Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

RESOURCE CAPITAL FUND V L.P.

Applicant

- and -

FIRST NICKEL INC.

Respondent

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

BOOK OF AUTHORITIES OF THE APPLICANT
(Initial Application)

August 19, 2015

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Box 40, Commerce Court West
Toronto, Ontario M5L 1A9

Linc A. Rogers - LSUC#: 43562N
Tel: (416) 863-4168
Email: linc.rogers@blakes.com

Chris Burr LSUC# 55172H
Tel: (416) 863-3261
Fax: (416) 863-2653
Email: chris.burr@blakes.com

Lawyers for the Applicant

INDEX

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

RESOURCE CAPITAL FUND V L.P.

Applicant

- and -

FIRST NICKEL INC.

Respondent

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

BOOK OF AUTHORITIES OF THE APPLICANT
(Initial Application)

I N D E X

Tab

TAB 1

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Receivers — Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*

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

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

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

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties

(Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

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

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

End of Document

TAB 2

2012 ONSC 5707
Ontario Superior Court of Justice [Commercial List]

1529599 Ontario Ltd. v. Dalcor Inc.

2012 CarswellOnt 12474, 2012 ONSC 5707, 222 A.C.W.S. (3d) 660

1529599 Ontario Limited, Applicant and Dalcor Inc., Respondent

D.M. Brown J.

Heard: September 19, 2012
Judgment: October 10, 2012
Docket: CV-12-9706-00CL

Counsel: S. Thom, for Applicant
C. Daley, for Respondent

Subject: Insolvency; Corporate and Commercial; Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Under February 2012 share purchase agreement, respondent agreed to purchase shares of corporation Z. from applicant — Price payable in two December 2011 and December 2012 installments of $50,000 — Respondent granted applicant security interest in all undertaking, property and assets, including equipment via General Security Agreement — Applicant alleged respondent failed to make December 2011 payment — No payment made in response to applicant's March 2012 demand — Demand included notice of intention to enforce security under s. 244(1) of Bankruptcy and Insolvency Act (Can.) — Applicant was only creditor with registered security interest against respondent — Applicant seized equipment owned by respondent March 2012 — Respondent objected seizure illegal — Respondent alleged having paid at least $75,000 towards purchase by payments in March 2011 and April 2011 plus cash payments — Applicant sought order appointing receiver and manager over respondent's assets and undertaking — Applicant sought judgment for $100,000 for March 2010 promissory note — Respondent counter-applied for return of equipment and losses — Application allowed — Overwhelming evidence respondent failed to make first installment payment — None of alleged $90,000 in payments from respondent to applicant constituted payments under note — Respondent failed to file business records attesting to treatment of payments — Respondent pointed to no document indicating treatment of amounts as partial payments — None of payments constituted payments on their face — Payments apparently for supply and delivery of materials — No support for alleged cash payments totaling $10,000 — Judgment granted for $100,000 due under note — Just and convenient to appoint receiver — Respondent would not co-operate with private appointment of receiver — Respondent's counter-application dismissed.

Business associations --- Powers, rights and liabilities — Corporate borrowing — Rights and obligations of security holders — Remedies on default — Miscellaneous

Under February 2012 share purchase agreement, respondent agreed to purchase shares of corporation Z. from applicant — Price payable in two December 2011 and December 2012 installments of $50,000 — Respondent granted applicant security interest in all undertaking, property and assets, including equipment via General Security Agreement — Applicant alleged respondent failed to make December 2011 payment — No payment made in response to applicant's March 2012

demand — Demand included notice of intention to enforce security under s. 244(1) of Bankruptcy and Insolvency Act (Can.) — Applicant was only creditor with registered security interest against respondent — Applicant seized equipment owned by respondent March 2012 — Respondent objected seizure illegal — Respondent alleged having paid at least $75,000 towards purchase by payments in March 2011 and April 2011 plus cash payments — Applicant sought order appointing receiver and manager over respondent's assets and undertaking — Applicant sought judgment for $100,000 for March 2010 promissory note — Respondent counter-applied for return of equipment and losses — Application allowed — Overwhelming evidence respondent failed to make first installment payment — None of alleged $90,000 in payments from respondent to applicant constituted payments under note — Respondent failed to file business records attesting to treatment of payments — Respondent pointed to no document indicating treatment of amounts as partial payments — None of payments constituted payments on their face — Payments apparently for supply and delivery of materials — No support for alleged cash payments totaling $10,000 — Judgment granted for $100,000 due under note — Just and convenient to appoint receiver — Respondent would not co-operate with private appointment of receiver — Respondent's counter-application dismissed.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244(1) — referred to

***D.M. Brown J.*:**

I. Overview

1 1529599 Ontario Limited ("152") applied for orders appointing A. Farber & Partners Inc. as receiver and manager over the assets and undertaking of Dalcor Inc. ("Dalcor") and judgment against Dalcor in the amount of $100,000.00 in respect of a promissory note dated March 11, 2010 (the "Note").

2 Dalcor issued a notice of counter-application seeking the return of construction equipment seized by 152 and damages for losses allegedly suffered as a result of that seizure.

3 The cardinal issue in dispute between the parties is whether Dalcor has paid the first installment of $50,000 under the Note.

4 I find that Dalcor has not. I grant the relief sought by 152, and I dismiss part of Dalcor's counter-application, deferring the balance.

II. Procedural history

5 When this application came before me on May 25, 2012, I adjourned the application to permit the calling of *viva voce* evidence. In light of new evidence the applicant wished to file on the return of the application on June 22, I further adjourned the matter and permitted the respondent to file a reply affidavit. The hearing did not proceed as scheduled on July 25 because

respondent's counsel sought to get off the record. On August 17, 2012 the respondent filed a reply affidavit. The applicant objected to the relevance of some portions of the affidavit. By endorsement dated September 5, 2012 I wrote: "Dalcor's right of reply was limited to matters raised in that affidavit (June 22), so to extent Mr. Daley's affidavit of Aug 17/12 (his late-filed reply affidavit) raises any matter which is not proper reply evidence, I will not take such improper evidence into account." The matter finally proceeded, with *viva voce* evidence, on September 19, 2012. Mr. Charles Daley, the principal of Dalcor, represented the company at the hearing.

6 The affidavits filed by both parties were marked as evidence at the hearing and I treated them as the examination-in-chief of the affiants, Brain Constans, the sole officer and director of 152, and Mr. Daley. Both Mr. Constans and Mr. Daley were cross-examined at the hearing.

III. The events

A. The February, 2010 share purchase agreement

7 152 used to own Zuron Construction Inc. ("Zuron"). Daley owns Dalcor. Prior to March, 2010, Daley had worked for Zuron.

8 Under a share purchase agreement dated February 18, 2012, Dalcor purchased all issued and outstanding shares of Zuron from 152 for the price of $100,000.00, payable in two equal $50,000 installments on December 31, 2011 and December 31, 2012. At that time Daley operated both Dalcor and Zuron out of premises located at 10 Ruggles Avenue, Richmond Hill, which they leased from Cobra Power Inc., another company owned by Constans.

9 Amongst the security granted by Dalcor for performance of the obligations set out in the Share Purchase Agreement were the Note dated March 11, 2010 and a General Security Agreement dated March 11, 2010.

10 Under the Note both Dalcor and Zuron agreed to pay 152 the sum of $50,000 on December 31, 2011 and $50,000 on December 31, 2012. The last paragraph of the Note provided:

> This Note shall be open for repayment at any time or times in whole or in part without notice or bonus. This note shall be due and payable in the event of the sale of the assets of Zuron Construction Inc. and/or there is a transfer or change of control in the shareholdings of Zuron Construction Inc. by Dalcor Inc.

11 Under the General Security Agreement Dalcor granted to 152 a security interest in all its undertaking, property and assets, then owned or after-acquired, including equipment. The failure of Dalcor to pay 152 when due any obligation secured by the GSA constituted an event of default. The GSA provided that upon an event of default 152 would enjoy the rights and remedies provided by law, including applying to court for the appointment of a receiver of the collateral and 152 was entitled to take possession of the collateral.

12 Around March 10, 2012, 152 delivered the Zuron shares to the escrow agent specified in the Share Pledge Agreement entered into between Dalcor and 152.

B. The dispute about whether Dalcor paid under the Note

13 Dalcor was evicted from the Ruggles Avenue premises around the end of October, 2011.

14 152 alleged that Dalcor failed to make the first payment due under the Note on December 31, 2011. On March 8, 2012 counsel for 152 sent a demand letter to Dalcor, to the attention of Daley, demanding payment of the $50,000 due on December 31, 2011. The demand letter included a notice of intention to enforce security under section 244(1) of the *Bankruptcy and Insolvency Act*.

15 Dalcor did not make any payments in response to that demand.

16 Constans deposed that 152 is the only creditor with a registered security interest against Dalcor.

17 On March 21, 2012 representatives of 152 attended at 1880 O'Connor Avenue, Toronto and seized three pieces of equipment owned by Dalcor. 152 took possession of the equipment, and it now is stored at 10 Ruggles Avenue. 152 also took possession of a 2006 Caterpillar 906 Loader owned by Dalcor located at the Ruggles Avenue location.

18 On March 26, 2012 Dalcor's counsel responded to the demand letter, describing the seizure of equipment as illegal because:

> [C]ontrary to your client's allegations, our client has made advance payments to your client's company and/or associated companies, in respect of the Promissory Note on March 10, 2011 and April 20, 2011 in the amounts of $25,000.00 and $50,000.00 respectively, for a total payment by our client in the amount of $75,000.00.

In that letter, and in a subsequent letter of March 29, 2012, Dalcor demanded the return of the seized equipment.

IV. The positions of the parties

19 152 took the position that Dalcor had not made any payments under the Note and, therefore, its seizure of the equipment was lawful.

20 Dalcor argued that in 2011 it had made three advance payments under the Note totaling $80,000.00, together with some cash payments. As a result, Dalcor contended that it was not in default under the Note, the seizures were unlawful, and it had suffered losses as a result.

V. Analysis

A. Did Dalcor pay $90,000 against the amounts due under the Note?

21 Daley deposed and testified that several payments Dalcor made in 2011 constituted advance payments of amounts due under the Note:

> (i) a Dalcor cheque dated March 2, 2011 in the amount of $5,000 made payable to Kenco Electrical Supply Inc. in Mississauga;
>
> (ii) a Dalcor cheque dated March 16, 2011 in the amount of $25,000 made payble to Kenco;
>
> (iii) a Dalcor cheque dated April 22, 2011 in the amount of $50,000 made payable to Cobra Power. The "Memo" section of the cheque recorded the word "loan"; and,
>
> (iv) unspecified cash payments totaling $10,000.

Daley testified that each cheque represented a partial re-payment of amounts due under the Note and the cheques were made payable to the stated payees at the direction of Constans. The latter denied having given any such directions and testified that the cheques had nothing to do with the repayment of the amount due under the Note.

22 For the reasons set out below, I do not accept Daley's evidence that these three payments constituted repayments of the amount due under the Note.

23 First, let me start with what Dalcor omitted to place into evidence. I think one can reasonably assume that Dalcor, as an operating company, maintains books and records, including financial statements, which record its debts, as well as any payments made against those debts. Dalcor placed none of its books and records into evidence even though Daley filed a total of four affidavits. The failure of Dalcor to file business records which showed that the three payments were treated, for its internal accounting purposes, as repayments of the amounts due under the Note weighs heavily against Daley's contention that they were.

24 Second, Dalcor could not point to any document passing between the parties, contemporaneous with any of the three payments, stating that the payments were to be treated as partial payments of the amounts due under the Notes. The parties

papered the share purchase transaction in a very formal manner, with a Share Purchase Agreement and several related security documents. This was not a "back of the envelope" deal between two businessmen. Given that context, one reasonably would expect some formal documentation evidencing specific repayments of monies due under the Note.

25 Third, on their face none of the three cheques were noted as constituting repayments of amounts due under the Notes.

26 Fourth, regarding the two cheques Dalcor made payable to Kenco, Constans acknowledged that he was a shareholder in Kenco. At the hearing Daley conceded that Dalcor had bought some supplies from Kenco, perhaps tools. 152 filed a May 2, 2012 letter from Bruce Strain of Kenco stating that the March 18, 2011 cheque for $25,000 was received from Dalcor "on account for the supply and delivery of electrical materials to various project sites".

27 Although this evidence was filed on an "information and belief" basis, it is noteworthy that Mr. Strain included with his letter certain Kenco business records. One was a March 2, 2011 deposit slip for Kenco's account at the Meridian Credit Union which identified, as part of that deposit, the amount of $5,000 from Dalcor "on account". This coincided with the first Dalcor cheque in that amount dated March 2, 2011. The second was a March 16, 2011 deposit slip for Kenco's Meridian account recording a deposit of $25,000 on that date of funds from Dalcor "paid on account". This deposit coincided with Dalcor's second payment to Kenco, the one dated March 16, 2011. At the hearing Daley rejected the suggestion that these slips recorded funds paid by Dalcor for supplies bought from Kenco and stated that the records were either erroneous or falsified. I do not accept Daley's evidence on this point. The most probable conclusion to be drawn from this evidence is that on March 2 and 16, 2011 Dalcor paid Kenco $5,000 and $25,000 on account of supplies it had purchased and, therefore, those payments did not constitute the repayment of amounts due under the Note.

28 Fifth, regarding Dalcor's April 22, 2011 cheque to Cobra in the amount of $50,000, Daley deposed that as a result of Dalcor's advance payments, Cobra provided it with a statement evidencing that only $10,000 was owing to Kenco regarding the Zuron purchase by Dalcor. In support of this statement Daley adduced an August 11, 2001 document on Cobra letterhead. Under the heading "Monies Owing to Cobra Power Inc." appeared the line item: "Owing Kenco regarding Zuron Construction Inc. purchases, $10,000". On its face this line item does not reference the Note or the Share Purchase Agreement.

29 Constans deposed that the $50,000 payment to Cobra was made in partial satisfaction of debts incurred by Dalcor and Zuron in respect of rent and supplies acquired with Cobra's credit. Constans testified that as of April 20, 2011, just prior to the $50,000 cheque, Dalcor and Zuron owed Cobra $124,666.20. In response Daley testified that a November 23, 2011 statement produced by Cobra's accountant, Colavita & Associates, showed that no receivables were owing to Cobra from Zuron or Dalcor at that time. A May 22, 2012 letter the accountant, Joseph Colavita, stated that the document only showed the trade receivables of Cobra and did not show loans payable by Zuron or Dalcor because they were not regarded as trade receivables. Mr. Colavita wrote that as of May 22, 2012 Dalcor and Zuron owed Cobra $184,304. Daley submitted a May 9, 2011 Canada Revenue Agency Notice of Assessment for Dalcor assessing $62,385.11 for unremitted source deductions, including penalty and interest. As I read his May 10, 2012 affidavit, sworn one year after that notice of assessment, as of the latter date Dalcor still had not paid the assessed amount.

30 The weight of this evidence shows that at the material time — April, 2011 — Zuron and Dalcor owned significant sums to Cobra. There is no doubt that the parties worked on some of the same construction projects. Although Daley attempted to demonstrate that in fact Dalcor and Zuron were loaning large amounts of money to Cobra at that time, an examination of some of the payments — e.g. the April 13, 2011 cheque for $58,000 — would indicate that the payments made by Dalcor and Zuron were in the context of ordinary course payments for specific construction projects on which both parties were involved. Again, the absence of any of the internal accounting records from Dalcor or Zuron makes it difficult to accept Daley's characterization of the payments as advances against the Note.

31 Sixth, Daley could provide no support for the various cash payments he contended reduced the overall debt to $10,000.

32 Finally, the Note bore no interest. Accordingly, while the Note did allow for repayment at any time, the absence of any interest charged on the principal amount meant little financial incentive existed to make any pre-payment.

33 In sum, the overwhelmingly weight of evidence leads to the conclusion that Dalcor has made no repayments of the monies due under the Note. I therefore find that Dalcor failed to pay the first installment due under the Note on December 31, 2011 and, as a result, an event of default occurred under the General Security Agreement.

B. What amount presently is due and owing under the Note?

34 Under the Note Dalcor was required to pay 152 the sum of $100,000.00 in equal, $50,000 payments on December 31, 2011 and December 31, 2012. I have found that Dalcor has not made any payments under the Note. Dalcor therefore breached its obligation to pay $50,000 on December 31, 2011. The Note did not contain a standard acceleration clause. However, as noted, the last paragraph of the Note provided that the Note became "due and payable in the event of the sale of the assets of Zuron Construction Inc."

35 In paragraph 4 of his May 10, 2012 affidavit Daley deposed that Dalcor had taken possession of all the construction equipment and machinery owned or financed by Zuron, and he detailed the pieces of equipment transferred by Zuron to Dalcor. Daley stated that 152 had agreed to those transfers. Daley deposed that in 2011 had purchased from the leasor two pieces of Zuron equipment: a 2006 Caterpillar 420E Backhoe Loader and a 2006 Caterpillar 906 Loader.

36 Constans, in paragraph 42 of his May 13, 2012 affidavit, denied that he had agreed to such transfers. Dalcor produced no documentary evidence supporting its contention that 152 had agreed to such transfers.

37 Then, in paragraphs 3 and 4 of his May 23, 2012 affidavit, Daley deposed:

> At no time was the above noted construction machinery and equipment transferred directly over to Dalcor. Dalcor as owner of the shares and assets of Zuron, by implication, became the owner of all construction machinery and equipment owned or financed by Zuron.
>
> Zuron remains the registered owner of all construction equipment and machinery obtained through the transaction with 152.

38 In contradiction of that evidence 152 adduced documents showing that three of the vehicles owned by Zuron at the time of the share purchase transaction were, as of May 27, 2011, insured in the name of Dalcor. In his August 17, 2012 reply affidavit Daley did not respond to this evidence, although in paragraphs 24 to 25 of his May 10, 2012 affidavit Daley had characterized one of the pieces — a 2006 Triaxle Trailer — as Dalcor's equipment. At trial Daley acknowledged that Dalcor owned the three pieces of equipment for which it was designated as the insured.

39 Daley's assertion in paragraphs 3 and 4 of his May 23, 2012 affidavit that "at no time was the above noted construction machinery and equipment transferred directly over to Dalcor" simply is not borne out by the evidence. On his own testimony Daley admitted that Dalcor had purchased two pieces of equipment leased by Zuron and it owned three other pieces for which Dalcor was registered as the insured. From this evidence I conclude that some equipment owned by Zuron at the time of the share purchase agreement was transferred to or bought by Dalcor. I prefer Constans' evidence that 152 did not consent to such transfers of Zuron equipment over the inconsistent evidence of Daley on the point. I therefore find that after the execution of the Note there was a sale of some of the assets of Zuron and that, in accordance with the terms of the Note, the entire amount under the Note became due and payable. I conclude that Dalcor owes 152 the sum of $100,000.00 under the Note, and judgment shall issue in favour of 152 against Dalcor for that amount.

C. Request to appoint a receiver over the assets and undertaking of 152

40 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]) the Court described the basic principles governing the judicial appointment of a receiver/receiver-manager:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The

fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

Although Dalcor argued that the appointment of a receiver is an extraordinary remedy to be granted sparingly, as observed by Newbould J. in paragraph 25 of his reasons in *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.), the line of cases expressing that principle do not deal with the situation of a secured creditor, such as 152, exercising its right to enforce its security.

41 In the present case it would be just or convenient to appoint a receiver over the assets and undertaking of Dalcor for the following reasons:

(i) Dalcor owes 152 the sum of $100,000;

(ii) The GSA dated March 11, 2010 grants 152 a security interest in the undertaking, property and assets of Dalcor and enables 152 to appoint a receiver/receiver-manager of the collateral upon an event of default;

(iii) An event of default occurred when Dalcor failed to make the December 31, 2011 payment under the Note;

(iv) The evidence disclosed that Dalcor will not co-operate with the private appointment of a receiver by 152. Indeed, Dalcor's principal, Daley, has disputed any indebtedness, and I have rejected his evidence; and,

(v) There is evidence that Dalcor may owe the CRA a significant sum of money. The appointment by the court of a receiver will ensure that competing claims to the assets and undertaking of Dalcor are dealt with in an equitable fashion.

42 A. Farber & Partners Inc. has consented to act as receiver. I appoint Farber as the receiver and manager of the assets, undertaking and property of Dalcor, and I have signed the draft order submitted by 152 at the hearing.

D. Dalcor's counter-application

43 In light of my findings that Dalcor defaulted on its obligations under the Note and that 152 was granted a security interest in the GSA with the power to appoint a receiver in the event of Dalcor's default, I dismiss that part of its Counter-Application seeking an order for the return of equipment already seized by 152. Since the prudence of the realization of the collateral can be dealt with at an appropriate point in the receivership proceedings, I defer dealing with the relief requested in paragraphs 1(b) through to 1(d) of the Notice of Counter-Application.

VI. Summary and Costs

44 By way of summary, I grant judgment in favour of 152 against Dalcor in the amount of $100,000, I appoint Farber as the receiver-manager of the assets, undertaking and property of Dalcor, and I dismiss the relief sought in paragraph 1(a) of the Notice of Counter-Application.

45 I would encourage the parties to try to settle the costs of this application. If they cannot, 152 may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, October 19, 2012. Dalcor may serve and file with my office responding written cost submissions by Wednesday, October 31, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

End of Document

TAB 3

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors --- Receivers — Jurisdiction of court to appoint

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — followed

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243 — considered

s. 243(1) — pursuant to

s. 244(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — pursuant to

APPLICATION for appointment of receiver.

Morawetz J.:

1 Business Development Bank of Canada ("BDC") brings this application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

2 Counsel to the Respondent submits that a receiver can be appointed by an interlocutory order where it appears to the court to be just or convenient to do so. Counsel referenced *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (Ont. H.C.) for this proposition. Counsel questioned as to whether it was proper to proceed by way of application as this would result in the granting of a final order, which, he submits, is inconsistent with the view expressed by Callaghan J. (as he then was) in *National Trustco*.

3 Counsel to BDC responded by referencing *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267 (Ont. C.A. [In Chambers]), a decision of MacPherson J.A. (In Chambers). In this case, the Ministry commenced its application, including the relief to appoint a receiver and manager pursuant to s. 101 of the *CJA*. The order appointing the receiver was granted and the moving party on appeal, Shehrazad, sought a stay pending appeal. The request for the stay was opposed by the Ministry on two bases: (1) the Court of Appeal had no jurisdiction to hear the motion because the order being appealed was an interlocutory order and, therefore, the appeal would have to be taken to Divisional Court; and (2) on the merits, the moving party could not meet the test for obtaining a stay.

4 With respect to the jurisdictional point, MacPherson J.A. disagreed with the position put forth by the Ministry noting that the Ministry did not bring a motion to appoint a receiver; rather, it made an application.

5 Justice MacPherson stated the following:

16. It follows that the decision of this court in *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.), governs the question of which court has jurisdiction to hear the appeal in these proceedings. In *Illidge*, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.

17. The court rejected this argument. Armstrong J.A. stated at paragraph 4:

> At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675, ... and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.

In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for stay should be considered on the merits.

6 The above passage is, in my view, a complete answer to the position put forth by counsel to the Respondent. The Court of Appeal did not take issue with the fact that the proceeding to appoint the receiver was brought by way of application which resulted in a final order.

7 In any event, the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver.

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

(a) the credit agreement is in default;

(b) the indebtedness is not in dispute;

(c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and

> (d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

23 The application is granted and the Fuller Landau Group Inc. is appointed Receiver.

Application granted.

End of Document

TAB 4

2010 BCSC 477
British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

2010 CarswellBC 855, 2010 BCSC 477, [2010] B.C.W.L.D. 4567, [2010] B.C.W.L.D. 4568, [2010] B.C.J. No. 635, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171

Textron Financial Canada Limited (Plaintiff) and Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth (Defendants)

Willcock J.

Heard: February 10, 2010
Judgment: April 9, 2010
Docket: Vancouver S100268

Counsel: W.E.J. Skelly, B. La Borie for Plaintiff
A. Brown for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff demanded payment from C Ltd. and NHLP, issued notice of intention to enforce security under s. 244 of Bankruptcy and Insolvency Act, and made demand upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for, inter alia, order appointing receiver — Application granted in part — Just and convenient to grant receivership order — As parties stipulated in their contracts that plaintiff would be entitled to appoint receiver or apply for court-appointed receiver in event of default, relief sought not extraordinary — Defendants owed plaintiff significant sum, and had not reduced principal debt — No dispute as to amount of debt, nor that defendants were in default — No imminent prospect of repayment of principal from operations — There had not been full disclosure of defendants' refinancing plans — Interim plan to make partial payments would not indemnify plaintiff against interest accumulating in interim — No assurance interim payments could be made — There was risk to plaintiff's equity and doubt regarding prospect of recovery of principal — Defendants' plans did not provide for indemnity to plaintiff for losses incurred on ongoing basis — There was inadequate provision to minimize irreparable losses lender would incur — No persuasive evidence appointment of receiver would cause defendants undue hardship — Plaintiff should not have to leave its interests in hands of defendants.

Debtors and creditors --- Receivers — Order appointing receiver

Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff, commercial lender, lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff made demand upon C Ltd. and NHLP for payment, and issued notice of intention to enforce security under provisions of s. 244 of Bankruptcy and Insolvency Act — Demand was also made upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for

order appointing receiver, and that receiver have conduct of sale of hotel, subject to court approval — Application granted in part — Balancing rights of parties, it was just and convenient to grant receivership order — Order appointing receiver would not authorize receiver to have conduct of sale of hotel — As conduct of sale precluded redemption, order sought was inconsistent with affording defendants redemption period — Special circumstances did not exist such that plaintiff should have order for sale before judgment and consideration of appropriate redemption period — It was not clear that value of security was diminishing — To contrary, there was some evidence that profitability and therefore value of hotel was likely to increase in interim — Some net income was being generated from operations — Receiver would be authorized to engage only in such sales as would occur in ordinary course of business of hotel.

Table of Authorities

Cases considered by *Willcock J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — referred to

Bank of Nova Scotia v. Mrazek (1985), 64 B.C.L.R. 282, 1985 CarswellBC 191 (B.C. C.A.) — considered

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — considered

Canlan Investment Corp. v. Gibbons (1983), [1983] 3 W.W.R. 225, 42 B.C.L.R. 199, 1983 CarswellBC 7 (B.C. S.C.) — considered

Citibank Canada v. Calgary Auto Centre (1989), 58 D.L.R. (4th) 447, 98 A.R. 250, 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343 (Alta. Q.B.) — considered

Devany v. Brackpool (1981), 1981 CarswellBC 266, 31 B.C.L.R. 256, 21 R.P.R. 100, 127 D.L.R. (3d) 498 (B.C. S.C. [In Chambers]) — considered

Eaton Bay Trust Co. v. Motherlode Developments Ltd. (1984), 50 C.B.R. (N.S.) 247, 1984 CarswellBC 548, 50 B.C.L.R. 149 (B.C. S.C.) — considered

First Pacific Credit Union v. Grimwood Sports Inc. (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7, 1984 CarswellBC 605 (B.C. C.A.) — considered

First Western Capital Ltd. v. Wardle (1982), 1982 CarswellBC 2252 (B.C. S.C.) — referred to

Korion Investments Corp. v. Vancouver Trade Mart Inc. (1993), 1993 CarswellBC 2061 (B.C. S.C. [In Chambers]) — considered

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]) — considered

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

Player v. Crompton & Co. (1914), [1914] 1 Ch. 954 (Eng. Ch. Div.) — referred to

Pope v. Roberts (1979), 1979 CarswellBC 6, 10 B.C.L.R. 50 (B.C. C.A.) — referred to

Pratchett v. Drew (1924), [1923] All E.R. Rep. 685, [1924] 1 Ch. 280 (Eng. Ch. Div.) — referred to

Red Burrito Ltd. v. Hussain (2007), 2007 CarswellBC 1936, 2007 BCSC 1277, 33 B.L.R. (4th) 205 (B.C. S.C.) — considered

Ross v. Ross Mining Ltd. (2009), 2009 YKSC 55, 2009 CarswellYukon 123, 57 C.B.R. (5th) 77 (Y.T. S.C.) — referred to

Royal Bank v. Astor Hotel Ltd. (1986), 1986 CarswellBC 487, 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) — considered

Royal Bank v. Cal Glass Ltd. (1978), 29 C.B.R. (N.S.) 302, 94 D.L.R. (3d) 84, 1978 CarswellBC 303, 8 B.C.L.R. 345 (B.C. S.C.) — considered

Royal Bank v. Camex Canada Corp. (1985), 63 B.C.L.R. 125, 1985 CarswellBC 137 (B.C. S.C.) — referred to

Royal Trust Corp. of Canada v. Exeter Properties Ltd. (February 28, 1985), Doc. Vancouver H850260 (B.C. S.C. [In Chambers]) — referred to

South West Marine Estates Ltd. v. Bank of British Columbia (1985), 1985 CarswellBC 249, 65 B.C.L.R. 328, 37 R.P.R. 137 (B.C. C.A.) — referred to

Truman & Co. v. Redgrave (1881), 18 Ch. 547 (Eng. Ch. Div.) — referred to

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — considered

Vista Homes Ltd. v. Taplow Financial Ltd. (1985), 64 B.C.L.R. 291, 1985 CarswellBC 470, 56 C.B.R. (N.S.) 225 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244 — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253
Generally — referred to

s. 15 — considered

s. 39(1) — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 66 — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 12 — pursuant to

R. 44 — pursuant to

R. 47(1) — referred to

R. 51A [en. B.C. Reg. 367/2000] — pursuant to

R. 57 — pursuant to

APPLICATION by plaintiff for order appointing receiver, and that receiver have conduct of sale of certain property.

***Willcock J.*:**

Introduction

1 Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

Background

2 Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

3 Chetwynd and NHLP built, own and operate the Hotel.

4 Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

(c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

5 On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of $7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

(a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");

(b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;

(c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands, granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;

(d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");

(e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

6 By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

7 The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

8 For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

9 On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of $7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

10 The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

11 On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

(1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

12 William Pomeroy describes himself as the president of a group of companies referred to as the "Pomeroy Group". The group operates and manages hotels and restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

13 It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

14 Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

15 Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

16 The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel generating net operating income of $457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

17 Chetwynd proposes to make an immediate payment to Textron in the amount of $20,000, and to pay all interest accruing to Textron on a monthly basis, approximately $20,000 per month, while the Pomeroy Group is pursuing restructuring.

18 Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that

Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

Issues

19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so

2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

20 The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

Applicable Law

Court-Appointed Receivers

21 Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

> 39(1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

22 Section 66 of *The Personal Property Security Act*, in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act*.

23 The *Rules of Court* provide the appointment may be on terms:

> 47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

24 In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 (B.C. S.C.), D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

25 The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have

> regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

26 This judgment was cited with approval by Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55 (Y.T. S.C.)). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

27 In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

28 The Court was of the view the English line of authorities, of which in *Player v. Crompton & Co.*, [1914] 1 Ch. 954 (Eng. Ch. Div.); *Truman & Co. v. Redgrave* (1881), 18 Ch. 547 (Eng. Ch. Div.); and *Pratchett v. Drew*, [1924] 1 Ch. 280 (Eng. Ch. Div.) were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (B.C. S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]), where receivers were appointed without proof of jeopardy.

29 Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (B.C. S.C. [In Chambers]), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

30 Mr. Justice Burnyeat held, at paras. 15-17:

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

> A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

31 The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

> In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978),pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co.*,[1914] 1 Ch. 954).

32 The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

33 As Taylor J. noted in *Royal Bank v. Cal Glass Ltd.* (1978), 94 D.L.R. (3d) 84 (B.C. S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

34 The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: [*Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95 (Alta. Q.B.); and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.).

35 As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. [*Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd.*, (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67

> B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

37 The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

38 The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

39 The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

40 In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was $5.7 million. The defendant did not dispute the default. It was prepared to make payments of $4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

41 The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

42 The parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

43 The defendant owed a significant sum of money;

44 There appeared not to be a dispute with the fact of the size of the indebtedness;

45 The defendant was in default;

46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

47 There were concerns with respect to the financial statements of the defendant; and

48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> > a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
> >
> > b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> >
> > c) the nature of the property;
> >
> > d) the apprehended or actual waste of the debtor's assets;
> >
> > e) the preservation and protection of the property pending judicial resolution;
> >
> > f) the balance of convenience to the parties;
> >
> > g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
> >
> > h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
> >
> > i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
> >
> > j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
> >
> > k) the effect of the order upon the parties;
> >
> > l) the conduct of the parties;
> >
> > m) the length of time that a receiver may be in place;
> >
> > n) the cost to the parties;
> >
> > o) the likelihood of maximizing return to the parties;
> >
> > p) the goal of facilitating the duties of the receiver.

51 Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088(Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> . . . . .
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

53 The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International*, at para. 17, the Court held:

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

54 In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described

by Taylor J. in [*Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

56 Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
>
> (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

57 A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (B.C. C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (B.C. S.C. [In Chambers]) and *Canlan Investment Corp. v. Gibbons* (1983), 42 B.C.L.R. 199 (B.C. S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

58 In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

> That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

60 The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

61 The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (B.C. C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (B.C. S.C.).

62 In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

> In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.

63 That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

64 The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

65 There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.) at para. 21; *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) [*Astor Hotel*], at para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (B.C. C.A.).

66 There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

67 At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

68 Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

69 In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes Ltd. v. Taplow Financial Ltd.* (1985), 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225 (B.C. S.C.); and *Astor Hotel*.

70 In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment

is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

72 In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union*

[citation omitted].

73 In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific*, *Vista Homes*, *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (B.C. S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

74 In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

Discussion

Appointment of a Receiver

75 The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

76 The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

77 There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

78 There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

79 The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

80 If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

81 In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

82 The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

83 The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.*, that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

84 The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

85 Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

86 The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

87 The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

88 It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

89 I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

90 The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

91 The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

92 The parties have leave to apply for further directions if necessary.

Application granted in part.

TAB 5

COMMERCIAL INSOLVENCY IN CANADA

SECOND EDITION

Kevin P. McElcheran, LL.B.

McCarthy Tétrault LLP

LexisNexis®

the creditor who might have sought the appointment, along with all other creditor claims, to employee claims because receivers have recourse to the realizations through indemnities, either privately from secured creditors or through court order, which are secured by a charge on the assets. Because this inversion of priorities was imposed on receivers who operated an employer's business and not on receivers who closed businesses and liquidated the employer's assets, financial creditors were encouraged to seek liquidations, worsening the position of employees who benefit from going concern sales of insolvent but viable businesses.

The 2009 amendments of section 14.06(1.2) strike a fair balance and may reverse the incentives that favoured liquidation. By preserving the applicable labour or employment law in respect of the post-appointment operation of the business by the receiver, the amendment protects the rights of employees to continue their employment during the receivership on the same terms as applied prior to the appointment. By protecting the receiver from personal liability for claims that accrued prior to the receiver's appointment, the amendment may encourage secured creditors to financially support the continuation of the business by the receiver and the marketing of the business as a going concern. Finally, the amendment does not interfere with the continuity of the employees' terms of employment under applicable employment or labour law with any purchaser of the business from the receiver.

(iii) Environmental Issues

Among the most important issues facing our society is the protection of our environment from further contamination and the clean-up of the environmental mess our industrial society has made. Receivers, like anyone else, have some responsibility for preventing the escape or discharge of pollutants from property while such property is in their control or possession. Most receivers are prepared to accept this statutory obligation as an appropriate allocation of social responsibility. However, it is not an appropriate allocation of social responsibility to require receivers who take control of contaminated property to clean up the mess the debtor or one of its predecessors may have made.

Even in cases in which the receiver does not manage the debtor's business, the receiver may be in possession of the debtor's business premises for a number of weeks or months before the disposition of the collateral is completed. During this period of possession, spills or other pollution may occur, which do not necessarily result from positive acts or decisions of the receiver. For example, leakages may be ongoing, having begun unnoticed long before the receiver's appointment. In addition, the receiver may be faced with storage or disposal problems of polluted or

polluting assets located on the debtor's premises at the time of possession by the receiver.

Perhaps the most instructive case for analyzing the potential environmental liability of a receiver is the duty suggested by *Canada Trust Co. v. Bulora Corp.*[184] In this case, a receiver and manager was held liable for compliance with an administrative order issued to the debtor prior to possession of the premises by the receiver. The order, pursuant to the *Fire Marshals Act*,[185] required the repair or demolition of the debtor's dilapidated rental units to protect the safety of residents in buildings adjacent to those units. The receiver and manager declined to abide by the order due to the prohibitive costs involved.

The Court declared that, pursuant to the receiver's powers in its capacity as manager of the business of the debtor, it was appropriate for the order to be served and be binding on the receiver at first instance, the receiver was held to have a "social duty to comply" with administrative orders designed to protect the safety of the public. The Court concluded that the "[r]eceivership cannot and should not be guided solely by the recovery of assets".[186] Instead, the receiver had a duty to manage the assets with a view to the safety of other persons who may be affected by those assets.[187]

Environmental legislation[188] imposes a broad range of liabilities on "persons" who permit or control the source of pollution, regardless of the time the pollution may have begun. The definition of "person", does not distinguish a person in possession from an owner. Thus, by virtue of being in possession, a receiver may be ordered to repair damage due to discharges that occurred during its possession of the property.

Prior to amendments to the BIA in 1992 and 1997, in many cases, the insolvency of the debtor operating on environmentally challenged property resulted in derelict properties for which no one would take responsibility. Anyone caught with an environmental hot potato faced potentially unlimited liability arising from merely taking possession of the

---

184 [1980] O.J. No. 752, 34 C.B.R. (N.S.) 145 (Ont. H.C.J.), affd [1981] O.J. No. 2396, 39 C.B.R. (N.S.) 152 (Ont. C.A.).

185 R.S.O. 1990, c. F.17, as repealed by the *Fire Protection and Prevention Act*, S.O. 1997, c. 4, s. 18(2).

186 *Canada Trust Co. v. Bulora Corp.*, [1980] O.J. No. 752, 34 C.B.R. (N.S.) 145 at 152 (Ont. H.C.J.), affd [1981] O.J. No. 2396, 39 C.B.R. (N.S.) 152 (Ont. C.A.).

187 *Canada Trust Co. v. Bulora Corp.*, [1981] O.J. No. 2396, 39 C.B.R. (N.S.) 152 (Ont. C.A.). While dismissing the appeal, the Court of Appeal disavowed the reliance by the court of first instance on "societal" duties of court-appointed receivers, simply concurring with the direction of the receiver to comply with the demolition order issued by the fire marshall's office. Nevertheless, directions to the receiver are subject to the discretion of the appointing court and the court's discretion may be affected by the societal impact of the requested order.

188 See, *e.g.*, *Environmental Protection Act*, R.S.O. 1990, c. E.19.

property. Environmental legislation did not permit trustee/receivers an opportunity to evaluate the environmental challenges facing it. In many cases, liability arises from possession alone.

In some cases, courts appointing receivers attempted to protect the receiver from liability arising by virtue of the appointment. Often, these protections attempted to override provincial or federal laws imposing environmental responsibility and liability on persons in possession of property. After some controversy,[189] courts adopted the better view that they did not have jurisdiction to make orders that override legislation.[190] Taking a less aggressive approach, some courts were careful of the circumstances in which receivers appointed by the courts would take possession and control of certain properties owned by the debtor. In such cases, the order appointing the receiver might grant a sale power over property without conferring a power to take possession of the property without further order of the court or before assessing the potential environmental liability arising from the property through environmental assessments or through administrative arrangements with the relevant environmental regulator.[191]

Although sometimes effective in avoiding liability of the receiver, these orders created a more sophisticated set of rules for the game of hot potato. These techniques remain available in appropriate cases to supplement the rules implemented by the BIA amendments in 1992 and 1997.

As a result of the 1992 and 1997 amendments to the BIA, if the owner of the property subject to the contamination is insolvent, a trustee/receiver is entitled to special protection from liability contained in section 14.06 of the BIA.[192] These provisions override any provincial or federal laws protecting the environment and are intended to replace potential personal liability of the trustee/receiver with a priority claim on certain property of the debtor to mitigate clean-up costs.

The section 14.06 regime is designed to permit the trustee/receiver to contest the environmental order or, accepting its validity and appropriateness, to assess the economic viability of compliance with the order in light of the trustee/receiver's primary mandate of maximizing the economic result for creditors and other stakeholders. In the event that compliance is not economically viable, the section 14.06 regime provides the appropriate

---

189 See, *e.g.*, *Bank of Montreal v. Lundrigans Ltd.*, [1992] N.J. No. 177, 92 D.L.R. (4th) 554, 100 Nfld. & P.E.I.R. 36 (Nfld.T.D.); *Re Lamford Forest Products Ltd.*, [1991] B.C.J. No. 3681, 86 D.L.R. (4th) 534, 10 C.B.R. (3d) 137 (B.C.S.C.).

190 *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, [1995] O.J. No. 3267, 20 C.E.L.R. (N.S.) 19 (Ont. Gen. Div.).

191 *Canadian Imperial Bank of Commerce v. Bramalea Inc.*, [1995] O.J. No. 4884, 33 O.R. (3d) 692, 44 B.L.R. (2d) 188 (Ont. Gen. Div.), Toronto 95-CQ-63582 (receivership order).

192 BIA, ss. 14.06(4)-14.06(8).

governmental authority with the opportunity to remediate the property in compliance with its own environmental legislation and to mitigate the costs from property of the debtor.[193]

The section 14.06 regime begins with the proposition that a trustee/receiver should not be responsible for inherited liability for existing environmental conditions and damage arising before its appointment. It continues by setting the standard of compliance that will be the personal responsibility of a trustee/receiver after its appointment at a lower standard than may have applied to the debtor. Under this lower standard, the trustee/receiver is only personally responsible if its own gross negligence or wilful misconduct after its appointment caused any environmental condition or damage.[194] This statutory protection does not impede provisions of environmental legislation that impose a duty to report or disclose information.[195]

The section 14.06 regime permits the trustee/receiver an opportunity to consider the economic choices surrounding compliance with existing or future environmental orders. In the event that an order is made under environmental legislation requiring a trustee/receiver to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee [defined to include a receiver and interim receiver] is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order" if the trustee/receiver (1) complies with the order or (2) abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage within 10 days, if no time for remediation is stated in the order, or within the time specified.

In respect of orders existing at the time the trustee/receiver is appointed, the trustee/receiver has 10 days after its appointment to comply or abandon, dispose of or release any interest in affected real property. If the trustee/receiver decides not to comply, section 14.06 provides a mechanism to pass on responsibility for the affected property either to a purchaser who is prepared to comply or to the appropriate government authority with a mandate to remedy the condition or damage. Finally, it provides a mechanism for funding the expense, including foreclosure by the government authority responsible for the clean up of the affected property and contiguous properties used in connection with the polluting activity, to mitigate the costs.

---

193 *Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.*, [2002] M.J. No. 172, 2002 MBQB 127, 32 C.B.R. (4th) 185 (Man. Q.B.).

194 BIA, s. 14.06(2).

195 BIA, s. 14.06(3).

Section 14.06(7) creates a super-priority charge on any real property of a debtor in a bankruptcy, receivership or proposal in favour of the relevant government authority for the costs of remedying any environmental condition or environmental damage affecting real property. The charge not only applies to the real property remediated by the relevant government authority but also against any other real property of the debtor that "contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage".[196]

The trustee/receiver may apply to the court exercising bankruptcy jurisdiction for a stay of the environmental order and for an extension of time to assess the economic viability of complying with the order rather than disposing of the property or abandoning it. The trustee/receiver may also apply to the court or body appointed under the law pursuant to which the order was made for a stay to enable the trustee/receiver to contest the order.[197]

The section 14.06 regime is not entirely risk free for trustees/receivers. If the trustee/receiver takes possession and control of a property, it must meet the standard of duty imposed by section 14.06(2)(b). At a minimum, trustees/receivers need to make an effort to understand the environmental issues that may affect any property in their possession in such capacity and to understand the environmental implications of the commercial activity undertaken by the debtor. As discussed above, investigations prior to a receiver's appointment through a monitor appointment or otherwise can be helpful in assessing these risks. In most cases, the trustee/receivers are well advised to establish lines of communication with environmental regulators responsible for the debtor's business activities and its property. Although the section 14.06 regime provides a framework for the resolution of environmental issues, the best results for all parties can be obtained through a cooperative approach that begins with effective communication.

(iv) Other Creditors

In seeking the appointment of a receiver, a creditor must begin with a plan for realization that considers the impact of other stakeholders exercising their rights. The appointment of a receiver privately under a security agreement is simple to put into effect but is essentially limited by the scope of the security and its priority relative to other creditors. Once a

---

196 BIA, s. 14.06(7).

197 BIA, s. 14.06(4)(b). An application for the extension of time must be made before the expiry of the trustee/receiver's time for electing to comply or abandon/dispose of the affected real property.

RESOURCE CAPITAL FUND V L.P. v. **FIRST NICKEL INC.**
Applicant Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES
RESOURCE CAPITAL FUND V L.P.
(Initial Application)

BLAKE, CASSELS & GRAYDON LLP
Box 40, Commerce Court West
Toronto, Ontario M5L 1A9

Linc A. Rogers LSUC#: 43562N
Tel: (416) 863-4168
Email: linc.rogers@blakes.com

Chris Burr LSUC#55172H
Tel: (416) 863-3261
Fax: (416) 863-2653
Email: chris.burr@blakes.com

Lawyers for the Applicant