwise. Quite to the contrary, these sophisticated parties expressly

specified in the LDA the circumstances under which the Lenders would have the ability to enforce those rights, upon exercising their Step-in Rights.

The Lenders' Standing: Requested Court Ordered Assignment

[133] The Assignment Motion is the Lenders' answer (in the alternative) to Unity's argument that the Lenders have no standing to bring the TIC Application. They ask the court to authorize the Receiver to assign to the Agent all of ProjectCo's rights to enforce payment and recovery of the TIC Payment from Unity under the Project Agreement. They further ask, if necessary and in the alternative, that the Receiver be joined as a co-applicant to the TIC Application as a necessary party.[8]

a) The Receiver's Rights to be Assigned: Scope and Limitations

[134] The first problem with the requested court ordered and authorized assignment by the Receiver to the Agent of ProjectCo's rights to determine TIC and enforce payment and recovery of the TIC Payment is that the Receiver's mandate is narrow. This is a non-possessory receivership. Neither the Receiver nor the Lenders have asked that the scope of the receivership be expanded. In these circumstances, the court was not directed to the provisions of the original Receivership Order said to grant the Receiver the rights that the court is now being asked to authorize be assigned to the Agent. However, this was not a ground of opposition raised by Unity; so, while it is not clear exactly where or how the Receiver possesses ProjectCo's rights and remedies under the Project Agreement relating to the TIC Payment, I have not decided the Assignment Motion on this basis.

[135] Even if the Receivership Order could be read broadly such that the Receiver possesses all of ProjectCo's rights and remedies under the Project Agreement relating to the TIC Payment, the Receiver's ability to deal with those rights and remedies is subject to all of the same constraints as would apply to their exercise by ProjectCo. ProjectCo itself is precluded from assigning its contractual rights and remedies under the Project Agreement without Unity's consent, which can be withheld in Unity's sole discretion under s. 47.1(a) of the Project Agreement. Unity has expressly stated that it will not consent to any assignment of ProjectCo's rights and remedies under the Project Agreement to the Lenders.

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[8] Adding the Receiver as a necessary party to the TIC Application under r. 5.03 of the *Rules of Civil Procedure*, R.S.O. 1990, c. C.43, would not solve the Lenders' standing issue on the TIC Application. It might have assisted the Lenders if there had been a finding of an equitable assignment, since an equitable assignment would have left the legal chose in action with ProjectCo (see *Gateway*, at paras. 32 and 34). Since the requested court ordered assignment by the Receiver to the Agent of ProjectCo's rights to enforce payment and recovery of the TIC Payment is not being granted, there is no other reason to add the Receiver as a party. Adding the Receiver as a party does not change the outcome of the court's determinations regarding the Lenders' standing to pursue the TIC Application. It is a distraction in the context of these otherwise complicated series of alternative arguments, hence the choice to address it in a footnote rather than in the body of this endorsement.

[136] The Lenders ask the court to override this contractual restriction upon assignments without Unity's consent. I am not prepared to authorize or direct an assignment of a contractual remedy, disassociated from the corollary obligations, in these circumstances. In *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, at para. 106, the Supreme Court of Canada stated:

> ... It is a "fundamental" and "universal commercial legal principle" that an assignor may not assign contractual rights in such a way as to "convey the benefits and nullify the burdens". Stated differently, a party seeking to enforce assigned rights under an agreement "can only do so subject to the terms and conditions therein"…

[137] The Lenders are asking the court to grant them rights that are greater than what the applicable contractual regime provides for. ProjectCo remains in default with no ability to cure. Since the Lenders have not assumed those obligations themselves it is unclear how ProjectCo's defaults under the Project Agreement would be factored into any consideration of an assigned right to enforce payment and recovery of the TIC Payment from Unity under the Project Agreement.

b) Alternative Relief: Authorizing the Agent to Act on Behalf of the Receiver

[138] Fundamentally, ProjectCo would not have the ability to come to court for the relief that the Agent seeks on the TIC Application. The Lenders effectively conceded this and, on October 26, 2022, amended the relief sought in their Assignment Motion to add further alternative relief, including:

> a. if necessary, an order authorizing BMO [the Agent] in the name of or on behalf of ProjectCo to exercise ProjectCo's rights under the Project Agreement to have the IC determine whether TIC has been achieved in accordance with the dispute resolution process set out in Schedule 27 of the Project Agreement.

[139] The Lenders advised the court that, if necessary, they would be prepared to agree to follow the Dispute Resolution Procedure provided in Schedule 27 of the Project Agreement for the determination of ProjectCo's entitlement to, and the amount of, any TIC Payment, although they point out that at present there is no IC to adjudicate and oversee the dispute resolution procedure as required by Section 4 of Schedule 27. The Lenders submit that, by this alternative relief, they are not seeking an assignment of ProjectCo's rights under the Project Agreement. They characterize this alternative relief to be for the court to grant permission to the Agent to enforce Unity's payment obligations on behalf of ProjectCo.

[140] The contractually specified mechanism requires that the TIC Certificate be applied for, followed by a determination by the IC under the Project Agreement as to whether TIC has been achieved and, if it has, the IC would grant a TIC Certificate. Should a dispute arise in that application, an extra-judicial dispute resolution procedure is provided for under the Project Agreement.

[141] The very existence of this process demonstrates the futility of the TIC Application as presently constituted (discussed in the next section of this endorsement). It exemplifies the problem

with what the Lenders are asking the court to do: namely assign their Agent the right to pursue the TIC Payment through a court process where the Project Agreement has set out a different mechanism for them to ultimately receive any TIC Payment that becomes payable to ProjectCo.

[142] Unity's position is that none of ProjectCo (because of its defaults), the Receiver (because of its mandate and/or ProjectCo's defaults) or the Agent (because of its lack of standing) can enforce the TIC Payment without addressing ProjectCo's defaults.

[143] The Lenders argue that it cannot be the case that no one has the ability to enforce ProjectCo's rights and remedies under the Project Agreement as that would render the Irrevocable Direction a nullity and would result in a windfall to Unity if the TIC Payment was owing, which the Lenders say remains to be determined on the TIC Application. They say they must have some recourse to establish that TIC has been achieved and, if so, to enforce the TIC Payment owing to ProjectCo (and directed to be paid to them). They contend: Where there is a right there must be a remedy. See *Black's Law Dictionary*, 6th ed, Letter U, p. 1520.

[144] The Lenders put forward the further alternative relief sought in their Assignment Motion as the appropriate solution to this problem: The court should issue directions to allow the Agent to exercise ProjectCo's right to have the IC determine whether TIC has been achieved in accordance with Schedule 27 of the Project Agreement.

[145] However, in asking the court for this remedy, the Lenders do not address the fact that they negotiated for specific rights and security that are provided for in the contracts that they entered into, specifically under their Loan Agreement with ProjectCo and under the LDA. If they had exercised their Step-in Rights, they would have been able to enforce all of ProjectCo's rights and remedies under the Project Agreement. The court is not inclined to exercise its equitable discretion to allow the Agent to step in to exercise ProjectCo's rights and remedies under the Project Agreement without any accountability for ProjectCo's obligations under and breaches of the Project Agreement and the implications thereof, the full extent of which remains unknown at this time and will remain unknown until the Project has been completed and Zurich's Rescission Action has been resolved.

Decision on the Assignment Motion

[146] For the foregoing reasons, I find that the Lenders have no legal or equitable right to seek a determination of the entitlement of ProjectCo to any TIC Payment, whether by the court or the IC (and an arbitrator, if necessary), and they have no standing to bring the TIC Application. Their lack of standing cannot be not cured by the relief sought on the Assignment Motion or by the request to add the Receiver as a co-applicant. The Assignment Motion is dismissed.

C. The Motion to Dismiss the TIC Application

[147] Since the Lift Stay Motion is granted, the TIC Application will become moot once Unity terminates the Project Agreement. I will nonetheless briefly explain why the Motion to Dismiss is also granted, in the interests of completeness.

Rules 21.01(1)(b) and 21.01(3)(b)

a) Lack of Standing:

[148] The Lenders' lack of standing to bring the TIC Application is sufficient grounds for it to be stayed or dismissed under rr. 21.01(1)(b) and 21.01(3)(b). To resist a motion to strike for lack of standing:

a. The applicant must have either a public interest or private interest standing;

b. In cases where private interest standing is asserted, the applicant must have a "personal and direct" legal interest in the litigation; and

c. The applicant has the burden of establishing their standing by pleading facts that would support such standing.

See *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, 153 O.R. (3d) 385, at paras. 31 and 33, leave to appeal ref'd 2021 CanLII 61407 (SCC).

[149] At most, the Lenders have an indirect or contingent financial interest in the TIC Payment as a result of the Irrevocable Direction, which is insufficient to establish standing. See *Carroll* and *Morris v. Nicolaidis*, 2021 ONSC 2957, at paras. 33–34.

[150] The Irrevocable Direction has been found not to be a legal or equitable assignment of the TIC Payment or of ProjectCo's rights and remedies in respect of the TIC Payment (for reasons outlined earlier in this endorsement). The Irrevocable Direction only comes into operation once the conditions for the TIC Payment under the Project Agreement have been satisfied.

b) The TIC Application Cannot Succeed as Constituted

[151] The premise of the TIC Application is misguided and it should be stayed or dismissed on that basis as well. It originally sought a declaration that TIC has been achieved or "substantially achieved". However, the Lenders now acknowledge that it has not been as there has been no TIC certification. The TIC Application alternatively seeks an order requiring Unity to take steps to achieve TIC, which can only be found to have been satisfied by the IC making that determination under Schedule 27 of the Project Agreement. The Lenders assert that Unity has an obligation to do so under either the Project Agreement or the order of Conway Order. I disagree. Neither the Project Agreement nor the Conway Order impose that obligation on Unity.

[152] The Lenders then seek, by way of alternative relief on the Assignment Motion, for the court to authorize the Agent to enforce ProjectCo's right to ask the IC to determine whether TIC was achieved and provide the necessary certification (in accordance with the certification mechanism prescribed under the Project Agreement). However, that relief is not part of the TIC Application. The alternative relief sought by the Assignment Motion (that the court has declined to grant for other reasons) brings into focus the problems with the TIC Application as presently constituted.

c) Decision on the Motion to Dismiss Under Rules 21.01(1)(b) and 21.01(3)(b)

[153] This is a classic circumstance in which a r. 21 motion should be granted as there is no point to the TIC Application continuing as it is presently constituted when it is plain and obvious that it cannot succeed. See e.g. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, 21 BCLR (5th) 215, at para. 17.

[154] Based on the lack of standing of the Agent/Lenders and futility of the TIC Application as currently constituted, I might ordinarily order that the TIC Application be stayed rather than dismissed. However, since it is going to become moot as a result of the termination of the Project Agreement following the lifting of the Stay, I am granting the requested order that the TIC Application be dismissed.

Abuse of Process: Rules 21.01(3)(d) and 25.11(c)

[155] Unity asserts that the TIC Application is strategic and should also be stayed because it is an abuse of the court's process, under rr. 21.01(3)(d) and 25.11(c).

[156] Earlier in this endorsement, the strategic nature of all of the ongoing proceedings was considered. The TIC Application is no more or less strategic than the Lift Stay Motion; both are to be expected and neither rise to the level that would constitute grounds for denying equitable relief if the court was otherwise inclined to do so. In this instance, the court has concluded that the TIC Application should be dismissed on other grounds, not on the basis of it being an abuse of process.

The Merits of the TIC Application

[157] Despite the fact that neither side was asking the court to decide the merits of the TIC Application, some considerable time and effort was devoted to submissions from both sides on the merits of that application. The merits of that application are not directly relevant to the outcome of the motions presently under consideration. They do provide some context, and will be reviewed briefly.

[158] Under the direction and management of Ellis Don, construction of the Project, including work on the Tower, continued after the Receivership Order. Various subtrades were retained to complete their scope of work including remedying deficiencies. However, the reduced scope of work under the CCDC 5A Contract included only some but not all of the items required for TIC under the Project Agreement. Some of the excluded TIC items are not to be completed until after Substantial Completion, and some not at all.

[159] The Lenders acknowledge that TIC Payment Certification requires that the Tower be completed in accordance with the Project Specific Output Specifications ("PSOS"). The Lenders ask the court to draw adverse inferences from refusals by Unity to answer questions about the specific requirements for TIC during the cross-examinations on these motions.

[160] Unity says it is not appropriate for the court to draw inferences about the merits of the TIC Application when the court is not deciding it. This is also because Mr. Afonso of Pelican Woodcliff,

the Lenders' Technical Advisor for the Project, conceded in cross-examination that (i) the Tower has not been completed in accordance with the PSOS; (ii) TIC has not been achieved; and (iii) TIC could only be achieved if Unity voluntarily issued variations to the requirements necessary to achieve TIC.

[161] Unity contends that, without the issuance of a variation under s. 29 of the Project Agreement to change the scope of TIC, or its agreement to accept non-compliances which it is not prepared to do, there is no basis for concluding that TIC has been achieved. Substantial compliance with the TIC requirements, while asserted by the Lenders, is not provided for in the Project Agreement. Unity points out that the concept of Tower Substantial Completion that was achieved in August 2020 under the ED Contract is not the same as TIC.

[162] The alternative relief sought by the Amended TIC Application directing Unity to achieve TIC (also supplemented by relief it has added to the Assignment Motion to permit to require the IC to determine whether it has been achieved in accordance with the dispute resolution process set out in Schedule 27 of the Project Agreement) is how the Lenders would propose to get around these obstacles to the TIC Application.

[163] Even if TIC is achieved, s. 4.12(a)(i) of the Project Agreement requires that the parties apply set-offs to the TIC Payment to determine the quantum of that payment. Unity maintains that paragraph 6 of the Conway Order, consented to by the Lenders, is consistent with this. It requires that all payments made by Unity under the "Supplemental Agreements" to achieve TIC and advance the Project "shall first be reimbursed from the Performance Bond Option 2.4 Payment Amount, failing which it shall be set off by Unity against the Tower Interim Completion Payment ..." Under Section 2(x) of the Conway Order, "Supplemental Agreements" includes all the direct contracts Unity entered into through the exercise of its Remedy Rights to advance the Project, including the CCDC 5A contract with Ellis Don and the ED Contract. Unity argues that even if TIC was achieved at some point, or is determined to have been achieved at some point in the future, it would be entitled to set off the extensive additional costs that it has incurred. The Lenders dispute this.

[164] These merits-based arguments on both sides need not be resolved. While the Lenders argue that the very existence of these disputes is reason not to dismiss or stay the TIC Application before these issues can be adjudicated on their merits, that has been overtaken by the court's decisions on the Lift Stay Motion and the Motion to Dismiss for the reasons previously indicated.

[165] While the court is generally cautious about summarily dismissing proceedings before the issues raised can be adjudicated on their merits, there are circumstances in which it is appropriate to do so, and this is one such circumstance, having regard to the other determinations made in the context of the three motions.

Unity's Alternative Relief

[166] If the Stay Motion had not been granted and the TIC Application had not been dismissed, then Unity sought, in the alternative, that the TIC Application be converted to an action and that it be stayed pending the outcome of the Rescission Action. This alternative relief does not arise because the Stay Motion and the Motion to Dismiss are both granted.

[167] The rationale for this request by Unity was that, even if there was a finding that TIC has been achieved, the set-offs to be applied pursuant to s. 4.12(a)(i) of the Project Agreement include amounts that Unity may be found to owe to Zurich in the Zurich Action. Unity argued that it would be prejudicial to Unity for the court to order that the TIC Payment be paid before the full extent of Unity's set-offs can be determined. For that reason, Unity asked that the TIC Application at the very least be stayed until after the determination of the Rescission Action.

[168] If I had not dismissed the TIC Application I would not have held it in abeyance pending the determination of the Rescission Action. There are a sufficient amount of known expenses to allow a preliminary determination of any entitlement of ProjectCo to a TIC Payment that any further adjustments could have been dealt with subsequently. There is little risk that the Lenders would not be good for the money if that later resulted in a downward adjustment to any TIC Payment made by Unity.

[169] The parties are in agreement, and the court concurs, that if the TIC Application were to proceed, it ought to be converted to an action given that: (i) there are material facts in dispute, and (ii) there are complex issues requiring expert evidence. Further, there are significant factual disputes between the parties as to the status of the Project, whether TIC can ever be achieved, the scope of remaining work to complete the Project and the applicability and quantum of set-offs available to the TIC Payment. See *G.F. Machining Solutions LLC v. Technicut Tool Inc*., 2019 ONSC 2259, at paras. 9–10, 18–19, 21; and *Przysuski v. City Optical Holdings Inc*., 2013 ONSC 5709, at para. 10.

Costs

[170] Given the complexity of the interrelated issues on these motions and the uncertainty of the outcome, the parties agreed to exchange their Costs Outlines before the end of 2023.

[171] After the release of this endorsement, the parties shall first confer to determine whether they can reach an agreement on the costs of these motions. They shall advise the court by March 29, 2024 whether or not such an agreement has been reached. If not, a case conference may be scheduled before me in the normal course through the Commercial List Scheduling Office to discuss a timetable for the exchange of written cost submissions and to consider whether the matter should be decided based on written submissions alone or a combination of in writing and oral submissions on costs.

Final Order and Disposition

[172] I did not hear any objections to the form of order sought by Unity on the Lift Stay Motion that was included as part of the Motion Record. The draft form of order will require the addition of my name and a date as well as adjustments to the preamble to reflect the hearing dates, before it can be signed. For this, and any other orders that the parties wish to have signed arising out of this endorsement, the procedure under r. 59 for settling orders should be followed. Once settled, they may be submitted to me for signature through the Commercial List office together with the approvals as to form and content of all parties. If the forms of order cannot be settled to the satisfaction of the parties, a case conference may be requested before me through the Commercial List office.

[173] This endorsement shall have the immediate effect of a court order without the necessity of a formal order being taken out.

KIMMEL J.

Date: March 13, 2024

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to December 15, 2024

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(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

(j) if he ceases to meet his liabilities generally as they become due.

f) si, à une assemblée de ses créanciers, il produit un bilan démontrant qu'il est insolvable, ou présente ou fait présenter à cette assemblée un aveu par écrit de son incapacité de payer ses dettes;

g) s'il cède, enlève ou cache, ou essaie ou est sur le point de céder, d'enlever ou de cacher une partie de ses biens, ou en dispose ou essaie ou est sur le point d'en disposer, avec l'intention de frauder, frustrer ou retarder ses créanciers ou l'un d'entre eux;

h) s'il donne avis à l'un de ses créanciers qu'il a suspendu ou qu'il est sur le point de suspendre le paiement de ses dettes;

i) s'il fait défaut à toute proposition concordataire faite sous le régime de la présente loi;

j) s'il cesse de faire honneur à ses obligations en général au fur et à mesure qu'elles sont échues.

Unauthorized assignments are void or null

(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.

R.S., 1985, c. B-3, s. 42; 1997, c. 12, s. 26; 2004, c. 25, s. 27.

Les cessions non autorisées sont nulles

(2) Toute cession de ses biens, autre qu'une cession consentie conformément à la présente loi, faite par un débiteur insolvable au profit de ses créanciers en général, est nulle.

L.R. (1985), ch. B-3, art. 42; 1997, ch. 12, art. 26; 2004, ch. 25, art. 27.

Application for Bankruptcy Order

Requête en faillite

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

Requête en faillite

43 (1) Sous réserve des autres dispositions du présent article, un ou plusieurs créanciers peuvent déposer au tribunal une requête en faillite contre un débiteur :

a) d'une part, si la ou les dettes envers le ou les créanciers requérants s'élèvent à mille dollars et si la requête en fait mention;

b) d'autre part, si le débiteur a commis un acte de faillite dans les six mois qui précèdent le dépôt de la requête et si celle-ci en fait mention.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

Cas où le créancier requérant est un créancier garanti

(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

Affidavit

(3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.

Consolidation of applications

(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

Place of filing

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

Proof of facts, etc.

(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

Dismissal of application

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Dismissal with respect to some respondents only

(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

Appointment of trustee

(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

Stay of proceedings if facts denied

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's

Affidavit

(3) La requête doit être attestée par un affidavit du requérant, ou d'une personne dûment autorisée en son nom, qui a une connaissance personnelle des faits qui y sont allégués.

Jonction des requêtes

(4) Lorsque plusieurs requêtes sont déposées contre le même débiteur ou contre des codébiteurs, le tribunal peut joindre les procédures, ou quelques-unes d'entre elles, aux conditions qu'il juge convenables.

Lieu du dépôt

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

Preuve des faits et de la signification

(6) À l'audition, le tribunal exige la preuve des faits allégués dans la requête et de la signification de celle-ci; il peut, s'il juge la preuve satisfaisante, rendre une ordonnance de faillite.

Rejet de la requête

(7) Lorsque le tribunal n'estime pas satisfaisante la preuve des faits allégués dans la requête, ou de la signification de celle-ci, ou si le débiteur lui a démontré à sa satisfaction qu'il est en état de payer ses dettes, ou si le tribunal juge que, pour toute autre cause suffisante, aucune ordonnance ne devrait être rendue, il doit rejeter la requête.

Rejet de la requête à l'égard de certains défendeurs seulement

(8) Lorsqu'il y a plus d'un défendeur dans une requête, le tribunal peut rejeter la requête relativement à l'un ou à plusieurs d'entre eux, sans préjudice de l'effet de la requête à l'encontre de l'autre ou des autres défendeurs.

Nomination de syndics

(9) Lorsqu'une ordonnance de faillite est rendue, le tribunal nomme un syndic autorisé à titre de syndic des biens du failli en tenant compte, dans la mesure où le tribunal le juge équitable, de la volonté des créanciers.

Sursis des procédures

(10) Lorsque le débiteur comparaît relativement à la requête et nie la véracité des faits qui y sont allégués, le tribunal peut, au lieu de rejeter la requête, surseoir aux procédures relatives à la requête aux conditions qu'il juge convenable d'imposer au requérant quant aux frais ou au

property and for any period of time that may be required for trial of the issue relating to the disputed facts.

Stay of proceedings for other reasons

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Security for costs

(12) Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

Bankruptcy order on another application

(13) If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Withdrawing application

(14) An application shall not be withdrawn without the leave of the court.

Application against one partner

(15) Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

Court may consolidate proceedings

(16) If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

débiteur afin d'empêcher l'aliénation de ses biens, et pendant le temps nécessaire à l'instruction de la contestation.

Suspension des procédures pour autres raisons

(11) Le tribunal peut, pour d'autres raisons suffisantes, rendre une ordonnance suspendant les procédures intentées dans le cadre d'une requête, soit absolument, soit pour un temps limité, aux conditions qu'il juge équitables.

Cautionnement pour frais

(12) Le requérant qui réside à l'étranger peut être contraint de fournir au débiteur un cautionnement pour les frais, et les procédures découlant de la requête peuvent être suspendues jusqu'à ce que le cautionnement soit fourni.

Ordonnance de faillite sur autre requête

(13) Lorsque des procédures relatives à une requête ont été suspendues ou n'ont pas été poursuivies avec la diligence et l'effet voulus, le tribunal peut, s'il croit juste de le faire en raison du retard ou pour toute autre cause, substituer au requérant ou lui adjoindre tout autre créancier envers qui le débiteur peut être endetté de la somme prévue par la présente loi; il peut rendre une ordonnance de faillite sur la requête d'un tel autre créancier, et doit dès lors rejeter, aux conditions qu'il croit justes, la requête dont les procédures ont été suspendues ou n'ont pas été poursuivies.

Retrait d'une requête

(14) Une requête ne peut être retirée sans l'autorisation du tribunal.

Requête contre un associé

(15) Tout créancier dont la réclamation contre une société de personnes est suffisante pour l'autoriser à présenter une requête en faillite peut présenter une requête contre un ou plusieurs membres de cette société, sans y inclure les autres.

Jonction des procédures par le tribunal

(16) Lorsqu'une ordonnance de faillite a été rendue contre un membre d'une société de personnes, toute autre requête contre un membre de la même société est déposée ou renvoyée au même tribunal, et ce dernier peut donner les instructions qui lui semblent justes pour joindre les procédures intentées dans le cadre des requêtes.

Continuance of proceedings on death of debtor

(17) If a debtor against whom an application has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if the debtor were alive.

R.S., 1985, c. B-3, s. 43; 1992, c. 27, s. 15; 2004, c. 25, s. 28.

Continuation des procédures advenant le décès d'un débiteur

(17) Advenant le décès d'un débiteur contre qui une requête a été déposée, les procédures sont continuées, à moins que le tribunal n'en ordonne autrement, comme s'il était vivant.

L.R. (1985), ch. B-3, art. 43; 1992, ch. 27, art. 15; 2004, ch. 25, art. 28.

Application against estate or succession

44 (1) Subject to section 43, an application for a bankruptcy order may be filed against the estate or succession of a deceased debtor.

Requête contre la succession d'un débiteur décédé

44 (1) Sous réserve de l'article 43, une requête en faillite peut être produite contre la succession d'un débiteur décédé.

Personal liability

(2) After service of an application for a bankruptcy order on the executor or administrator of the estate of a deceased debtor, or liquidator of the succession of a deceased debtor, the person on whom the order was served shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the application is disposed of; otherwise, in addition to any penalties to which the person may be subject, the person is personally liable for the payment or transfer.

Responsabilité personnelle

(2) Le liquidateur de la succession d'un débiteur décédé, l'exécuteur testamentaire de celui-ci ou l'administrateur de sa succession, après qu'une requête en faillite lui a été signifiée, ne peut payer aucune somme d'argent ni transférer aucun bien du débiteur décédé, sauf ce qui est requis pour acquitter les frais funéraires et testamentaires convenables, avant qu'il ait été décidé de la requête; sinon, en sus des peines qu'il peut encourir, il en est tenu responsable personnellement.

Act done in good faith

(3) Nothing in this section invalidates any payment or transfer of property made or any act or thing done, in good faith, by the executor, administrator of the estate or liquidator of the succession before the service of an application referred to in subsection (2).

R.S., 1985, c. B-3, s. 44; 2004, c. 25, s. 28.

Actes faits de bonne foi

(3) Le présent article n'a toutefois pas pour effet d'invalider un paiement ou un transfert de biens fait ou tout acte ou chose accompli de bonne foi par le liquidateur, l'exécuteur testamentaire ou l'administrateur avant la signification de la requête.

L.R. (1985), ch. B-3, art. 44; 2004, ch. 25, art. 28.

Costs of application

45 (1) If a bankruptcy order is made, the costs of the applicant shall be taxed and be payable out of the estate, unless the court otherwise orders.

Frais de requête

45 (1) Lorsqu'une ordonnance de faillite est rendue, les frais du requérant sont taxés et payables sur l'actif à moins que le tribunal n'en ordonne autrement.

Insufficient proceeds

(2) If the proceeds of the estate are not sufficient for the payment of any costs incurred by the trustee, the court may order the costs to be paid by the applicant.

R.S., 1985, c. B-3, s. 45; 1992, c. 1, s. 14; 2004, c. 25, s. 28.

Insuffisance de l'actif

(2) Lorsque le produit de l'actif ne suffit pas à payer les frais subis par le syndic, le tribunal peut ordonner au requérant de payer ces frais.

L.R. (1985), ch. B-3, art. 45; 1992, ch. 1, art. 14; 2004, ch. 25, art. 28.

Interim Receiver

Appointment of interim receiver

46 (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of

Séquestre intérimaire

Nomination d'un séquestre intérimaire

46 (1) S'il est démontré que la mesure est nécessaire pour la protection de l'actif du débiteur, le tribunal peut, après la production d'une requête en faillite et avant qu'une ordonnance de faillite ait été rendue, nommer un syndic autorisé comme séquestre intérimaire de tout ou

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

1992, c. 27, s. 36; 1997, c. 12, s. 65.

Non-application of certain provisions

69.41 (1) Sections 69 to 69.31 do not apply in respect of a claim referred to in subsection 121(4).

No remedy, etc.

(2) Notwithstanding subsection (1), no creditor with a claim referred to in subsection 121(4) has any remedy, or shall commence or continue any action, execution or other proceeding, against

(a) property of a bankrupt that has vested in the trustee; or

(b) amounts that are payable to the estate of the bankrupt under section 68.

1997, c. 12, s. 65.

No stay, etc., in certain cases

69.42 Despite anything in this Act, no provision of this Act shall have the effect of staying or restraining, and no order may be made under this Act staying or restraining,

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2001, c. 9, s. 574.

Déclaration de non-application

69.4 Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision.

1992, ch. 27, art. 36; 1997, ch. 12, art. 65.

Précision

69.41 (1) Les articles 69 à 69.31 ne s'appliquent pas aux réclamations visées au paragraphe 121(4).

Recours interdits

(2) Malgré le paragraphe (1), le créancier d'une réclamation mentionnée au paragraphe 121(4) n'a aucun recours et ne peut intenter ou continuer d'actions, exécutions ou autres procédures relativement aux biens du failli dévolus au syndic ou aux montants à verser à l'actif de la faillite au titre de l'article 68.

1997, ch. 12, art. 65.

Restrictions

69.42 Malgré les autres dispositions de la présente loi, aucune disposition de la présente loi ne peut avoir pour effet de suspendre ou restreindre et aucune ordonnance ne peut être rendue, pour suspendre ou restreindre :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

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CODIFICATION

Excise Tax Act

Loi sur la taxe d'accise

R.S.C., 1985, c. E-15

L.R.C. (1985), ch. E-15

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

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D is the total of all consideration, included in determining that income, for supplies made by the registrant of items of inventory of the registrant.

D le total des contreparties, incluses dans le calcul de ce revenu, des fournitures de stocks que l'inscrit a effectuées.

Cessation

(7) An authorization granted under subsection (2) to a registrant ceases to have effect on the earlier of

(a) the day on which a revocation of the authorization becomes effective, and

(b) the day that is three years after the day on which the authorization, or its renewal, became effective.

Cessation

(7) L'autorisation accordée à un inscrit cesse d'avoir effet trois ans après la date de la prise d'effet de l'autorisation ou de son renouvellement, ou si elle est antérieure, à la date de la prise d'effet du retrait de l'autorisation.

Application after revocation

(8) Where an authorization granted to a registrant under subsection (2) is revoked, effective on a particular day, the Minister shall not grant to the registrant another authorization under that subsection that becomes effective before

(a) where the authorization was revoked in circumstances described in paragraph (5)(a), the day that is two years after the particular day; and

(b) in any other case, the first day of the second fiscal year of the registrant commencing after the particular day.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; 1993, c. 27, s. 86; 2000, c. 30, s. 49; 2001, c. 15, s. 10; 2007, c. 18, s. 25.

Demande après retrait d'autorisation

(8) Toute autorisation que le ministre accorde, en application du paragraphe (2), à un inscrit à qui il a déjà retiré une semblable autorisation à compter d'un jour donné ne peut prendre effet qu'à compter du jour suivant :

a) si l'autorisation a été retirée en vertu de l'alinéa (5)a), le jour qui tombe deux ans après le jour donné;

b) dans les autres cas, le premier jour du deuxième exercice de l'inscrit qui commence après le jour donné.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; 1993, ch. 27, art. 86; 2000, ch. 30, art. 49; 2001, ch. 15, art. 10; 2007, ch. 18, art. 25.

Trust for amounts collected

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Montants perçus détenus en fiducie

222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Montants perçus avant la faillite

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

Retraits de montants en fiducie

(2) La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus :

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Non-versement ou non-retrait

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; 1990, c. 45, s. 12; 1993, c. 27, s. 87; 2000, c. 30, s. 50.

Sens de droit en garantie

(4) Pour l'application des paragraphes (1) et (3), n'est pas un droit en garantie celui qui est visé par règlement.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; 1990, ch. 45, art. 12; 1993, ch. 27, art. 87; 2000, ch. 30, art. 50.

Sale of account receivable

222.1 If a person makes a taxable supply that gives rise to an account receivable and at any time the person supplies by way of sale or assignment the debt, for the purposes of sections 222, 225, 225.1 and 227,

Vente d'un compte client

222.1 Lorsqu'une personne effectue une fourniture taxable donnée engendrant un compte client et que la personne fournit cette dette par vente ou cession, les présomptions suivantes s'appliquent dans le cadre des articles 222, 225, 225.1 et 227 :

CANADA

CONSOLIDATION

CODIFICATION

Crown Liability and Proceedings (Provincial Court) Regulations

Règlement sur la responsabilité civile de l'État et le contentieux administratif (tribunaux provinciaux)

SOR/91-604

DORS/91-604

Current to December 15, 2024

Last amended on November 23, 2018

À jour au 15 décembre 2024

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(4) If, on the final disposition of an action in which a confession of judgment has been made and has not been accepted, the plaintiff does not recover a larger sum than the one offered by the confession of judgment, the Crown, whatever the result of the action, shall be entitled to costs incurred after the date of filing of the confession.

(5) No confession of judgment filed under this section shall be accepted as evidence against the Crown, either in the action in which it was filed or in any other action or suit.

(6) No provision in any provincial rules relating to confessions of judgment has any application in proceedings under Part II of the Act.

(4) Si, lors de la décision définitive d'une action où une confession de jugement a été faite et n'a pas été acceptée, le demandeur ne recouvre pas une somme supérieure à celle qu'offrait la confession de jugement, l'État, quelle que soit l'issue de l'action, a droit aux dépens engagés après la date du dépôt de la confession.

(5) La confession de jugement déposée aux termes du présent article ne peut servir de preuve contre l'État soit dans l'action ou elle a été déposée, soit dans quelque autre action ou poursuite.

(6) Les dispositions des règles provinciales relatives aux confessions de jugement ne s'appliquent pas aux poursuites intentées sous le régime de la partie II de la Loi.

General

10 Where, by or under the provincial rules, the Attorney General or an agency of the Crown would, if the Crown were a person, be required or permitted to do anything in relation to any matter not expressly dealt with in these Regulations, within a certain period of time, a period of 14 days is to be added to the time otherwise allowed for doing that thing.

SOR/2018-255, s. 4.

11 No order for security for costs may be made against the Crown.

12 Rules of the court relating to taxation of costs between solicitor and client have no application as between the Attorney General and the agents or mandataries of the Attorney General.

SOR/2018-255, s. 5(E).

Dispositions générales

10 Pour toute question non expressément prévue par le présent règlement, les délais fixés par les règles provinciales à l'égard des particuliers sont prolongés de 14 jours à l'égard du procureur général ou des organismes mandataires de l'État, celui-ci étant assimilé à une personne.

DORS/2018-255, art. 4.

11 Aucune ordonnance de cautionnement pour la sécurité des frais ne peut être rendue contre l'État.

12 Les règles du tribunal relatives à la taxation des frais entre avocat et client ne s'appliquent pas entre le procureur général et ses mandataires.

DORS/2018-255, art. 5(A).

CANADA

CONSOLIDATION

CODIFICATION

Security Interest (GST/HST) Regulations

Règlement sur les droits en garantie (TPS/TVH)

SOR/2011-55

DORS/2011-55

Current to December 15, 2024

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Security Interest (GST/HST) Regulations

Règlement sur les droits en garantie (TPS/TVH)

Interpretation

1 In these Regulations, ***Act*** means the *Excise Tax Act*.

Prescribed Security Interest

2 (1) For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.

(2) For the purpose of subsection (1), if, at a particular time, an amount deemed to be held in trust by the person referred to in that subsection is not remitted to the Receiver General or withdrawn in the manner and at the time provided under Part IX of the Act, the amount of the prescribed security interest referred to in that subsection may not exceed the amount determined by the following formula until such time as all amounts deemed under subsection 222(1) of the Act to be held in trust by the person are withdrawn in accordance with subsection 222(2) of the Act or are remitted to the Receiver General:

A – B

where

A is the amount of the obligation secured by the mortgage or hypothec that is outstanding at the particular time; and

B is the total of

(a) all amounts, each of which is the value determined at the particular time, having regard to all the circumstances including the existence of any deemed trust for the benefit of Her Majesty pursuant to subsection 222(1) of the Act, of all the rights of the secured creditor securing the obligation, whether granted by the person or not, including guarantees or rights of set-off or of compensation but not including the mortgage or hypothec referred to in subsection (1), and

Définition

1 Dans le présent règlement, ***Loi*** s'entend de la *Loi sur la taxe d'accise*.

Droits en garantie visés

2 (1) Pour l'application du paragraphe 222(4) de la Loi, est un droit en garantie visé, quant à un montant qui est réputé en vertu du paragraphe 222(1) de la Loi être détenu en fiducie par une personne, la partie d'une hypothèque garantissant l'exécution d'une obligation de la personne qui grève un fonds ou un bâtiment, mais seulement si l'hypothèque est enregistrée conformément au régime d'enregistrement foncier applicable avant le moment où le montant est ainsi réputé être détenu en fiducie.

(2) Pour l'application du paragraphe (1), si, à un moment donné, un montant réputé être détenu en fiducie par la personne mentionnée à ce paragraphe n'est pas versé au receveur général ou retiré selon les modalités et dans le délai prévus par la partie IX de la Loi, le montant du droit en garantie mentionné à ce paragraphe ne peut excéder la somme obtenue par la formule ci-après tant que tous les montants réputés en vertu du paragraphe 222(1) de la Loi être détenus en fiducie par la personne ne sont pas retirés conformément au paragraphe 222(2) de la Loi ou versés au receveur général :

A – B

où :

A représente le montant de l'obligation garantie par l'hypothèque qui est impayé au moment donné;

B la somme des montants suivants :

a) le total des montants dont chacun représente la valeur déterminée au moment donné, compte tenu des circonstances, y compris l'existence d'une fiducie réputée établie au profit de Sa Majesté conformément au paragraphe 222(1) de la Loi, des droits du créancier garanti garantissant l'obligation, consentis par la personne ou non, y compris les garanties et droits de compensation mais non l'hypothèque visée au paragraphe (1),

b) les montants appliqués en réduction de l'obligation après le moment donné.

(b) all amounts applied after the particular time on account of the obligation.

(3) A prescribed security interest under subsection (1) includes the amount of any insurance or expropriation proceeds relating to land or a building that is the subject of a registered mortgage interest or registered hypothecary right, adjusted in accordance with subsection (2), but does not include a lien, a priority or any other security interest created by statute, an assignment or hypothec of rents or leases, or a mortgage interest or hypothecary right in any equipment or fixtures that a mortgagee, hypothecary creditor or any other person has the right absolutely or conditionally to remove or dispose of separately from the land or building.

Coming into Force

3 These Regulations are deemed to have come into force on October 20, 2000.

(3) Le droit en garantie visé au paragraphe (1) comprend le produit de l'assurance ou de l'expropriation lié à un fonds ou à un bâtiment qui fait l'objet d'un droit hypothécaire enregistré, rajusté conformément au paragraphe (2), mais non les privilèges, priorités ou autres garanties créés par une loi, les cessions ou hypothèques de loyers ou de baux ou les droits hypothécaires sur les biens d'équipement ou les accessoires fixes que le créancier hypothécaire ou une autre personne a le droit absolu ou conditionnel d'enlever du fonds ou du bâtiment ou dont il a le droit absolu ou conditionnel de disposer séparément.

Entrée en vigueur

3 Le présent règlement est réputé être entré en vigueur le 20 octobre 2000.

BRITISH COLUMBIA

Court Rules Act

SUPREME COURT CIVIL RULES

B.C. Reg. 168/2009

Deposited July 7, 2009 and effective July 1, 2010
Last amended September 9, 2024 by B.C. Reg. 165/2024
and includes amendments by B.C. Reg. 166/2024

Consolidated Regulations of British Columbia

This is an unofficial consolidation.

Consolidation current to November 5, 2024

PART 8 – APPLICATIONS

RULE 8-1 – HOW TO BRING AND RESPOND TO APPLICATIONS

Definition

(1) In this rule, **"application respondent"** means a person who files an application response under subrule (9).

[en. B.C. Reg. 176/2023, Sch. 1, s. 8 (a).]

How applications must be brought

(2) To apply for an order from the court other than at trial or at the hearing of a petition, a party must do the following:

(a) in the case of an application for an order by consent, apply in accordance with

(i) this rule, or

(ii) Rule 8-3;

(b) in the case of an application of which notice need not be given, apply in accordance with

(i) this rule, or

(ii) Rule 8-4;

(c) in the case of an urgent application, apply in accordance with Rule 8-5;

(d) in the case of an application referred to in Rule 8-6 that may be made by written submissions, apply in accordance with the directions of the case planning conference judge referred to in Rule 8-6;

(e) in the case of an application for which a procedure is provided for by these Supreme Court Civil Rules, apply in accordance with that procedure;

(f) in the case of any other application, apply in accordance with this rule.

[The ability of a party to a fast track action to bring an application under this Part may be limited – see Rule 15-1 (7) to (9).]

Notice of application

(3) A party wishing to apply under this rule must file

(a) a notice of application, and

(b) the original of every affidavit, and of every other document, that

(i) is to be referred to by the applicant at the hearing, and

(ii) has not already been filed in the proceeding.

Contents of notice of application

(4) A notice of application must be in Form 32 and must

(a) set out the orders sought or attach a draft of the order sought,

(b) briefly summarize the factual basis for the application,

(c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted,

(d) list the affidavits and other documents on which the applicant intends to rely at the hearing of the application,

(e) set out the applicant's estimate of the time the application will take for hearing,

(f) subject to subrules (5) and (6), set out the date and time of the hearing of the application,

(g) set out the place for the hearing of the application in accordance with Rule 8-2, and

(h) provide the data collection information required in the appendix to the form,

and the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length.

[en. B.C. Reg. 241/2010, Sch. A, s. 1 (b).]

Date and time of hearing

(5) Subject to subrule (6), the hearing of an application must be set for 9:45 a.m. on a date on which the court hears applications or at such other time or date as has been fixed by the court or a registrar.

Date and time if hearing time more than 2 hours

(6) If the applicant's estimate referred to in subrule (4) (e) is more than 2 hours, the date and time of hearing must be fixed by a registrar.

[am. B.C. Reg. 119/2010, Sch. A, s. 17 (a).]

Service of application materials

(7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on every other person, other than a party, who may be affected by the orders sought:

(a) a copy of the filed notice of application;

(b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;

(c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).

[am. B.C. Reg. 120/2014, s. 4.]

Time for service

(8) The documents referred to in subrule (7) of this rule must be served,

(a) subject to paragraph (b) of this subrule, at least 8 business days before the date set for the hearing of the application, or

(b) in the case of an application under Rule 9-7, at least 12 business days before the date set for the hearing of the application.

[am. B.C. Reg. 241/2010, Sch. A, s. 1 (c) and (d).]

Application response

(9) A person who is served with documents referred to in subrule (7) of this rule and who wishes to respond to the notice of application (in this subrule called the "responding person") must do the following within 5 business days after service or, in the case of an application under Rule 9-7, within 8 business days after service:

(a) file an application response;

(b) file the original of every affidavit, and of every other document, that

(i) is to be referred to by the responding person at the hearing, and

(ii) has not already been filed in the proceeding;

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and documents, referred to in the application response under subrule (10) (b) (ii), that has not already been served on that person;

(iii) if the application is brought under Rule 9-7, any notice that the application respondent is required to give under Rule 9-7 (9).

[en. B.C. Reg. 241/2010, Sch. A, s. 1 (e).]

Contents of application response

(10) An application response must be in Form 33, must not exceed 10 pages in length and must

(a) indicate, for each order sought on the application, whether the application respondent consents to, opposes or takes no position on the order, and

(b) if the application respondent wishes to oppose any of the relief sought in the application,

(i) briefly summarize the factual and legal bases on which the orders sought should not be granted,

(ii) list the affidavits and other documents to which the application respondent intends to refer at the hearing of the application, and

(iii) set out the application respondent's estimate of the time the application will take for hearing.

[am. B.C. Reg. 241/2010, Sch. A, s. 1 (f).]

Address for service

(11) An application respondent who has not yet provided an address for service in the proceeding must include an address for service in any application response filed under subrule (9), and Rule 4-1 applies.

(12) Repealed. [B.C. Reg. 241/2010, Sch. A, s. 1 (g).]

Applicant may respond

(13) An applicant who wishes to respond to any document served under subrule (9) must file and serve on each application respondent any responding affidavits no later than 4 p.m. on the business day that is one full business day before the date set for the hearing.

[am. B.C. Regs. 119/2010, Sch. A, s. 17 (b); 241/2010, Sch. A, s. 1 (h) and (i).]

No additional affidavits

(14) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13).

[am. B.C. Reg. 241/2010, Sch. A, s. 1 (h).]

Application record

(15) Subject to subrule (18), the applicant must provide to the registry where the hearing is to take place an application record as follows:

(a) the application record must be in a ring binder or in some other form of secure binding;

(b) the application record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:

(i) a cover page in Form 30.001;

(ii) an index;

(iii) a copy of the filed notice of application;

(iv) a copy of each filed application response;

(v) a copy of every filed affidavit and pleading, and of every other document other than a written argument, that is to be relied on at the hearing;

(vi) if the application is brought under Rule 9-7, a copy of each filed pleading;

(c) the application record may contain

(i) a draft of the proposed order,

(ii) subject to subrule (16), a written argument,

(iii) a list of authorities and

(iv) a draft bill of costs;

(d) the application record must not contain

(i) affidavits of service,

(ii) copies of authorities, including case law, legislation, legal articles or excerpts from text books, or

(iii) any other documents unless they are included with the consent of all the parties of record;

(e) the application record must be provided to the registry

(i) no earlier than 9 a.m. on the business day that is three full business days before the date set for the hearing and no later than 4 p.m. on the business day that is one full business day before the date set for the hearing, or

(ii) if an earlier date is fixed by a registrar, on or before that date.

[am. B.C. Regs. 119/2010, Sch. A, s. 17 (c) and (d); 241/2010, Sch. A, s. 1 (i); 176/2023, Sch. 1, s. 8; 165/2024, Sch. 1, s. 1 (a).]

Additional copy of filed notice of application

(15.1) The applicant must, concurrently with the filing of the application record under subrule (15), provide to the registry a copy of the filed notice of application that

(a) is kept separate from the ring binder or other form of secure binding referred to in subrule (15) (a), and

(b) clearly indicates the orders sought by way of highlighting or other marking of the relevant paragraphs of Part 1 of the copy of the filed notice of application.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Application to be removed from hearing list

(15.2) Unless the court otherwise orders, if the applicant fails to provide an application record to the registry in accordance with subrule (15), the application must be removed from the hearing list.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Leave to permit late filing of application record

(15.3) Despite subrule (15) (e), the applicant may apply for an order granting leave to provide an application record to the registry after the period or date referred to in that subrule, as the case may be.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Applicant may apply to reinstate application to hearing list

(15.4) If an application has been removed from the hearing list under subrule (15.2), the applicant may apply for an order that the application be reinstated to the hearing list.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Order for costs

(15.5) If an application respondent attends for the hearing of an application that has been removed from the hearing list under subrule (15.2), the application respondent may apply for an order for costs or other directions.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Form of application

(15.6) An application for an order under subrule (15.3), (15.4) or (15.5) must be made by requisition in Form 30.01.

[en. B.C. Reg. 239/2023, Sch. 1, s. 1.]

Written argument

(16) Unless an application is estimated to take more than 2 hours, no party to the application may file or submit to the court a written argument in relation to the application other than that included in the party's notice of application or application response.

Service of application record index

(17) The applicant must serve a copy of the application record index on each application respondent no later than 4 p.m. on the business day that is one full business day before the date set for the hearing.

[am. B.C. Reg. 241/2010, Sch. A, s. 1 (j).]

If application respondent's application is to be heard at the hearing

(18) If an application respondent intends to set an application for hearing at the same time as the applicant's application, those parties must, so far as is possible, prepare and provide to the registry where the hearing is to take place a joint application record and agree to a date for the hearing of both applications.

[am. B.C. Reg. 119/2010, Sch. A, s. 17 (e).]

Application record to be returned

(19) Unless the court otherwise orders, the applicant must retrieve the application record

(a) at the conclusion of the hearing, or

(b) if the hearing of the application is adjourned to a date later than the following business day, after the hearing is adjourned.

[am. B.C. Regs. 119/2010, Sch. A, s. 17 (f); 241/2010, Sch. A, s. 1 (k).]

Application record to be returned to the registry

(20) If the application record has been retrieved by the applicant under subrule (19) (b), the applicant must return the application record to the registry between 9:00 a.m. and 4 p.m. on the business day that is one full business day before the new date set for the hearing of the application.

[am. B.C. Regs. 119/2010, Sch. A, s. 18; 241/2010, Sch. A, s. 1 (l).]

Provision of amended application record

(21) If any additional affidavits are filed and served under subrule (14) and are not included in the application record, the applicant must provide to the registry an amended application record containing those affidavits.

Resetting adjourned applications

(21.1) To reset an application that has been adjourned without a date being set for it to be heard ("adjourned generally") or that has been removed from the hearing list under subrule (15.2), the applicant must

(a) file a requisition in Form 17 setting out the following:

(i) the date and time of the hearing of the application;

(i.1) the place of hearing;

(ii) the date the notice of application was filed;

(iii) a brief description of the orders sought;

(iv) the applicant's estimate of the time the application will take for hearing;

(v) whether the orders sought are within the jurisdiction of an associate judge, and

(b) serve a copy of the filed requisition on the application respondents at least 2 business days before the date set for the hearing.

[en. B.C. Reg. 119/2010, Sch. A, s. 17 (g); am. B.C. Regs. 241/2010, Sch. A, s. 1 (m); 239/2023, Sch. 1, s. 2; 277/2023, Sch. 3, s. 1; 165/2024, Sch. 1, s. 1 (b).]

Application respondent may apply for directions

(22) If, after an application has been adjourned generally, the applicant does not reset the application for hearing within a reasonable time after an application respondent has requested the applicant to do so, an application respondent may apply, by requisition in Form 17 on 2 business days' notice, for directions.

[am. B.C. Regs. 119/2010, Sch. A, s. 17 (h); 241/2010, Sch. A, s. 1 (n).]

RULE 8-2 – PLACE APPLICATION IS HEARD

Place of hearing of application

(1) An application may be heard at

(a) the place ordered by a registrar under subrule (4),

(b) if an order is not made under subrule (4), the place on which all parties of record have agreed, or

(c) if paragraphs (a) and (b) do not apply, a place at which the court normally sits in the judicial district in which the proceeding is being conducted.