Bank of Nova Scotia v. Freure Village on Clair Creek, [1996] O.J. No. 5088

Ontario Judgments

Ontario Court of Justice (General Division)

Commercial List

Blair J.

May 31, 1996.

[1996] O.J. No. 5088 | 40 C.B.R. (3d) 274 | 1996 CarswellOnt 2328 | 1996 CanLII 8258

Between Bank of Nova Scotia, applicant, and Freure Village on Clair Creek, Freure Management and Freure Investments, respondents/defendants, and Toronto-Dominion Bank and Canada Trust, creditors

Case Summary

Mortgages — Mortgage actions — Action on covenant — Practice — Summary judgment — Receivers — Appointment — By court.

This was a motion by the Bank of Nova Scotia for summary judgment regarding covenants in certain mortgages and the appointment of a receiver-manager. Three of the mortgages granted by Freure Village to the Bank had matured and had not been paid. A fourth mortgage was in default due to tax arrears. The Bank was owed in excess of $13,200,000. Freure argued that the Bank had agreed to forebear for six months to a year such that the monies were not due and owing at the time the demand was made. The mortgage covenants permitted the Bank to appoint a private receiver-manager. Freure argued that the Bank could effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver. Freure also argued that a court-appointed receiver was more costly than a privately-appointed one.

HELD: Motion granted.

On the evidence, there was no merit to the defence that the Bank had agreed to forebear. The Bank was entitled to summary judgment. It was just and convenient for there to be a court-appointed receiver. An attempt by the Bank to enforce its security privately would probably have led to more litigation. The interests of debtors and creditors and the orderly disposition of the property were better served by the Court appointing a receiver-manager.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 101.

Ontario Rules of Civil Procedure, Rules 20.01, 20.04.

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.

BLAIR J. (endorsement)

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).

This endorsement pertains to both motions.

The Motion for Summary Judgment

2 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.

3 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*; Irving Ungerman Ltd. v. Galanis *(1993) 4 O.R. (3d) 545*.

4 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).

5 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.

6 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.

7 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

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

9 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.

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*.

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

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

13 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 11/2 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.

14 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.

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

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

BLAIR J.

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd., [2010] B.C.J. No. 635

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.M. Willcock J. (In Chambers)

Heard: February 10, 2010.

Judgment: April 9, 2010.

Docket: S100268

Registry: Vancouver

[2010] B.C.J. No. 635 | 2010 BCSC 477 | 67 C.B.R. (5th) 97 | 91 C.P.C. (6th) 171 | 2010 CarswellBC 855

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

(92 paras.)

Case Summary

Commercial law — Secured transactions — Enforcement on default — Availability of statutory rights and remedies — Receiver or receiver and manager — Court appointment — Rights of secured party on default — Under security agreement — Application by Textron Financial Canada for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels and Northern Hotels allowed in part — Textron lent money to Chetwynd for the construction of the Pomeroy Inn — Textron sought an order for the sale of the Inn — It was just and convenient to grant a receivership order — No special circumstances existed for ordering the sale of the Inn before judgment.

Application by Textron Financial Canada for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels and Northern Hotels. Textron, a commercial lender, sought an order empowering the receiver to sell the Pomeroy Inn Chetwynd. Textron lent money to Chetwynd for the construction of the Pomeroy Inn. Chetwynd defaulted on the loan. The director of the Pomeroy Inn testified that it was being restructured and would be able to meet its obligations in the future. Chetwynd proposed making monthly payments while it pursued restructuring.

HELD: Application allowed in part.

The parties stipulated in their contracts that Textron would be entitled to apply for a court-appointed receiver in the event of default. The relief sought by Textron was not extraordinary. Chetwynd and Northern owed Textron significant amounts of money. There was no imminent prospect of repayment. Chetwynd did not fully disclose its restructuring plan. The interim payment plan would not indemnify Textron against interest accumulating on the principal and arrears in the interim. There were no assurances that the interim payments would be made. There was a real risk to Textron's equity and real doubt with respect to the prospect of recovery of principal. It was just and convenient to grant a receivership order. No special circumstances existed that would justify allowing the sale of the Pomeroy Inn before judgment and before consideration of an appropriate redemption period.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 12, Rule 44, Rule 47(1), Rule 51A, Rule 57

Law and Equity Act, *RSBC 1996, CHAPTER 253, s. 15*, s. 39(1)

Personal Property Security Act, *RSBC 1996, CHAPTER 359, s. 66*

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

Counsel

Counsel for the plaintiff: W.E.J. Skelly and B. La Borie.

Counsel for Defendants: A. Brown.

Reasons for Judgment

P.M. WILLCOCK J.

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

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

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

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

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

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

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

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

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

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

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

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

16 The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel generating net operating income of $457,000 before

depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

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

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

ISSUES

19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so
2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

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

APPLICABLE LAW

Court-Appointed Receivers

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

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

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

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

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

24 In *Red Burrito Ltd. v. Hussain,* 2007 BCSC 1277, D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [1993] B.C.J. No. 2352."

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

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

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

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

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

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

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

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

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

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

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

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

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

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

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment.

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

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd*., *(1983), 62 N.S.R. (2d) 358*, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd. (1980), 24 B.C.L.R. 172* at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd*. *(1985), 67 B.C.L.R. 191* at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd. (1991), 7 C.B.R. (3d) 216* at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd. (1982), 20 Sask.R. 335* at 341 (Q.B.).

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

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

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

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

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

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

ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

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

43 the defendant owed a significant sum of money;

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

45 the defendant was in default;

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

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

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

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

50 Mr. Justice Masuhara held:

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

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

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

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

> granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

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

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in *Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

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

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

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

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

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

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J.

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

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

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

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

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

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

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

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

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

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

67 At p. 234:

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

68 Further, Bennett notes at p. 245:

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

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

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

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

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

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

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

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

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

DISCUSSION

Appointment of a Receiver

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

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

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

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

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

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

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

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

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

84 The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the plaintiff in permitting the defendants to manage the operations of

the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

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

Order for Sale

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

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

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

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

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

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

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

P.M. WILLCOCK J.

Canadian Tire Corp. v. Healy, [2011] O.J. No. 3498

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

F.J.C. Newbould J.

Heard: July 28, 2011.

Judgment: July 29, 2011.

Court File No. CV-119250-00CL

[2011] O.J. No. 3498 | 2011 ONSC 4616 | 81 C.B.R. (5th) 142 | 2011 CarswellOnt 7430 | 206 A.C.W.S. (3d) 66

Between Canadian Tire Corporation, Limited, Applicant, and Mark Healy and Mark V. Healy Sales & Distribution Inc., Respondents

(33 paras.)

Case Summary

Bankruptcy and insolvency law — Administration of estate — Administrative officials and appointees — Receivers — Appointment — Application by creditor for appointment of fully-empowered receiver of dealership allowed — Soft receivership had been appointed during arbitration — Dealership had defaulted on four payments owing to creditor, which was major supplier and brand holder — Dealership was unable to pay inventory, leaving creditor open to either increased financial exposure or damage to brand and reputation — Dealership had breached dealer contract with creditor by intentional overstatement of invested equity — Creditor rightly had little confidence that dealership could be trusted to run its business.

Application by Canadian Tire for the appointment of a fully-empowered receiver of Healy Inc. to take control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. During arbitration of a contractual dispute between the parties, the receiver had been appointed on limited powers for a soft receivership. In April 2011, Canadian Tire demanded payment of an outstanding debt. As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over $12.9 million. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments owing to Canadian Tire when its bank dishonoured payment because of insufficient funds.

HELD: Application allowed.

Healy Inc. was unable to pay inventory. Canadian Tire was left with the options of continuing to supply inventory and increasing its financial exposure through Healy Inc. or ceasing inventory supply and damaging its brand and reputation. Healy Inc. was not a strong candidate for equitable consideration. Healy Inc. had breached its dealer contract with Canadian Tire by the intentional overstatement of invested equity through a temporary injection of funds. Canadian Tire rightly had little confidence that Healy Inc. could be trusted to run its business properly.

Statutes, Regulations and Rules Cited:

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

Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 101*

Counsel

William J. Burden and John N. Birch, for the Applicant.

William C. McDowell and Trent Morris, for the Respondents.

Daniel Murdoch, for Franchise Trust and CIBC.

Kenneth Rosenberg, for Ernst & Young Inc.

F.J.C. NEWBOULD J.

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

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

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

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

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

6 In December 2007, Healy Inc. commenced an arbitral proceeding in accordance with the Dealer Contract. The arbitral proceeding related only to alleged damages suffered by Healy Inc. in relation to Store 429, the Oakville store that Healy Inc. operated from 2000 to 2006. No claim was made in respect of Healy Inc.'s current Store 152. The trial of that proceeding before the arbitrator, Graeme Mew, began on May 26, 2010 and ran for 42 days to December 17, 2010. Healy Inc. claimed damages of $40 million. The arbitrator released his award on March 23,

2011 in which he dismissed all of the claims except one claim in which he held Canadian Tire liable for $250,000 for breach of a duty of good faith. Mr. Healy and Healy Inc. have appealed the award, which is to be heard on September 15 and 16, 2011. Mr. McDowell says that if entirely successful, Healy Inc. could realistically be entitled to an award of between $3 and $5 million.

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

(i) attend at the store premises;

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

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

(iv) complete a store inventory count; and

(v) otherwise monitor the business.

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

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

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

(i) Franchise Trust, guaranteed by Canadian Tire;

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

(iii) Canadian Tire.

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

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

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

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

15 The letter also demanded that $741,442 be re-injected into Healy Inc by May 2, 2011. These amounts

represented a cumulative overdraw by Mr. Healy from the business as of the end of fiscal 2010 over and above the amounts permitted under the Dealer Contract. That money has not been injected into Healy Inc.

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

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

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

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

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

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

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

19 Healy Inc.'s primary argument is that if it is successful on the appeal from the arbitrator's award, it stands to collect somewhere between $3 and $5 million. It is said that this would be sufficient to pay off what had been demanded and Mr. Healy would be in a better position to build up the business and improve its balance sheet. Mr. McDowell put it that the prospect of the appeal being successful was not remote.

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

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

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

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

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

23 As things now stand, Healy Inc. has been unable to pay inventory, defaulting on payments when its bank dishonoured cheques because of insufficient funds. On his cross-examination, Mr. Healy said that if the bank would not let him draw on his credit line, he would not be ordering any more inventory but would operate his business until he ran out of inventory. This is not a satisfactory situation. In spite of the $2.3 million owed to Canadian Tire for inventory which is in default, there is a further $1.5 that will become due for inventory based on May 30, 2011 figures.

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

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

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

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

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

(a) "Healy repeatedly breached his contractual obligations under Policy 26.";

(b) "Pursuant to Policy 26, the intentional overstatement of invested equity by a dealer through temporary injection is considered to be a non-curable event of default under section 20.1 of the

Dealer Contract. Healy not only breached this obligation on several occasions, but also took excessive draws out of his business, when the business could ill afford for him to do so. As submitted by CTC, during his career as a dealer, Mr. Healy has been consistently overdrawn throughout the year";

(c) In 2009, Healy obtained loans totalling $554,990 so that he could re-inject into the business the amount of his overdraws prior to year end, and then draw out the same money after year end to re-pay to loans.

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

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

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

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

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

F.J.C. NEWBOULD J.

Bank of Montreal v. Carnival National Leasing Ltd., [2011] O.J. No. 671

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

F.J.C. Newbould J.

Heard: February 11, 2011.

Judgment: February 15, 2011.

Court File No. CV-10-9029-00CL

[2011] O.J. No. 671 | 2011 ONSC 1007 | 74 C.B.R. (5th) 300 | 2011 CarswellOnt 896 | 198 A.C.W.S. (3d) 79

RE: Bank of Montreal, Applicant, and Carnival National Leasing Limited and Carnival Automobiles Limited, Respondents

(38 paras.)

Case Summary

Creditors and debtors law — Receivers — Court appointed receivers — Order — Appointment of receiver — Application by the Bank of Montreal (BMO) for the appointment of PriceWaterhouse Coopers as national receiver of the respondents allowed — The respondents were indebted to BMO for approximately $17 million — It had been more than 70 days since demand for payment was made and BMO was entitled to payment of the outstanding loans and to enforce its security — It was highly unlikely that the respondents would be able to pay out BMO in any reasonably foreseeable period of time and a court appointed receiver would be preferable to a privately appointed one.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3, s. 243*(1)

Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 101*

Counsel

John J. Chapman and Arthi Sambasivan, for the Applicants.

Fred Tayar and Colby Linthwaite, for the Respondents.

Rachelle F. Mancur, for Royal Bank of Canada.

ENDORSEMENT

F.J.C. NEWBOULD J.

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

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

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

Events leading to demand for payment

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

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

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

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

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr.

Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

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

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

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

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

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

Farley J.:

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

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

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

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

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

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

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

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

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

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

(b) Court appointed receiver

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

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* *(1996), 40 C.B.R. (3d) 274*, Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

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

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

26 *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd*. *(1987), 16 C.P.C. (2d) 130* is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking* *2010 ONSC 4008* cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd*., *[2008] O.J. No. 5090*, 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

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

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of

appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

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

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

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

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

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

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

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

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

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

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

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

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court.

Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

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

F.J.C. NEWBOULD J.

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd., [1992] O.J. No. 330

Ontario Judgments

Ontario Court of Justice - General Division

Toronto Weekly Court

Davidson J.

Heard: February 17, 1992

Judgment: February 24, 1992

Action No. 91-CQ-9985

[1992] O.J. No. 330

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

(5 pp.)

Case Summary

Debtor and creditor — Appointment by court of receiver-manager — Agreement providing for appointment of receiver-manager upon default of charge — No prejudice to chargor by appointment.

This was an application for the appointment of a receiver-manager. The parties to a charge specifically contracted for the right of the plaintiff to appoint a receiver-manager when there was default under the charge. Default occurred and the plaintiff appointed a receiver-manager who attended to take possession but possession and entry was refused by the chargor. The chargor objected primarily on the basis that the appointment would prejudice the chargor who was seeking refinancing. There was no evidence of mismanagement by the chargor in the management of the business nor any intent to impair the security.

HELD: The application was allowed.

The Court was not persuaded that there was prejudice to the chargor by the appointment. Benefit would result from an orderly management of the business pending any refinancing.

STATUTES, REGULATIONS AND RULES CITED:

Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 114*. Judicature Act, R.S.O. 1980, c. 223, s. 19.

Bernard J. Kamin, Q.C., for the Moving Party the Plaintiff. Gary Daniel, for the Responding Party the Defendant.

DAVIDSON J. (orally)

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

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

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

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

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

I have reference to the decision in the Bank of Montreal v. Appcon Ltd. *(1981), 33 O.R. (2d) 97* which was referred in one of the decisions put to me by the defendant's counsel in submissions, namely Ryder Truck Rental Canada Ltd. et al. v. Thorne Ernest et al. *(1987), 16 C.P.C. (2d) 130*. In my view the Bank of Montreal decision is of some assistance. In that case Justice Anderson considered the meaning of just and convenient in s. 19 of the Judicature Act (presently s. 114 of the Courts of Justice Act) and he expressed the view that one should have in the mind the existence of a debenture conferring by contract certain rights on a debenture holder, in that case the right to appoint a receiver. Although security was not commented on at length in that case it does not appear to have been in serious jeopardy yet the receiver was appointed.

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

It seems to me that the fact of non-payment of the mortgage of over $5,000,000 when due in September, 1991, the interest that is accumulating, outstanding debts in respect to the property amounting to well over $300,000 to some of the trades and overdue loans and bearing in mind the absence of any funds apparently available to the defendant to conduct the business, that all of this would be self evident to any proposed lender in any refinancing negotiations and I do not feel that the appointment of a receiver/manager would be prejudicial in that context.

Additionally it seems to me that at least the chargee would benefit by an orderly management of the business pending any refinancing that might be negotiated and at the same time safeguarding the security and its ongoing liability and the conduct of the business of the business carried on on the property.

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

Submissions were made.

Endorsement on the Record:

"For oral reasons dictated this day order appointing Mintz and Partners as Receiver Manager of defendant in respect to the subject lands with right of defendant officers to full and unfettered access to the Books and Records of defendant at all reasonable times.

Terms of appointment to be agreed upon by the parties, in the alternative to be subject of submissions at a date to be arranged.

Costs of the motion to plaintiff on solicitor and client basis fixed at $2,000 inclusive of disbursements + G.S.T. but not including cost of transcript of cross-examination of defendant representative which shall also be paid by defendant."

DAVIDSON J.

1938 CarswellOnt 81
Ontario Supreme Court, In Bankruptcy

Solloway, Re

1938 CarswellOnt 81, [1938] 4 D.L.R. 12, [1938] O.W.N. 373, 19 C.B.R. 350

In re I. W. C. Solloway

Urquhart, J.

Judgment: September 22, 1938

Counsel: *F. A. Brewin*, for the petitioner.
R. I. Ferguson, K.C., for the debtor.

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.B Miscellaneous

Headnote
Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — General
Petition — Acts of Bankruptcy — Failure to Meet Liabilities Generally as They Became Due — Notice of Suspension of Payment of Debts — Petition to be Presented to Court having Jurisdiction in Locality of Debtor — "Locality of Debtor" Considered — Onus on Petitioner to Satisfy Court of its Jurisdiction — Dismissal of Petition — The Bankruptcy Act, Secs. 2(y), 3(i)(j), 4(5)(12), Bankruptcy Rule 101, 9 C.B.R. 22, 29, 31, 32, 375.
On a petition filed against the debtor the Court held that the debtor was bankrupt within the meaning of sec. 3 of *The Bankruptcy Act* but held further that the petitioner had failed to satisfy the Court that it was the Court having jurisdiction in the "locality of the debtor" as defined in sec. 2(*y*) of *The Bankruptcy Act*. The petition was accordingly dismissed but without prejudice to the presentation of a petition to another Court or to this Court upon further material.

***Urquhart, J.*:**

1 Application for a receiving order made by John P. McLaughlin, a judgment creditor of the debtor. By a judgment of Kerwin, J., dated June 13th, 1933, [1934] O.R. 464, at p. 466, a report of the Assistant Master finding a sum due by the debtor to the petitioner was confirmed and the petitioner was awarded judgment for $55,922.58. The Court of Appeal reversed this in 1934, [1934] O.R. 464, at p. 472; the Supreme Court of Canada in 1936 restored the judgment at a reduced amount, [1936] S.C.R. 127, and the Privy Council last year restored the original judgment at the original amount of $55,922.58. This last judgment is reported in [1938] A.C. 247, 107 L.J.P.C. 1, [1937] 1 W.W.R. 130, 1937 Can. Abr. 210.

2 On November 4, 1937, after the first judgment had been pronounced, by letter, solicitors for the petitioner wrote to the solicitors for the debtor demanding payment of the above sum with interest, amounting in all to $69,237.25. This was not complied with and no effort has been made to pay same. In fact about the same time intimation was given that the debtor was about to suspend payment of his debts. (See. 3(*i*) [9 C.B.R. 29]).

3 A petition in bankruptcy was filed in the Bankruptcy Court on November 25, 1937; served on the 30th day of December, 1937, on the debtor, in the City of Toronto, where the defendant was then and had been for a period of two months attending a criminal proceedings against him, whether in custody or otherwise is not clear.

4 The King's order was not issued until November 23, 1937, and it was not made an order of the Supreme Court of Canada until January 18, 1938, or eight days after the day set for the presentation of the bankruptcy petition.

5 Consideration of the petition was from time to time adjourned and finally it was argued on May 17 before me, and judgment reserved. I do not think the petition was premature as there was an existing judgment debt even before the King's order was taken out.

6 The grounds of bankruptcy are alleged: (a) that the debtor had ceased to meet his liabilities as they became due; (b) that he gave a verbal notice through his solicitors that he had suspended or was about to suspend payment of his debts.

7 It was scarcely argued before me that an act of bankruptcy had not taken place — the real issue before me was whether the petition should have been presented in Montreal or in Toronto.

8 The debtor took the position that failure to pay one creditor when the debtor has many creditors does not prove that he has ceased to pay his creditors generally as debts become due and he refers to *In re Tenebein*, 8 C.B.R. 321, [1927] 2 W.W.R. 374, 3 Can. Abr. 341, 346, or Abr. Bkcy. Cas. 193, 198. In that case the circumstances were entirely different from this.

9 The judgment of the creditor indicates that the debtor owes large sums outside of this particular claim, which is large enough, and then there is the intimation that he had suspended or was about to suspend payment of his just debts, which fact is not denied.

10 There is no doubt in my mind that the debtor is bankrupt within the meaning of sec. 3 of the Act. Reference to *In re Raitblat* (1925), 5 C.B.R. 714, 3 Can. Abr. 331, 344, or Abr. Bkcy. Cas. 183, 196 [affirmed 5 C.B.R. 765]. The debtor should therefore be declared a bankrupt by some Court. Can he be declared a bankrupt here in this Court? Can the bankruptcy petitions be presented in Toronto? Sec. 4(5) [9 C.B.R. 31] says:

> The petition shall be presented to the court having jurisdiction in the locality of the debtor.

11 The "locality of the debtor" is defined by sec. 2(*y*) [9 C.B.R. 22] which reads:

> "Locality of a debtor," whether a bankrupt or assignor means (i) the principal place where the debtor has carried on business during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; (ii) the place where the debtor has resided during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; or (iii), in cases not coming within (i) or (ii), the place where the greater portion of the property of such debtor is situate.

12 The debtor does not file any affidavit as to either his residence or his place of business or where his principal assets are. He says the onus is squarely on the applicant to bring him within the Act, that the onus is on the applicant to satisfy the Court with almost the particularity of the criminal law requirements that one of the above subsections is complied with; that no man ought to have his civil status altered without the clearest evidence of jurisdiction; and that the proceedings in the Ontario Courts first above mentioned showed he was a resident of Montreal.

13 The debtor, prior to 1930, carried on the business, out of which this judgment arose, of a broker in the City of Toronto. He was carrying on the business in the name of a company called Solloway Mills and Company Limited, a company incorporated under the laws of Ontario.

14 It is practically conceded that he did not reside in Toronto for the year prior to the petition. In fact I gather he was so busy travelling around answering civil and criminal proceedings against him that he could be said to have no fixed place of abode.

15 Toronto city directories prior to 1930 showed him a resident at an address on Charles Street East, but from 1930 on he disappears from the directory listing. The 1930 listing for the firm above mentioned, after giving the firm name, went on to say (I.W.C. Solloway, President, Montreal). I have no doubt that Montreal was, if any place was, his place of residence from 1930 on. He could not be said to be resident in Toronto during the year immediately preceding the presentation of the petition in bankruptcy. So he does not come under sec. 2(*y*)(ii). I do not think he comes under sec. 2(*y*)(iii). This subsection only applies in very rare cases where a person cannot be brought under sec. 2(*y*)(i) or 2(*y*)(ii) [9 C.B.R. 22]. I do not think this is such a case.

16 Solloway has, as his place of residence, Montreal, where the petition could be presented on the residence ground, so even the fact that his only known asset, viz., $2,000 in Court as security for costs is in Toronto, would not make sec. 2(*y*)(iii) apply. He may have, and probably has, other assets. No man could have carried on the business he did and not have very large assets somewhere.

17 Therefore, the only section available to help the petitioner is sec. 2(*y*)(i), the principal place where the debtor has carried on business during the year immediately preceding the presentation of the petition. An affidavit on this point is made by the petitioner. It is dated January 7, 1938. In it he swears that the debtor in the course of operation of the business of his companies in Toronto became indebted, that he has not yet paid him and other creditors, that the companies have ceased business, that the debtor has no settled place of residence and he believes he is still carrying on business in the legal sense within the meaning of sec. 2(*y*)(i) and that the City of Toronto is the proper place to make the application for a receiving order.

18 No written reply is attempted to this affidavit and there is no material filed in answer. It is quite clear that the debtor did not carry on business in Toronto in the ordinary sense of the words during 1937 or for some time previously, but Mr. Brewin argues that he was carrying on the brokerage business in Toronto prior to 1930 and has not paid the debts which he incurred in that business and therefore he is still in business within the meaning of sec. 2(*y*)(i).

19 He refers to *In re Reynolds*, [1915] 2 K.B. 186, 84 L.J.K.B. 1346. This case, however, I do not think, throws much light on the subject outside of laying down the general proposition. There is evidence in that case that collecting and other business was done actually in addition to the mere fact of the debtor owing his trade creditors.

20 In the case of *In re Tobin* (1930), 12 C.B.R. 55, 33 Que. P.R. 353, 3 Can. Abr. 351, or Abr. Bkcy. Cas. 203, it is laid down by Surveyer, J., at p. 58, that

> It would require a very clear text to take the liquidation of an insolvent estate away from the Province where the debtor has his domicile, his principal establishment, his electoral status, where he is liable to pay taxes and where his succession, when he dies will devolve.

21 This case appears to me to make it conclusive that the onus is on the petitioner to satisfy the Court by irresistible evidence that Ontario is the proper forum. Bankruptcy Rule 101 [9 C.B.R. 375] also bears this out; it is as follows:

> 101. On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved to the satisfaction of the Court by affidavit or by any evidence which would be admissible to prove the facts in a civil action in the Court.

22 The onus is clearly on the petitioner and the debtor need only dispute and deny.

23 I also think some effect should be given to the words "has carried on" in sec. 2(*y*)(i) [9 C.B.R. 22]. These words imply activity and not mere passivity.

24 Sec. 4(12) [9 C.B.R. 32] reads:

> Nothing herein contained shall invalidate any proceedings by reason of the same having been commenced, taken or carried on in the wrong court, but the court may at any time transfer to the proper court the petition, application, or proceeding, as the case may be.

25 This subsection, however, only gives the Court power to transfer, if by inadvertence a mistake is made but does not, if the approaching error is pointed out on the argument, give the Court power to make the error and then transfer the case to the proper jurisdiction.

26 Therefore, with considerable reluctance, I am compelled to deny the petition but without prejudice to the right of the petitioner to make application in Montreal or such other undoubted jurisdiction as there may be, or to make a new application here upon more convincing material.

27 As to costs, the application will be refused without costs, the point is a novel one and anyway it would be ridiculous to make the creditor to whom so much is owing pay costs of the debtor, especially as the matter is doubtful.

1939 CarswellOnt 70
Ontario Court of Appeal

Solloway, Re

1939 CarswellOnt 70, [1939] 2 D.L.R. 617, [1939] O.R. 295, 20 C.B.R. 309

In re I. W. C. Solloway

Riddell, Fisher and McTague JJ.A.

Judgment: April 25, 1939

Counsel: *F. A. Brewin*, for the petitioner, appellant.
R. I. Ferguson, K.C., for the debtor, respondent.

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.B Miscellaneous

Headnote
Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — General
Petition — Acts of Bankruptcy — Failure to Meet Liabilities Generally as They Become Due — Notice of Suspension of Payment of Debts — Petition to be Presented to Court having Jurisdiction in Locality of Debtor — "Locality of Debtor" Considered — Whether Onus on Petitioner to Satisfy Court of its Jurisdiction — "Whether Debtor Actively or Constructively Carrying on Business in Ontario — Dismissal of Petition — Appeal Dismissed — The Bankruptcy Act, Secs. 2(y), 4(3)(5)(12), Bankruptcy Rule 101, 9 C.B.R. 22, 31, 32, 375.
An appeal by the petitioner from the order of Urquhart J., reported in 19 C.B.R. 350, dismissing the appellant's petition for a receiving order was dismissed without costs, McTague J.A. dissenting.

***Riddell J.A.*:**

1 This is an appeal from a judgment of Urquhart J., (1938), 19 C.B.R. 350, setting aside proceedings in bankruptcy, and holding that there was no jurisdiction to grant the order.

2 Observing the principle of *stare decisis*, we are possibly bound to hold that the debtor is still carrying on business. Moreover, we should do all permitted by law to have the assets of the debtor divided amongst his creditors. But from a careful and repeated examination of the material, I am unable to say that the learned Justice was wrong. I think the appeal must be dismissed but it is not a case to saddle the appealing creditor with costs; there will be no costs of this appeal.

***Fisher J.A.*:**

3 One McLaughlin presented a petition in bankruptcy for a receiving order declaring Isaac W. C. Solloway a bankrupt. Solloway disputed the right to such an order, and Urquhart J., before whom the petition was heard, dismissed it without costs, and without prejudice to the right of the petitioner to file a petition against the debtor in another jurisdiction other than the Province of Ontario.

4 The appeal followed and was ably argued by counsel representing both parties. As the relevant facts have been stated with perfect precision by Urquhart J., and are to be found in 19 C.B.R. 350, [1938] O.W.N. 373, their repetition is needless.

5 We agree with the findings of the trial Judge that the debtor has not resided in Ontario since 1930, and also that he did not carry on actively any business in Ontario during one year previously to the presentation of the petition.

6 The real and difficult question is whether Solloway carried on business in a constructive sense during that period.

7 For the appellant his counsel contended that until a debtor's debts are paid he is deemed to be constructively carrying on business within the meaning of sec. 2(*y*)(i) of *The Bankruptcy Act* [9 C.B.R. 22], and cited in support *In re Reynolds; Ex parte White Bros. Ltd.*, [1915] 2 K.B. 186, 84 L.J.K.B. 1346; *Ex parte Bamford* (1809), 15 Ves. 449, and *In re Worsley*, [1901] 1 Q.B. 309, 70 L.J.Q.B. 93.

8 In *Ex parte Bamford* the debtor had committed an act of bankruptcy after retiring from trade, and Lord Eldon L.C. stated that the principle on which this case was decided was, that so long as the debtor did not pay the debts he had contracted while engaged in trade he was to be regarded as still engaged in trade, and Lord Cozens-Hardy M.R. in *In re Reynolds*, at p. 190, said:

> Two principles have been laid down — I might almost say for centuries, at any rate for many years — at a time when traders alone, and not ordinary members of the public, could be made bankrupt. It was held that for the purpose of the bankruptcy law a man did not cease to be a trader because he shut up his shop and went away; he continued to be a trader so long as any of the trade debts remained unpaid. It was further held, and even more clearly, that when a trader not merely omitted to pay his debts but got in the assets of the business he was still carrying it on.

9 These cases are based on the fact that the debtor at one time did in fact trade or carry on business. While it is true the debtor's companies carried on business in Ontario, Solloway never carried on business within one year prior to the presentation of the petition in Ontario. My interpretation of sec. 2(*y*) is that clause (i) refers to a debtor who has in fact at one time carried on business in the Province of Ontario. If he has not carried on business in the Province of Ontario, the petition must be presented either in the province in which he has in fact carried on business, or in which he has in fact resided. These cases might apply to events happening prior to an assignment or receiving order being made if the debtor had at one time carried on business in the Province of Ontario, and ceased to do so, owing debts incurred in the business, and under these circum stances the Supreme Court of Ontario would have jurisdiction to entertain a petition under sec. 4(3)(*b*) [9 C.B.R. 31]. It is clear from this that:

10 (1) the continuation of the business which the law implies is predicated on a business having been in fact conducted; and

11 (2) upon the unpaid debt being a trade debt, that is to say, incurred in the conduct of the business. Neither of these conditions exists in the case at bar.

12 In *In re Dagnall; Ex parte Soan and Morley*, [1896] 2 Q.B. 407, Vaughan Williams J., said, at p. 410: "Whether a person is carrying on a trade or not is a question of fact."

13 In dealing with sec. 2(*y*)(iii) [9 C.B.R. 22], we agree, for the reasons stated by the trial Judge, that the petitioner has not, in the record, brought himself within that section of the Act.

14 Because of the foregoing conclusions it is not necessary to discuss whether the learned Judge was right in finding that there had been an act of bankruptcy upon which a petition could be founded.

15 I would dismiss the appeal but without costs.

McTague J.A. **(dissenting):**

16 This is an appeal by the petitioning creditor, one J. P. McLaughlin, from the order of Urquhart J., dated September 22, 1938, reported in 19 C.B.R. 350, [1938] O.W.N. 373, dismissing his petition in bankruptcy against the respondent Solloway.

17 As Mr. Justice Urquhart's decision is based entirely on the jurisdiction of the Court, it becomes necessary to examine the relevant provisions of *The Bankruptcy Act*.

18 Sec. 4(5) [9 C.B.R. 31] provides:

> The petition shall be presented to the court having jurisdiction in the locality of the debtor.

19 Sec. 2(*y*) defines "locality of the debtor" as follows [9 C.B.R. 22]:

> (*y*) 'locality of a debtor,' whether a bankrupt or assignor means
>
> (i) the principal place where the debtor has carried on business during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment.
>
> (ii) the place where the debtor has resided during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; or
>
> (iii) in cases not coming within (i) or (ii), the place where the greater portion of the property of such debtor is situate.

20 During the argument I expressed to counsel for the respondent the view that the petitioner had not made out a case under sec. 2(*y*)(ii) or under 2(*y*)(iii), not that I am in accord with the conclusion of the learned Judge of first instance that the material before him disclosed that the debtor's residence was in Montreal, but rather that it did not disclose his residence as being in Ontario. A subsequent reading of the material has not changed that view, and I am still of opinion, as I was during the argument, that the whole matter falls to be decided on whether the petitioner has made out a prima facie case under 2(*y*)(i).

21 In discussing the case of *In re Tobin* (1930), 12 C.B.R. 55, 3 Can. Abr. 351 or Abr. Bkcy. Cas. 203, the learned Judge of first instance expressed the opinion (19 C.B.R. at p. 353) that "the onus is on the petitioner to satisfy the Court by *irresistible* evidence that Ontario is the proper forum", and goes on to refer to Bankruptcy Rule 101 [9 C.B.R. 375] as supporting such a conclusion. With all respect I am unable to agree with such interpretation. Certainly the onus is on the petitioner to make out a case on satisfactory evidence, but not irresistible evidence. In other words, he must make out a case which *prima facie* entitles him to the order in the absence of evidence from the debtor, to the contrary. It must be kept uppermost in mind here, that the debtor has chosen to offer no evidence, and indeed on the hearing of the appeal, refused to file an affidavit that the debtor's residence was in Montreal, although counsel stated that such was the case.

22 Reverting back to sec. 2(*y*)(i), it is quite evident that the debtor was not actively carrying on business during the year immediately preceding the date of the petition. The affidavit of the petitioner, does, however, set forth that the debtor was, during the years 1927 to 1930, president, director and chief shareholder in two companies named "Solloway Mills & Co. Limited", and that these two companies carried on business in the City of Toronto, and the head office of each was in the City of Toronto. As to Solloway personally carrying on business in the City of Toronto in those years, the petitioner refers to the judgment of the Privy Council in the action of himself as

plaintiff against Solloway and the two companies: see *Solloway v. McLaughlin*, [1938] A.C. 247, 107 L.J.P.C. 1, [1938] 1 W.W.R. 130, 1937 Can. Abr. 210.

23 On this state of facts appellant contends that constructively the debtor must be taken to be carrying on business in Toronto right down to the time his debts are paid which, in this case, means right down to the day when the petition was presented. In support of this proposition he relies on *In re Reynolds; Ex parte White Bros. Ltd.*, [1915] 2 K.B. 186, 84 L.J.K.B. 1346; *Ex parte Bamford* (1809), 15 Ves. 449 and *In re Worsley*, [1901] 1 Q.B. 309, 70 L.J.Q.B. 93.

24 In *Ex parte Bamford*, Lord Eldon L.C. laid it down that so long as a debtor did not pay the debts he had contracted while engaged in trade, he was to be regarded as still engaged in trade.

25 In *In re Reynolds*, at p. 190, Lord Cozens-Hardy M.R. put the same proposition very vigorously when he said:

> Two principles have been laid down — I might almost say for centuries, at any rate for many years — at a time when traders alone, and not ordinary members of the public could be made bankrupt. It was held that for the purpose of the bankruptcy law a man did not cease to be a trader because be shut up his shop and went away; he continued to be a trader so long as any of the trade debts remained unpaid. It was further held, and even more clearly, that when a trader not merely omitted to pay his debts but got in the assets of the business — he was still carrying it on.

26 If one is to give effect to the principle, then it must be quite evident that Solloway, Mills & Company Limited, both companies, were in this constructive sense, carrying on business in the City of Toronto. This being the case, I must confess I can see no difference in Solloway's case personally. The circumstances of how he carried on business are made plain in the Privy Council judgment in the very case out of which the appellant's judgment arose, and that judgment is made part of the material. It seems quite clear that he used the two companies to carry on the brokerage business in such a way as enables one to conclude that he was not only carrying on business for his own profit, but in a fraudulent manner in concert with his two companies. If Lord Eldon's principle is applicable to the companies, it seems to me to be no less applicable to Solloway.

27 The real question before us then is whether we should adopt this principle of constructively carrying on business so as to bring the debtor within the purview of sec. 2(*y*)(i). I see no good reason not to. After all the whole scope of bankruptcy law is to make the assets of the debtor available to pay the debts owing to his creditors. If one limits the meaning of "carrying on business" to "actively carrying on business", then it is not difficult to conceive situations where a debtor could absolutely avoid being subjected to bankruptcy law in Canada, by simply refusing to establish any definite place of residence. The doctrine of constructively carrying on business gets rid of what might prove otherwise an impossible and I should think unanticipated situation.

28 On this basis of interpretation, backed by old and sound authority, I think the petitioning creditor made out a *prima facie* case belore Mr. Justice Urquhart. The debtor has not chosen to meet that case. Therefore, the petitioner should succeed.

29 It may be that by having the proceedings carried on in Ontario the debtor will be seriously inconvenienced if his residence is really in Montreal. If that is the case, the debtor still has an opportunity of applying, on proper material, to have the proceedings transferred to another jurisdiction under sec. 4(12) [9 C.B.R. 32].

30 For these reasons I would allow the appeal and grant the petition with costs here and below.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Vesnaver, Re | 2015 QCCS 3357, 2015 CarswellQue 11729, 2015 CarswellQue 6930, J.E. 2015-1261, EYB 2015-254595, 258 A.C.W.S. (3d) 666 | (C.S. Qué., Jul 16, 2015)

2001 SCC 92, 2001 CSC 92
Supreme Court of Canada

Eagle River International Ltd, Re

2001 CarswellQue 2725, 2001 CarswellQue 2726, 2001 SCC 92, 2001 CSC 92, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 110 A.C.W.S. (3d) 596, 207 D.L.R. (4th) 385, 280 N.R. 155, 30 C.B.R. (4th) 105, J.E. 2002-93, REJB 2001-27203

Azco Mining Inc., Appellant v. Sam Lévy & Associés Inc., Respondent

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

Heard: May 15, 2001
Judgment: December 20, 2001
Docket: 27876

Proceedings: affirming [2000] R.J.Q. 392 (C.A. Que.); affirming [1999] R.J.Q. 1497 (C.S. Que.)

Counsel: *Yves Martineau*, for Appellant
Jean-Philippe Gervais, for Respondent

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.B Miscellaneous
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.3 Powers of bankruptcy court
I.3.b Miscellaneous

Headnote
Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of bankruptcy court — Territorial jurisdiction — General
Under s. 183 of Bankruptcy and Insolvency Act, courts retain character as superior courts of inherent jurisdiction — Quebec court had jurisdiction over petition made by trustee in bankruptcy — Petition was properly filed in Quebec — Agreement between venture capital company and Quebec company contained choice of law, not choice of forum, provisions — Quebec court could apply laws of British Columbia — Venture capital company's claim that proceedings had real and substantial connection to British Columbia was not sustainable on facts or in law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 183.
Bankruptcy --- Powers of bankruptcy court — General
Under s. 183 of Bankruptcy and Insolvency Act, courts retain character as superior courts of inherent jurisdiction — Venture capital company waived concerns with service of petition in Quebec once it invoked jurisdiction of Quebec court to transfer proceedings to British Columbia — Since venture capital company played significant

role in Quebec company's bankruptcy, it was not stranger to bankruptcy — Trustee was entitled to claim specific property that was wrongfully withheld and bring legal proceeding in relation to bankruptcy in bankruptcy court — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 30(1)(d), 43(5), 118(1), 183, 183(10), 187(7) — Constitution Act, 1867, s. 91(21).

Faillite --- Compétence en matière de faillite et d'insolvabilité — Compétence des tribunaux — Compétence du tribunal de faillite — Compétence territoriale — En général

Tribunaux mentionnés à l'art. 183 de la Loi sur la faillite et l'insolvabilité conservent leur statut de cour supérieure de compétence inhérente — Tribunal québécois avait compétence à l'égard de la requête présentée par le syndic de faillite — Requête a été déposée à bon droit au Québec — Entente conclue entre une société à capital de risque et une société québécoise contenait des dispositions portant sur le choix des lois applicables et non sur l'élection de for — Tribunal québécois pouvait appliquer les lois de la Colombie-Britannique — Prétention de la société à capital de risque selon laquelle les procédures avaient un lien réel et important avec la Colombie-Britannique n'était appuyée ni par les faits ni par le droit — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 183.

Faillite --- Pouvoirs du tribunal de faillite — En général

Tribunaux mentionnés à l'art. 183 de la Loi sur la faillite et l'insolvabilité conservent leur statut de cour supérieure de compétence inhérente — Société à capital de risque a renoncé à faire valoir ses arguments relativement à la validité de la signification de la requête au Québec dès qu'elle a invoqué la compétence du tribunal québécois pour faire renvoyer l'instance en Colombie-Britannique — Puisque la société à capital de risque a joué un rôle important dans la faillite de la compagnie québécoise, elle n'était pas étrangère à la faillite — Syndic de faillite avait le droit de réclamer des biens particuliers qui étaient détenus illégalement et d'intenter des procédures judiciaires se rapportant à la faillite devant le tribunal de faillite — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 30(1)d), 43(5), 118(1), 183, 183(10), 187(7) — Loi constitutionnelle de 1867, art. 91(21).

A venture capital company with offices in British Columbia entered a mine financing agreement with a Quebec company. The agreement stipulated it would be governed by the laws of British Columbia. The Quebec company was adjudged bankrupt. The trustee in bankruptcy brought a petition in Quebec to recuperate the assets of the Quebec company, including assets allegedly held or controlled by the venture capital company.

The venture capital company brought a motion to transfer the petition to the British Columbia bankruptcy court. The motion was dismissed. The motions judge found that the agreement indicated a choice of law rather than a choice of forum. Although the motions judge had jurisdiction under s. 187(7) of the *Bankruptcy and Insolvency Act*, the transfer was not justified as it did not consider the interests of all creditors. The motions judge's decision was upheld on appeal. The Court of Appeal found the petition was authorized under s. 30(1)(d) of the Act. The Quebec company was carrying on business in Quebec when the bankruptcy claim was initiated. The Court of Appeal found it would not be more economical to transfer the petition to British Columbia, and it would be more equitable and efficient if a single court oversaw the bankruptcy proceedings. The venture capital company appealed.

Held: The appeal was dismissed.

Under s. 183 of the *Bankruptcy and Insolvency Act*, the courts retain their character as superior courts of inherent jurisdiction. The Quebec company carried on business in Quebec, including having offices in and carrying on meetings in that province. The Quebec company's only connection to British Columbia was the financing agreement. Under s. 43(5) of the Act, the petition could not have been filed in British Columbia. The Quebec court had jurisdiction over the petition and over the Quebec company when the receiving order was made. The petition was properly filed in Quebec.

Section 188(1) of the Act denotes the national jurisdiction of the Act by stipulating that orders made by a provincial bankruptcy court will be upheld across the country. The jurisdiction of the Quebec Superior Court sitting in bankruptcy was properly invoked by petitioning the creditors. The venture capital company waived any concerns it had with the service of the petition once it invoked the jurisdiction of the Quebec court to transfer the proceedings to British Columbia.

Whether or not the trustee's claim against the venture capital company was contractual in nature, the claim was not excluded from federal bankruptcy jurisdiction on this basis. The word "bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given broad scope in order to accomplish its purpose. This broad scope was passed to the

bankruptcy court by way of s. 183(10) of the *Bankruptcy and Insolvency Act*. Claims for specific property and claims for relief granted in the Act can be advanced in bankruptcy courts. If the contractual dispute with the trustee related to bankruptcy, any property and civil rights aspect would not impair the jurisdiction of the bankruptcy court. The bankruptcy court would lack jurisdiction only if the venture capital company was a "stranger to the bankruptcy" or the court was unable to award the remedy sought by the trustee. The venture capital company claimed it was the Quebec company's largest creditor while the trustee regarded the venture capital company as the Quebec company's largest debtor. In either case, the venture capital company played a significant role in the bankruptcy and it was not a stranger to the bankruptcy. While the bankruptcy court does not have jurisdiction to award damages in breach of contract cases, the trustee's claim was not a simple claim in damages. The bankruptcy court was not precluded from considering an order that substituted money for claimed property when the latter could not be delivered. Much of the trustee's claim was for specific property that was wrongfully withheld. The trustee was entitled to claim the shares and warrants and to bring a legal proceeding in relation to the bankruptcy in bankruptcy court.

The agreement contained choice of law provisions. The Quebec courts were able to apply the laws of British Columbia. Section 187(7) of the Act provides that a transfer will be ordered when the proceeding would be "more economically administered" in another division or district or "for other sufficient cause". The venture capital company's claim that the proceedings had real and substantial connection to British Columbia was not sustainable on facts or in law. A substantial connection to a bankruptcy proceedings was dependent on "locality of debtor". No connection existed between the proceedings and British Columbia other than the fact that the agreements contained a choice of law clause favouring British Columbia. The venture capital company's connection to British Columbia was not very strong as the majority of its business activities took place outside that province. There was no juridical advantage for the venture capital company to proceed in British Columbia.

Une société à capital de risque qui avait des bureaux en Colombie-Britannique a conclu un contrat de financement minier avec une compagnie québécoise. Le contrat stipulait qu'il serait régi par les lois de la Colombie-Britannique. La compagnie québécoise a été déclarée en faillite. Le syndic de faillite a présenté une requête au Québec afin de recouvrer l'actif de la compagnie québécoise, y compris des biens dont il était allégué qu'ils étaient détenus ou contrôlés par la société à capital de risque.

La société à capital de risque a présenté une requête sollicitant le renvoi de la requête du syndic devant le tribunal de faillite de la Colombie-Britannique. Cette requête a été rejetée. Le juge saisi de la requête a conclu que l'entente contenait un choix portant sur les lois applicables plutôt que sur l'élection de for. Même si le juge saisi de la requête avait compétence en vertu de l'art. 187(7) de la *Loi sur la faillite et l'insolvabilité*, le renvoi du dossier n'était pas justifié puisqu'il ne tenait pas compte des intérêts de tous les créanciers. La décision du juge a été confirmée en appel. La Cour d'appel a conclu que la requête du syndic était autorisée par l'art. 30(1)d) de la Loi. La compagnie québécoise faisait des affaires au Québec lorsque la procédure de faillite a été enclenchée. La Cour d'appel a estimé qu'il ne serait pas plus économique de renvoyer la requête du syndic devant le tribunal en Colombie-Britannique et qu'il serait plus équitable et efficace que les procédures en matière de faillite soient supervisées par un seul tribunal. La société à capital de risque a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

Les cours mentionnées à l'art. 183 de la *Loi sur la faillite et l'insolvabilité* conservent leur statut de cour supérieure de compétence inhérente. La compagnie québécoise faisait affaire au Québec. Elle y avait des bureaux et y tenait des réunions. Le contrat de financement était le seul lien entre la compagnie québécoise et la Colombie-Britannique. En vertu de l'art. 43(5) de la Loi, la requête du syndic n'aurait pu être déposée en Colombie-Britannique. Le tribunal québécois avait compétence sur la requête et sur la compagnie québécoise lorsque l'ordonnance de séquestre a été rendue. La requête de mise en faillite a été déposée à bon droit au Québec.

L'article 188(1) de la Loi énonce la compétence nationale de la Loi en stipulant que les ordonnances rendues par un tribunal de faillite provincial peuvent être confirmées partout au pays. Les créanciers requérants ont à bon droit fait appel à la compétence de la Cour supérieure du Québec siégeant en matière de faillite. La société à capital de risque a renoncé à faire valoir les arguments qu'elle pouvait avoir relativement à la validité de la signification

de la requête du syndic dès qu'elle a invoqué la compétence du tribunal québécois pour solliciter le renvoi des procédures en Colombie-Britannique.

Que la réclamation du syndic à l'égard de la société à capital de risque ait été de nature contractuelle ou pas, il ne s'agissait pas d'un fondement permettant d'exclure la compétence fédérale en matière de faillite à l'égard de cette réclamation. Le mot « faillite » dans l'art. 91(21) de la *Loi constitutionnelle de 1867* doit être interpreté de façon large pour réaliser son objet. Cette portée générale a été transmise au tribunal de faillite par le biais de l'art. 183(1) de la *Loi sur la faillite et l'insolvabilité*. Les réclamations portant sur des biens particuliers et sur des réparations accordées par la Loi peuvent être faites devant les tribunaux de faillite. Si le litige contractuel avec le syndic avait un lien avec la faillite, tout aspect ayant trait à la propriété et aux droits civils ne porterait pas atteinte à la compétence du tribunal de faillite.

Le tribunal de faillite n'aurait pas compétence seulement si la société à capital de risque était « étrangère à la faillite » ou si le tribunal était incapable d'ordonner la réparation demandée par le syndic. La société à capital de risque a prétendu être le plus important créancier de la compagnie québécoise tandis que le syndic voyait plutôt cette société comme étant le plus important débiteur de la compagnie québécoise. Dans les deux cas, la société à capital de risque a joué un rôle important dans la faillite et elle n'était pas étrangère à la faillite. Bien que le tribunal de faillite n'ait pas la compétence pour accorder des dommages dans le cadre d'affaires de violation de contrat, la réclamation du syndic ne constituait pas une simple réclamation de dommages. Le tribunal de faillite n'était pas empêché d'envisager une ordonnance visant à substituer de l'argent aux biens revendiqués lorsque ces derniers ne pouvaient être livrés. La majeure partie de la revendication du syndic portait sur des biens particuliers qui étaient détenus illégalement. Le syndic avait le droit de réclamer les actions et les bons de souscription et d'intenter des procédures judiciaires portant sur ces biens devant le tribunal de faillite.

Le contrat contenait des dispositions portant sur le choix des lois applicables. Les tribunaux québécois étaient en mesure d'appliquer les lois de la Colombie-Britannique. L'article 187(7) de la Loi énonce que le renvoi peut être ordonné lorsque la procédure peut « être administré[e] d'une manière plus économique » dans un autre district ou devant une autre division ou « pour un autre motif suffisant ». La prétention de la société à capital de risque selon laquelle les procédures avaient un lien réel et important avec la Colombie-Britannique n'était aucunement appuyée par les faits ou le droit. La détermination de l'existence d'un lien important avec des procédures en matière de faillite dépendait de la « localité d'un débiteur ». Il n'existait aucun lien entre les procédures intentées et la Colombie-Britannique, mis à part le fait que les contrats contenaient une clause portant sur le choix des lois applicables qui était en faveur de la Colombie-Britannique. Le lien entre la société à capital de risque et la Colombie-Britannique n'était pas très fort, puisque la majorité des affaires de la société avaient lieu à l'extérieur de cette province. La société à capital de risque n'avait aucun avantage judiciaire à ce que les procédures aient lieu en Colombie-Britannique.

Table of Authorities

Cases considered by *Binnie J.*:

Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62 (S.C.C.) — distinguished

Arctic Gardens Inc., Re (1989), *(*sub nom. *Blaiklock Inc. c. Canadian Imperial Bank of Commerce)* 78 C.B.R. (N.S.) 1, 35 Q.A.C. 68, *(*sub nom. *Arctic Gardens Inc. (Syndic de) v. Blaiklock Inc)* [1990] R.J.Q. 6 (C.A. Que.) — referred to

Ash v. Corp. of Lloyd's (1991), *(*sub nom. *Ash v. Lloyd's Corp.)* 6 O.R. (3d) 235, 87 D.L.R. (4th) 65, 7 C.P.C. (3d) 343 (Ont. Gen. Div.) — referred to

Ash v. Corp. of Lloyd's (1992), 7 C.P.C. (3d) 364, *(*sub nom. *Ash v. Lloyd's Corp.)* 9 O.R. (3d) 755, 94 D.L.R. (4th) 378, 60 O.A.C. 241 (Ont. C.A.) — referred to

Ash v. Corp. of Lloyd's, 94 D.L.R. (4th) vii, *(*sub nom. *Ash v. Lloyd's Corp.)* 10 O.R. (3d) xvn, [1992] 3 S.C.R. v (S.C.C.) — referred to

Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015 (1996), 39 C.B.R. (3d) 311, *(*sub nom. *Associated Freezers of Canada Inc. (Bankrupt) v. Retail, Wholesale Canada, Local 1015*

(Division of United Steelworkers of America)) 151 N.S.R. (2d) 376, *(*sub nom. *Associated Freezers of Canada Inc. (Bankrupt) v. Retail, Wholesale Canada, Local 1015 (Division of United Steelworkers of America))* 440 A.P.R. 376 (N.S. C.A.) — referred to
Atlas Lumber Co., Re (1922), 3 C.B.R. 226, 61 Que. S.C. 153 (Que. Bktcy.) — referred to
Atlas Lumber Co. v. Winstanley (1940), [1941] S.C.R. 87, [1941] 1 D.L.R. 625 (S.C.C.) — considered
Boily v. McNulty (1927), 8 C.B.R. 565, [1928] S.C.R. 182, [1928] 1 D.L.R. 926 (S.C.C.) — followed
Bourque Consumer Electronics Inc. (Syndic de), Re (May 14, 1991), Doc. Montreal 500-11-001899-901 (C.S. Que.) — referred to
Coastal Steel Corp. v. Tilghman Wheelabrator Ltd. (1983), 709 F.2d 190 (U.S. C.A. 3rd Cir.) — referred to
Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v. Caisse populaire de Black-Lake, 66 C.B.R. (N.S.) 19, [1987] R.J.Q. 1715, 15 Q.A.C. 81 (C.A. Que.) — referred to
Diaz Contracting Inc., Re (1987), 817 F.2d 1047 (U.S. C.A. 3rd Cir.) — referred to
Ellis v. Silber (1872), 8 Ch. App. 83 (Eng. Ch. Div.) — followed
Excavations Sanoduc Inc. c. Morency, [1991] R.D.J. 423 (C.A. Que.) — referred to
Falvo Enterprises Ltd. v. Price Waterhouse Ltd., 34 O.R. (2d) 336, 40 C.B.R. (N.S.) 305, 28 C.P.C. 134 (Ont. H.C.) — referred to
Galaxy Interiors Ltd. (1971), Re (1971), [1972] 1 O.R. 186, 15 C.B.R. (N.S.) 143, 22 D.L.R. (3d) 510 (Ont. S.C.) — referred to
Geoffrion c. Barnett, [1970] C.A. 273 (C.A. Que.) — referred to
Harelkin v. University of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14 (S.C.C.) — referred to
Hays & Co. v. Merrill Lynch (1989), 885 F.2d 1149 (U.S. C.A. 3rd Cir.) — referred to
Holley v. Gifford Smith Ltd. (1986), 14 O.A.C. 65, *(*sub nom. *Holley, Re)* 54 O.R. (2d) 225, *(*sub nom. *Holley, Re)* 26 D.L.R. (4th) 230, *(*sub nom. *Holley, Re)* 59 C.B.R. (N.S.) 17, 12 C.C.E.L. 161 (Ont. C.A.) — referred to
Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of), 2001 SCC 90, 30 C.B.R. (4th) 6 (S.C.C.) — followed
Industrial Acceptance Corp. v. Lalonde, 32 C.B.R. 191, [1952] 2 S.C.R. 109, [1952] 3 D.L.R. 348 (S.C.C.) — referred to
Industrial Packaging Products Co. v. Fort Pitt International Inc. (1960), 161 A.2d 19, 399 Pa. 643 (U.S. Penn. S.C.) — referred to
Ireland, Re, [1962] Que. S.C. 686, 5 C.B.R. (N.S.) 91 (C.S. Que.) — followed
Lions d'Or Ltée, Re (1965), 8 C.B.R. (N.S.) 171 (C.S. Que.) — referred to
Lofsky, Re, 28 C.B.R. 164, [1947] O.R. 782, [1947] 4 D.L.R. 374 (Ont. C.A.) — considered
L'Union St-Jacques de Montréal v. Bélisle (1874), L.R. 6 P.C. 31, 1 Cart. B.N.A. 63, 5 R.L.O.S. 622 (Quebec P.C.) — considered
M. B. Greer & Co., Re, 33 C.B.R. 69, [1953] O.W.N. 329, [1953] 2 D.L.R. 209 (Ont. S.C.) — referred to
M.P. Industrial Mills Ltd. v. Manitoba Development Corp. (1972), 17 C.B.R. (N.S.) 226 (Man. Q.B.) — referred to
Mancini (Trustee of) v. Falconi (1987), 65 C.B.R. (N.S.) 246, *(*sub nom. *Clarkson Gordon Inc. v. Falconi)* 61 O.R. (2d) 554, 43 D.L.R. (4th) 444 (Ont. S.C.) — referred to
Maple Leaf Fruit Co., Re, 30 C.B.R. 23, [1949] 3 D.L.R. 426 (N.S. C.A.) — referred to
Maritime Telegraph & Telephone Co. v. Pre Print Inc. (1996), 131 D.L.R. (4th) 471, 44 C.P.C. (3d) 40, 147 N.S.R. (2d) 148, 426 A.P.R. 148 (N.S. C.A.) — referred to
Martin, Re, 33 C.B.R. 163, [1953] O.W.N. 694, [1953] 3 D.L.R. 823 (Ont. S.C.) — referred to
Maska U.S. Inc. v. Alfieri (Liquidator of), [1998] R.J.Q. 1380 (C.A. Que.) — referred to
Mount Royal Lumber & Flooring Co., Re (1926), 8 C.B.R. 240, 42 Que. K.B. 277, [1927] 2 D.L.R. 866 (C.A. Que.) — considered
Pollack Ltée c. Giroux (1979), 30 C.B.R. (N.S.) 256 (C.S. Que.) — referred to
Reynolds, Re, 10 C.B.R. 127, 62 O.L.R. 271, [1928] 2 D.L.R. 520 (Ont. S.C.) — referred to

Sarabia v. "Oceanic Mindoro" (The) (1996), 26 B.C.L.R. (3d) 143, [1997] 2 W.W.R. 116, 4 C.P.C. (4th) 11, (sub nom. *Sarabia v. Ship Oceanic Mindoro)* 84 B.C.A.C. 8, (sub nom. *Sarabia v. Ship Oceanic Mindoro)* 137 W.A.C. 8 (B.C. C.A.) — referred to

Sarabia v. "Oceanic Mindoro" (The), [1997] 2 S.C.R. xiv (S.C.C.) — referred to

Saskatchewan Moratorium Legislation, Re (1955), (sub nom. *Canadian Bankers' Assn. v. Saskatchewan (Attorney General))* [1956] S.C.R. 31, 35 C.B.R. 135, [1955] 5 D.L.R. 736 (S.C.C.) — considered

Sigurdson v. Fidelity Insurance Co. of Canada, [1980] 6 W.W.R. 315, 35 C.B.R. (N.S.) 75, 20 B.C.L.R. 345, 110 D.L.R. (3d) 491 (B.C. C.A.) — considered

Stewart v. LePage (1916), 53 S.C.R. 337, 29 D.L.R. 607 (S.C.C.) — followed

Treco, Re (1999), 239 B.R. 36 (U.S. Dist. Ct. S.D. N.Y.) — referred to

Treco, Re (2001), 240 F.3d 148 (U.S. C.A. 2nd Cir.) — referred to

Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd. (1985), [1986] 1 W.W.R. 380, 41 Alta. L.R. (2d) 5, 65 A.R. 271 (Alta. C.A.) — referred to

Westam Development Ltd., Re (1967), 10 C.B.R. (N.S.) 61, 59 W.W.R. 65, 61 D.L.R. (2d) 421 (B.C. C.A.) — referred to

Statutes considered

Bankruptcy Act, 1869 (U.K.) (32 & 33 Vict.), c. 71

Generally — referred to

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

Generally — referred to

s. 2(1) "locality of a debtor" [renumbered 1997, c. 12, s. 1(1)] — considered

s. 2(1) "property" [renumbered 1997, c. 12, s. 1(1)] — referred to

s. 17(1) — referred to

s. 30(1)(d) — considered

s. 43(5) — considered

s. 72(1) — considered

ss. 91-100 — referred to

s. 183 — considered

s. 183(1) — considered

s. 183(1)(b) — considered

s. 183(1)(c) — considered

s. 187(7) — considered

s. 188 — considered

s. 188(1) — considered

s. 188(2) — considered

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

Generally — referred to

art. 3135 — considered

art. 3148 — referred to

art. 3148 al. 5 — considered

Code de procédure civile, L.R.Q., c. C-25

Generally — referred to

Constitution Act, 1867, (U.K.) 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 — referred to

s. 91 ¶ 21 — referred to

s. 92 ¶ 13 — referred to

Rules considered

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 3 [rep. & sub. SOR/98-240] — considered

Rules amending the Bankruptcy and Insolvency Rules, SOR/98-240

Generally — referred to

***Binnie J.*:**

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

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

June 7, 1996 financing agreement

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

June 12, 1996 management agreement

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

. . . . .

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

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

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

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

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

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

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

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

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., principally" based on the financing agreements to recover about U.S. $3.85 million in the payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

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

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

A. Yes, it is.

Q. For what amount?

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

Q. That's U.S. currency?

A. That is U.S. currency.

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

A. Exactly.

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

II. Judicial History

A. Quebec Superior Court, [1999] R.J.Q. 1497 (C.S. Que.)

11 Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

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

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

B. Quebec Court of Appeal, [2000] R.J.Q. 392 (C.A. Que.)

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(d) of the Act which empowers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

15 Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present

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

III. Relevant Statutory Provisions

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

2. (1) In this Act

"locality of a debtor" means the principal place

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

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

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

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

. . . . .

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

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

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

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

. . . . .

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

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

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

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

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

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

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

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

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

. . . . .

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

. . . . .

(5) the defendant submits to its jurisdiction.

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

IV. Analysis

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

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

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

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

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

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

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

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

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

20 Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Atlas Lumber Co. v. Winstanley* (1940), [1941] S.C.R. 87 (S.C.C.), *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

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

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

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

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

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

2. Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty* (1927), [1928] S.C.R. 182 (S.C.C.), at p. 186: [translation] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories under s. 188: *Mount Royal Lumber & Flooring Co., Re* (1926), 8 C.B.R. 240 (C.A. Que.), *per* Rivard J.A., at p. 246, [translation] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario...". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S. C.A.), at p. 314, and *Maska U.S. Inc. v. Alfieri (Liquidator of)*, [1998] R.J.Q. 1380 (C.A. Que.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337 (S.C.C.), at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remaining issue with respect to *in personam* jurisdiction was thereby waived.

29 Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?

30 The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION]
>
> Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the *BIA* such as the application to have preferential payments declared void (see sections 91 to 100 *BIA*). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

31 Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *Lofsky, Re* (1947), 28 C.B.R. 164 (Ont. C.A.), *per* Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co. of Canada* (1980), 35 C.B.R. (N.S.) 75 (B.C. C.A.), at p. 102; *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225 (Ont. C.A.); *Ireland, Re* (1962), 5 C.B.R. (N.S.) 91 (C.S. Que.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (Ont. H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *Saskatchewan Moratorium Legislation, Re* (1955), [1956] S.C.R. 31 (S.C.C.), it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *L'Union St-Jacques de Montréal v. Bélisle* (1874), L.R. 6 P.C. 31 (Quebec P.C.), Lord Selborne L.C., speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne's description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), 8 Ch. App. 83 (Eng. Ch. Div.), at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger

to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Ireland, Re*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v. Caisse populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Que.); *Martin, Re* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *Reynolds, Re* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Galaxy Interiors Ltd. (1971), Re* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.), and *Lofsky, Re*, supra, at p. 169.

37 The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in the bankruptcy court: *Geoffrion c. Barnett*, [1970] C.A. 273 (C.A. Que.); *Arctic Gardens Inc., Re* (1989), [1990] R.J.Q. 6 (C.A. Que.); *Excavations Sanoduc Inc. c. Morency*, [1991] R.D.J. 423 (C.A. Que.). See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of)*, supra, and *Atlas Lumber Co., Re* (1922), 3 C.B.R. 226 (Que. Bktcy.); but the push is not confined to Quebec: *Maple Leaf Fruit Co., Re* (1949), 30 C.B.R. 23 (N.S. C.A.); *Westam Development Ltd., Re* (1967), 10 C.B.R. (N.S.) 61 (B.C. C.A.), at p. 65; *M. B. Greer & Co., Re* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *M.P. Industrial Mills Ltd. v. Manitoba Development Corp.* (1972), 17 C.B.R. (N.S.) 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Reynolds, Re*, supra, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Lofsky, Re*, supra, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Galaxy Interiors Ltd. (1971), Re*, supra, and *Sigurdson*, supra), as can claims for relief specifically granted by the Act (*Ireland, Re*, supra, and *Atlas Lumber Co., Re*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L.W. Houlden and L.B. Morawetz observe:

> There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.
>
> *Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4.

40 The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. Does this Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?

41 In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

42 As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns Western African Gold and Exploration Ltd., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

43 As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject-matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for $3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (S.C.C.), we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

47 The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

48 In *Lofsky, Re*, supra, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile

never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

49 See also *Reynolds, Re*, supra, at p. 131.

50 On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

51 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. *Sigurdson* , supra, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Ireland, Re*, supra.

52 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

53 As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

54 Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

> [TRANSLATION]

> It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

55 The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Galaxy Interiors Ltd. (1971), Re*, supra, per Houlden J. at p. 144, *Mancini (Trustee of)* , supra, per Catzman J. at pp. 250-51, *Atlas Lumber Co., Re*, supra, per Rinfret J., at p. 234.

56 It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

5. Even if Fully Clothed with Jurisdiction to Hear this Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?

57 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district of division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

58 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, supra, released concurrently.

59 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Lions d'Or Ltée, Re* (1965), 8 C.B.R. (N.S.) 171 (C.S. Que.), and *Pollack Ltée c. Giroux* (1979), 30 C.B.R. (N.S.) 256 (C.S. Que.).

60 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Québec Civil Code* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de), Re* (May 14, 1991), Doc. Montreal 500-11-001899-901 (C.S. Que.) and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.).

(i) Choice of Forum Clause

61 The appellant's point is that the applicable rules are found in the *Québec Civil Code*, and in particular art. 3148 which provides in part that:

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

62 The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold and Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

63 As to the legal issue, the question is whether arts. 3148 or 3135 of the *Québec Civil Code* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "in cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Québec Civil Code*. But this is incorrect. Resort is to be had to the provincial rules only "in cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Québec Civil Code*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Québec Civil Code* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

64 Leaving aside, then, the inapplicable directives of the *Québec Civil Code*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws*, (4th ed. 1997) pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (B.C. C.A.), *per* Huddart J.A., at p. 153 (leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiv (S.C.C.)); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.* (1985), [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Corp. of Lloyd's* (1991), 6 O.R. (3d) 235 (Ont. Gen. Div.); aff'd (1992), 9 O.R. (3d) 755 (Ont. C.A.), (leave to appeal to S.C.C. refused [1992] 3 S.C.R. v (S.C.C.)); *Maritime Telegraph & Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S. C.A.).

(ii) Public Policy Considerations

65 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt International Inc.*, 161 A.2d 19 (U.S. Penn. S.C., 1960); *Treco, Re*, 239 B.R. 36 (U.S. Dist. Ct. S.D. N.Y., 1999), aff'd 240 F.3d 148 (U.S. C.A. 2nd Cir., 2001).

66 In *Saskatchewan Moratorium Legislation, Re*, supra, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.), at p. 120.

67 In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

> [TRANSLATION]

> The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.
>
> (A. Bohémier, *Faillite et Insolvabilité*, Montréal, Les Éditions Thémis, Vol. 1, 1992, at p. 48)

68 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in Fletcher, I.F., *Insolvency in Private International Law* (Oxford: Clarendon Press 1999) at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (U.S. C.A. 3rd Cir., 1983); *Diaz Contracting Inc., Re*, 817 F.2d 1047 (U.S. C.A. 3rd Cir., 1987), and *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (U.S. C.A. 3rd Cir., 1989).

69 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

70 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against the *Amchem*, supra, and public interest factors within the framework of s. 187(7) of the Act.

71 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

72 The appellant, relying on *Amchem*, supra, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

73 Again, with respect, I do not think this position is sustainable on the law or the facts.

74 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, supra, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

75 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, supra, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem*

factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

76 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

77 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart* , supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

78 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

79 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

80 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart* , supra, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before

> us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under s. 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

81 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

82 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

1941 CarswellOnt 58
Ontario Supreme Court, In Bankruptcy

Rotenberg, Re

1941 CarswellOnt 58, 22 C.B.R. 433

In re Max Rotenberg trading as Janet Frocks

O. E. Lennox, Assistant Master Acting Registrar in Bankruptcy

Judgment: August 12, 1941

Counsel: *R. H. Sankey, K.C.*, for the applicant, Canadian Celanese Limited, petitioning creditor, and custodian in the Province of Quebec. G.
A. Gale, for custodian in Province of Ontario.
M. Prousky, for H. Brown, petitioning creditor in the Province of Ontario.

Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order
Headnote
Bankruptcy --- Receiving order — Rescission or stay of receiving order
Petition — One Filed in Quebec and Later One Filed in Ontario — Receiving Order in Ontario on Debtor's Consent Prior to Receiving Order in Quebec — Motion to Rescind Receiving Order Made in Ontario — No Irregularity — Interest of Creditors — Convenience of Debtor — Forum — Facts — Dismissal of Motion — The Bankruptcy Act, Secs. 2(y), 4(5), 164, Bankruptcy Rule 12, 9 C.B.R. 22, 31, 318, 351.
On a petition filed in Montreal on July 18, 1941, and after the appointment of an interim receiver on July 29, a receiving order was made on July 31, 1941. Meantime on a petition filed in Ontario against the same debtor on July 25, 1941, a receiving order was made by the Registrar on the consent of the debtor on July 29, 1941. A motion was brought on behalf of the petitioning creditor and custodian in the Province of Quebec for an order under sec. 164 of *The Bankruptcy Act* rescinding the receiving order made in Ontario. It was submitted on behalf of the custodian in Ontario that the motion should have been to a Judge under Bankruptcy Rule 12.
Held, that Bankruptcy Rule 12 was designed to meet a situation where a single petition had been presented in the wrong locality, and not to a situation such as the present where there were competing petitions.
Held, further, that the receiving order made in Ontario was properly made on the material before the Registrar, and on the facts, having regard to the provisions of sec. 2(*y*), of *The Bankruptcy Act* the interest of the creditors as well as the convenience of the debtor would best be served if the proceedings were continued in Ontario.
The motion was dismissed.

***Lennox, Esq.*, Asst. Master, Acting Registrar in Bankruptcy:**

1 This is a motion for an order rescinding the receiving order made herein by the Registrar in Bankruptcy on July 29, 1941, and was heard by me in the Registrar's absence.

2 On July 18, 1941, an informal meeting of creditors was held in the office of the debtor's solicitor in Toronto. On the same day a petition in bankruptcy was filed in Montreal, apparently as a result of the information disclosed at the meeting. No decision was reached by the creditors on this day, and the meeting adjourned to July 25. In the meantime, the Montreal bailiff was unable to serve the debtor at his place of business in that city, or find any trace of him in Montreal, and certified as to this under date of July 21 when the petitioning creditor obtained an order for substituted service of the petition by leaving a certified copy in the mail box and with the janitor on the premises. On July 23 the local credit manager in Toronto of the creditor telephoned the debtor and advised him of the petition.

3 On July 25 the adjourned meeting was unable to effect a compromise, and on this day a second petition was filed in Toronto, and served on July 26. On July 28 the debtor consented to a receiving order, and upon this consent a receiving order was made on July 29. On the same day the Deputy Registrar at Montreal appointed an interim receiver, and on the return of the petition on July 31 made a final receiving order.

4 On these facts Mr. Sankey submits that the local order should be rescinded or stayed under the provisions of sec. 164 [9 C.B.R. 318]. Mr. Gale, on the other hand, submits that the proper procedure is to apply to a Judge under the provisions of Rule 12 [9 C.B.R. 351]. I am unable to agree with the latter contention. Rule 12 is designed to meet a situation where a single petition has been presented in the wrong locality. Here there are competing petitions. Upon a proper application for rescission being made an officer of the Court is bound to consider whether, in view of subsequent material, the order is a proper one; and as a final analysis, having regard to the provisions of sec. 2(*y*) [9 C.B.R. 22], which forum will best serve the interest of the estate and the body of the creditors as a whole.

5 The order was unquestionably properly made on the material then before the Registrar. The applicant rests his argument mainly on the theory that in the light of the debtor's consent, the local proceedings are irregular and an abuse of the process of the Court. I am referred to *In re Lalonde* (1924), 4 C.B.R. 416, 55 O.L.R. 279, 3 Can. Abr. 308, 375, in which the Court has, in effect, ruled that any action on the part of a debtor taken subsequent to the launching of a petition against him, either by making an assignment, or consenting to a later petition, should be taken as a consent to the original proceedings, on the ground that the action of the debtor is to be taken as an attempt to direct the administration of his affairs by making his own choice of custodian. These cases were decided at a time when trustees in Bankruptcy were not required to be licensed. The situation is now somewhat different; but that feature need not be considered here.

6 The ruling is based on the supposition that the debtor could not have been prompted by any sound or proper motive. In the present case the debtor is vitally interested, as will be disclosed later, as to where his affairs should be administered, as between the city in which he resides, or has his abode, and a point hundreds of miles distant. Many demands may be made on his time, and in view of this circumstance it cannot fairly be said it is a case of choosing between custodians.

7 There is no evidence that the local petitioning creditor attended the informal meetings and so was aware of the proceedings in Quebec. He refers to these meetings in his petition, but his affidavit of verification qualifies certain of his statements as based on inquiries, information and belief. The material in support of the application raises implications against him, as well as the debtor. On the other hand, it is not explained on what material the applicant saw fit to apply for an order for substituted service of this petition, an order of last recourse, when their Toronto representative was able to contact the debtor two days later. It is further not disclosed whether they were aware of the local receiving order when they applied for and obtained an order appointing an interim receiver, and if they were aware of this, what the purpose or necessity of the order was, or how it could be implemented.

8 Courts in Bankruptcy are auxiliary to each other, and this situation having developed, and there being no evidence of any irregularity rendering the proceedings in this Court a nullity, I consider it my duty to consider where the proceedings may be carried on most effectively and expeditiously, (tested in the light of sec. 2(*y*)) and

if the balance rests with Quebec, to stay the proceedings here; or if, on the material, any uncertainty should still exist, then to decide in favour of Quebec as being the jurisdiction in which the first petition was presented.

9 The petition shall be presented to the Court having jurisdiction in the locality of the debtor: sec. 4(5) [9 C.B.R. 31]. The "locality of a debtor" is defined by sec. 2(*y*)(i)(ii)(iii) [9 C.B.R. 22] as follows:

> (*y*) 'locality of a debtor' whether a bankrupt or assignor, means
>
> (i) the principal place where the debtor has carried on business during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment;
>
> (ii) the place where the debtor has resided during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; or
>
> (iii) in cases not coming within (i) or (ii), the place where the greater portion of the property of such debtor is situate.

10 My understanding of the foregoing conditions is that clause (i) is the primary consideration; it weighs the direct interests of the creditors; and clause (ii) which directly considers the convenience of the debtor, and indirectly the interest of the creditors, in respect of the cost of securing the debtor's attendance, only comes into play when (i) is not conclusive.

11 I have been referred to many authorities containing broad principles of law but they, in my opinion, are of little assistance. We are not dealing with a technical question, but a practical question of expediency, and each particular case must be considered in the light of its own particular facts. Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd. v. Howe*, [1906] A.C. 455, at p. 458, 75 L.J.K.B. 858, said: "... the real business is carried on where the central ... control actually abides". But that was a taxation case, and consequently the decision turned on technical considerations. The central control of the debtor's business is unquestionably in Toronto, and the practical angle of this is that those who are qualified to testify as to his records and accounts, and concerning the detail of his business are resident in Toronto or the vicinity. Otherwise there is little satisfactory evidence, upon which to make a decision, under this clause. It appears that in amount of their claims, the creditors are fairly equally divided between the two jurisdictions; in the matter of numbers there is considerable doubt. The question of the collection of accounts receivable is, of course, an important factor. The debtor's sworn statement that the greater portion of these are owing in this jurisdiction is not, in itself, sufficiently definite. But the fact that this business was commenced in Toronto eight years ago, and that the Montreal branch has been only operating for four years, lends weight to the assertion.

12 From the foregoing consideration there appears to be a balance, if not a preponderance, of convenience in favour of carrying on proceedings in this jurisdiction. But if there should be a doubt, this is outweighed by a consideration of clause (ii). The material discloses that the debtor has resided in Toronto for the past twenty years, where he has carried on this business for the past eight years, and only com menced operating in Montreal owing to trade union difficulties in Toronto. If there was any reason to discredit his sworn statement, this would be largely offset by the Montreal bailiff's certificate, which states that he was unable to find any ordinary place of residence belonging to the debtor in Montreal.

13 If, indeed, the debtor has spent most of his time in Montreal in the past few years, it is still not the place of his abode, and his business having ceased, he has no apparent reason to spend more time there: *In re Tobin* (1930), 12 C.B.R. 55, 3 Can. Abr. 351, as follows, at p. 58:

> ... it would require a very clear text to take the liquidation of an insolvent estate away from the Province where the debtor has his domicile, his principal establishment, his electoral status, where he is liable to pay taxes and where his succession, when he dies, will devolve.

14 Cited with approval by Mr. Justice Urquhart in *Re Solloway*, 19 C.B.R. 350, [1938] O.W.N. 373, 1938 Can. Abr. 44, is a strong statement of policy in such matters.

15 A person's conduct may best be reviewed in the community in which he resides, and according to the standards of such community. But I am not resting my decision on abstract considerations. As I have already indicated, if these proceedings are removed from this jurisdiction the debtor may be seriously prejudiced in earning a livelihood due to demands being made for attendance in Montreal; and otherwise even though the consideration of other factors may not be conclusive, such information as is available indicates that proceedings should be continued in Ontario.

16 For these reasons the application will be dismissed. The respondents are entitled to costs out of the assets of the estate forthwith after taxation.

1979 CarswellOnt 248
Ontario Supreme Court, In Bankruptcy

Flax Investment Ltd., Re

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

Re FLAX INVESTMENTS LIMITED

Saunders J.

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

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

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.B Miscellaneous

Headnote
Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — General
Bankruptcy petitions for receiving orders — Formalities — Place of filing — Locality of debtor — Principal place of carrying on business — Principal place of residence of debtor — The Bankruptcy Act, s. 2.
The debtor corporation was an Ontario corporation having its head office in the city of Toronto in the province of Ontario. The accounting books and records were in Toronto. The president of the company, who was also one of its two beneficial shareholders, resided in Toronto, had his office in Toronto and did business in Toronto on behalf of the company. The other beneficial shareholder resided in Manitoba. The company was registered to do business in Manitoba, and it carried on its farming operations in Manitoba. The question arose as to where the petition should be filed.
Held:
The petition was properly filed in Ontario.
The debtor company did not carry on business in the year preceding the petition in Ontario, but the principal place where the debtor resided during the year immediately preceding the date of the petition was in the province of Ontario.
A petitioning creditor in considering in what court to bring his petition can choose to bring it on the basis of either para. (*a*) or para. (*b*) of the definition of "locality of the debtor" in s. 2 of the Bankruptcy Act, and only if there is no principal place as described in either paragraph may para. (*c*) of the definition section be resorted to. In other words, it is possible in certain cases to bring a petition in either one of two courts.
Annotation

The import of this decision is far-reaching in our modern economy with multi-national companies carrying on business actively in every province of Canada. One must keep in mind, in selecting the forum, the test set out by the court in *Re Solloway*, 19 C.B.R. 350, [1938] 4 D.L.R. 12, affirmed [1939] O.R. 295, 20 C.B.R. 309, [1939]

2 D.L.R. 617 (C.A.). The present decision really follows *Re Malartic Hygrade Gold Mines Ltd.; Lionel Berube Inc. v. Minaco Equip. Ltd.* (1966), 10 C.B.R. (N.S.) 34 (Ont.). The test seems to be as set out in s. 2 ("locality of a debtor") of the Bankruptcy Act, namely, alternatively, where the debtor carried on business *or* has resided, and only if the petitioner cannot fit himself therein, then he should look to para. (*c*) of that definition in s 2. In Quebec, where there is more than one registrar or bankruptcy district and the residence factor does not seem to apply to a specific district where the debtor resides but to Quebec as a whole (see *Re Boily v. McNulty*, 8 C.B.R. 248, affirmed 42 Que. K.B. 425, 8 C.B.R. 250, which was affirmed [1928] S.C.R. 182, 8 C.B.R. 565, [1928] 1 D.L.R. 926), one should look to the combined effect of paras. (*a*) and (*b*) of the said definition in s. 2 as opposed to the residence test only (see *Re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433 (Ont.)).

The learned bankruptcy judge states that the issue of locality is "a procedural matter under the Bankruptcy Act which must be considered by a petitioner in ascertaining the court in which to launch his petition". However, it is submitted that by the use of the word "shall" the directions of the Act are mandatory as opposed to merely procedural. In any event, if the petitioner chooses the wrong place of filing, he can obtain relief under s. 157(10) of the Bankruptcy Act.

M.B. Page, Q.C.

Table of Authorities

Cases considered:

Malartic Hygrade Gold Mines Ltd., Re; Lionel Berube Inc. v. Minaco Equip. Ltd. (1966), 10 C.B.R. (N.S.) 34 (Ont.) — *applied*

Rotenberg (Janet Frocks), Re (1941), 22 C.B.R. 433 (Ont.) — *not agreed with*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3 ss. 2, 25(5).

Words and phrases considered:

LOCALITY OF DEBTOR

The definition of the "locality of a debtor" presents some interpretative difficulty. The references to the "locality of the debtor" in s. 25(5) [of the *Bankruptcy Act*, R.S.C. 1970, c. B-3] and "the principal place" in the definition suggest that a debtor may have but one locality. On the other hand, the principal place described in para.(a) of the definition may and often is different from the principal place as described in para.(b). In the case of *re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433 (Ont.), the then assistant master, in considering a slightly different definition of the section, held in effect that primary consideration should be given to para.(a) and, if that is not conclusive, the residence of the debtor may provide jurisdiction. With respect, I do not agree. There is nothing in the language of the definition which gives primary position, words could have been inserted in para. (b) such as "in cases not coming within paragraph (a)", as was done in drafting para.(c).

RESIDENCE OF A COMPANY

The residence of the company presents some difficulty. A corporation is resident where its seat of management is located and a corporation may be resident in more than one place.

***Saunders J.* (orally):**

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

2 In the dispute filed on behalf of the company it was admitted that there was a debt owing to Mr. Hunter, and the evidence established that such debt was in excess of $1,000 and was due and unpaid at the date of the petition. Evidence was presented of debts owing to other creditors. Mrs. Streeter, the president and sole owner of Streeter Power Sales and Services Limited, gave evidence as to debts owing to that company for the rental of equipment

and the sale of parts. Mr. Tikal, a solicitor in the city of Toronto, gave evidence as to rentals owing to lessors of premises leased to the company, including rentals owing to him personally as a lessor. Mr. Fisher, a chartered accountant, gave evidence as to overdue payment of accounts rendered by him, and finally the petitioning creditor, Mr. Hunter, gave evidence as to the indebtedness of the company to him. Mr. Streeter did not have copies of his invoices, but his testimony was uncontradicted that the equipment and parts that he provided were for the account of the company and not for any other customer. Certain of the evidence of Mr. Tikal was based on information supplied to him by others. Mr. Fisher's invoices were submitted to the company and discussed with both principals of the company. No evidence was called on behalf of the company to contradict the evidence given by its creditors. On the basis of the evidence I am satisfied that the petitioning creditor has established that the company had at the date of the petition ceased to meet its liabilities generally as they become due.

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

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

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

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

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

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

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

8 The purposes for the incorporation of the company as set out in its articles are, first, of a real estate or land trading nature and, second, of a farming nature. As described by Mr. Hunter, the enterprise was a joint venture

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

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

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

11 Against this background it is necessary to consider the issue as to whether the Ontario court has jurisdiction to hear this petition. The definition of the "locality of a debtor" presents some interpretative difficulty. The references to the "locality of the debtor" in s. 25(5) and "the principal place" in the definition suggest that a debtor may have but one locality. On the other hand, the principal place described in para. (*a*) of the definition may and often is different from the principal place as described in para. (*b*). In the case of *Re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433 (Ont.), the then assistant master, in considering a slightly different definition of the section, held in effect that primary consideration should be given to para. (*a*) and, if that is not conclusive, the residence of the debtor may provide jurisdiction. With respect, I do not agree. There is nothing in the language of the definition which gives a primary position to para. (*a*) over para. (*b*). To achieve such primary position, words could have been inserted in para. (*b*) such as "in cases not coming within paragraph (*a*)", as was done in drafting para. (*c*).

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

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

14 The residence of the company presents some difficulty. A corporation is resident where its seat of management is located, and a corporation may be resident in more than one place. In this case the head office of the company was at all times in Toronto. The accounting books and records were moved to Toronto in the fall of 1978. Mr. Hunter, the president of the company and one of its two beneficial shareholders, resided in Toronto, had

his office in Toronto and did business in Toronto on behalf of the company, although he also spent a substantial part of the year in Florida and some time in Manitoba. Mr. Procter, the other director and the secretary of the company, resided in Manitoba, and, as I have said, there is no evidence that he was ever in Toronto during the year. The company was registered to do business in Manitoba, and it leased land and equipment in Manitoba for its farming operations which were managed by Square One.

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

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

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

18 In have endorsed the record as follows.

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

1966 CarswellOnt 30
Ontario Supreme Court, In Bankruptcy

Malartic Hygrade Gold Mines Ltd., Re

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

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

McDermott J.

Judgment: October 27, 1966

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

Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.B Miscellaneous

Headnote
Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — General
Petition for receiving order — Conflict between petitions filed in Ontario and in Quebec against same debtor — Receiving orders made in both provinces — Dismissal of application to rescind or annul receiving order made in Ontario — The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 2(k), 21(5), 138(1), 144(5).
On 21st August 1964, a petition for a receiving order was filed in the Province of Quebec. On 19th July 1965, a petition against the same debtor was filed in the Province of Ontario. Both petitions were disputed. On 1st March 1966, a receiving order was made in Ontario which was confirmed by the Ontario Court of Appeal on 21st June 1966. On 9th March 1966, a receiving order was made on the petition filed in the Province of Quebec in respect of which notice of appeal was given. An application was made to rescind the receiving order made on 1st March 1966.
Held, the application to rescind the receiving order made in Ontario, and the application to annul the bankruptcy in Ontario, should be dismissed.
The guiding factors in deciding the question as to where the bankruptcy administration should be carried out are ss. 2(*k*) and 21(5) of the Bankruptcy Act. The head office of the debtor company was in Ontario, the company was incorporated under the laws of the Province of Ontario, the books of the company were located in Ontario, the auditors of the company were located in Ontario and the president was a resident of the Province of Ontario. The share register of the debtor company was held by a trust company which had its head office in the Province of Ontario. The assets of the debtor company consisted of a property situated in the Province of Quebec but in respect of which operations were discontinued in 1964. The "locality" of the debtor appeared fully satisfied by the administration of the bankrupt estate being carried out in Ontario so far as s. 2(*k*)(i) and (ii) were concerned; and s. 2(*k*)(iii) referred only to cases which do *not* come within s. 2(*k*)(i) and (ii). It appeared to be of greater convenience to all the creditors to have the administration carried on promptly and in the Province of Ontario. Moreover, in applications to review, rescind or vary orders made pursuant to s. 144(5), the Court should not be asked to re-hear on the same material or on evidence merely corroborative of that given at the hearing: *Re Trenwith*, [1933] O.W.N. 639, 15 C.B.R. 107, 3 Can. Abr. (2nd) 470, applied. The allegations in the supporting material were not so

substantially different from the material which had been submitted to the Court on the hearing of the petition for a receiving order as to justify the Court in interfering with the receiving order previously made by it. Furthermore, it appeared throughout that the applicant, the petitioner for the receiving order in the Province of Quebec, had been guilty of some delays throughout.

Annotation

An application for review under s. 144(5) may be founded on other admissible evidence than that which might have been before the court on the original hearing and new evidence merely corroborative of what was heard at the trial is not admissible: *Re Bryant Isard & Co.; Kent's Claim* (1922), 3 C.B.R. 534, 23 O.W.N. 215, 3 Can. Abr. (2nd) 713; *Re Barter; Trustee v. Dupont et Frere* (1923), 3 C.B.R. 677, *(*sub nom. *Raymond v. Dupont et Frere)* 23 O.W.N. 661, 3 Can. Abr. (2nd) 2314. As His Lordship pointed out, by reference to the case of *Re Trenwith*, [1933] O.W.N. 639, 15 C.B.R. 107, 3 Can. Abr. (2nd) 470, if an application is made to review, rescind or vary orders made, the court should not be asked to re-hear on the same material or on evidence merely corroborative of that given at the hearing. Any application under this section should be brought on new evidence of a substantial nature: See also *Re Capital Trust Corpn.; Lamarre v. Dolan Estate* (1943), 24 C.B.R. 207, 3 Can. Abr. (2nd) 2320. Considering, that an appeal against the receiving order made in Ontario on 1st March 1966, was dismissed by the Court of Appeal of that province, it is difficult to understand why an application was made under ss. 138(1) and 144(5) on quite similar material without new evidence.

It appears logical that when considering whether a receiving order should be made in one province or the other, the governing criterion should be the interest of the creditors and possibly also the convenience of the debtor: *Re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433, 3 Can. Abr. (2nd) 473.

It appears quite obvious that the court was, to some extent, influenced by the fact that the bankruptcy proceedings in the Province of Quebec were not prosecuted with all due despatch. As a rule, where two petitions are being filed against the same debtor, the court usually makes a receiving order on the first petition filed. An exception is made, however, where the first petition is not duly prosecuted. In the case of *Re Stimson & Co.* (1931), 12 C.B.R. 149, 3 Can. Abr. (2nd) 346, a petition was filed but not duly prosecuted. The second petition was then filed and prosecuted with due despatch. The court made a receiving order on the second petition.

Considering all the circumstances, the learned bankruptcy judge came undoubtedly to the only possible solution. The question to be determined in the end was "where could the bankruptcy proceedings be carried on most effectively and expeditiously having primarily regard to the benefit of the creditors?" On this basis, it was obvious that Ontario was the forum where the bankruptcy proceedings should be continued.

***McDermott J.*:**

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

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

September 1966, by consent, and at that date again adjourned on consent but made peremptory for 4th October 1966, on which date, as aforesaid, the application came on for hearing.

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

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

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

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

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

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

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

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

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

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

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

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

15 26th July 1965 — Notice of dispute by debtor, Malartic Hygrade Gold Mines Limited, filed, objecting to petition of Minaco on grounds that in June 1964 Malartic filed at Montreal, a pro posal under the Bankruptcy Act, and further objecting on the ground that another petition for a receiving order (from Lionel Berube Inc.) was filed

at Val d'Or on 21st August 1964, and that by order of a judge of the Superior Court in Bankruptcy in Quebec, the proceedings were suspended.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 There apparently was no reason whatsoever why, in the gap from 19th January 1966, to the filing of the new proposal by the debtor on 7th February 1966, the application on the petition of 21st August 1964, could not have been resumed before the proper tribunal in the Province of Quebec. In his affidavit of 28th February 1966, filed, William S. Miller, secretary-treasurer of Minaco Equipment Limited, swears, in para. 11, that Lionel Berube Inc. was then aware of the petition of Minaco Equipment Limited, which had already been filed in the Bankruptcy Court in Ontario on 19th July 1965. It is further evident from the original letter of John J. Bussin to Mr. Claude Allard dated 14th September 1965, which is filed in this court as Ex. B to the affidavit of Claude Allard sworn 23rd March 1966, that Mr. Claude Allard was fully aware of the fact that the petition had been filed here on 15th July 1965. The debtor, Malartic Hygrade Gold Mines Limited was represented by counsel, in the Bankruptcy Court in Ontario, when the receiving order by such court was made on 1st March 1966, and from then on should definitely have been aware of the receiving order having been granted and it must be assumed that it would report to its principal counsel in Quebec that such receiving order had been made. Surely it would be represented in the Quebec Court at the time the receiving order was granted there on 9th March 1966 on the petition of Lionel Berube Inc.

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

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

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

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

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

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

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

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

37 The Clarkson Company Limited of the city of Toronto was, by the receiving order of 1st March 1966, appointed trustee of the estate of the said bankrupt and has already had a meeting of creditors on Thursday 24th March 1966. This company has offices both in the Province of Ontario and the Province of Quebec and would seem to be the most suitable trustee, under all the circumstances, rather than having the affairs of the bankrupt company carried on from Rouyn, Quebec, where the trustee appointed under the order of Drouin J. of 9th March 1966 is located.

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

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

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

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

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

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

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

> The Court in which the bankruptcy proceedings are properly pending, by reason of its original jurisdiction in the bankruptcy district in which an authorized assignment was made and filed, will treat as a nullity, proceedings taken without its leave in another province of Canada before the Court ordinarily having bankruptcy jurisdiction there which would infringe upon the control of the bankruptcy by the Court having original jurisdiction.

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

46 Counsel for the respondent, in reply, referred to the case of *Re Trenwith*, [1933] O.W.N. 639, 15 C.B.R. 107, 3 Can. Abr. (2nd) 470, which was a motion to annul or stay proceedings under a receiving order, or to stay

proceedings or alternatively to remove the trustee. The facts of the application were in no way whatsoever on the same footing as is the instant application, and, in the result, the application was dismissed by the late Armour J. with costs, but it was interesting to read the remarks of Armour J. on p. 111 made as follows:

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

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

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

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

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

51 It is most unfortunate that these two creditors, namely Minaco Equipment Limited and Lionel Berube Inc., could not have co-operated in the early efforts to have a receiving order made in one jurisdiction or another, after Mr. J. J. Bussin of Toronto on behalf of Minaco Equipment wrote to Mr. Claude Allard on 14th September 1965, apprizing him of having learned of a petition filed on behalf of Lionel Berube Inc. by Mr. Allard, of which Mr. Bussin had no knowledge until after the petition of Minaco Equipment Limited was filed, and offering to co-operate in every way, even to the point of being agreeable to withdraw the petition filed on behalf of Minaco Equipment Limited, if Mr. Allard insisted on continuing with the petition filed on behalf of Lionel Berube Inc. This generous offer appeared to have brought no satisfactory response whatsoever and Mr. Bussin was therefore obliged to continue, in the interest of his client, to see that some receiving order was made to protect the creditors.

52 Actually, the motion boils down to whether one court or the other is wrongly seized with the matter and should be given precedence over the other. It appears that the creditor, Minaco Equipment Limited, has expended money both in Ontario and Quebec, and that the trustee appointed in the Ontario jurisdiction has proceeded to

have his meeting of creditors, and there could well be a substantial loss to Minaco Equipment Limited if it should be penalized by not having the order made by the Ontario Court of Bankruptcy jurisdiction upheld.

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

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

HMANALY L§3
Houlden & Morawetz Analysis L§3

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Part XI (ss. 243-252)
L.W. Houlden and Geoffrey B. Morawetz

L§3 — Appointment of Receiver and Manager

L§3 — Appointment of Receiver and Manager

See ss. 243, 245, 246, 246.1, 247, 248, 249, 250, 251, 252

The *Bankruptcy and Insolvency Act* applies to receivers of the estates of insolvent persons or bankrupts whether appointed with or without court order: s. 243(2). Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA,* to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver. The national receiver is entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. Creditors are still entitled to have a provincially appointed receiver act on their behalf under the *Act.* The subsection was further amended in 2009 by providing specific powers that may be exercised by the court appointed receiver.

Where notice is to be sent under s. 244(1), s. 243(1.1) specifies that the appointment of a national receiver cannot be made before the expiry of ten days after the date on which the secured creditor sends the notice, unless the insolvent person consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before expiry of the ten days. The notice provides the debtor with an opportunity to repay the liability that underlies the security being enforced. Section 243(2) specifies that a receiver under the *BIA* includes one appointed under this Act or another statute.

Section 243(4) specifies that a receiver appointed either by the court or under the terms of a security agreement to take control of all or substantially all of the inventory, accounts receivable, or other property must be a licenced trustee.

Section 243(5) was added in 2009 to clarify that an application for the appointment of a receiver must be made in the locality of the debtor. The previous statutory language was silent on where the application may be made. Accordingly, the application was sometimes brought in a location that was more convenient for the creditor who was making the application, which may not have had any connection with the place in which the debtor's business was located or where other creditors were located. This practice had the effect of preventing smaller creditors from participating in the process, because of the prohibitive cost of hiring legal counsel in a distant jurisdiction.

The court may make any order respecting fees and disbursements of the receiver that it considers appropriate, and may grant a priority charge to the receiver ahead of secured lenders: s. 243(6). However, the court is not to make such an order unless it is satisfied that the secured creditors who may be materially affected by the order have been given reasonable notice and the opportunity to make representations to the court. Disbursements do not include payments made in the operation of the insolvent debtor's business: s. 243(7).

A receiver is a person who has been appointed to take, or has taken, possession or control, pursuant to a security agreement or a court order, of all or substantially all of the inventory, accounts receivable or other property of the debtor: s. 243(2). A person who has never had control of the debtor's business, did not have a key or pass to the debtor's premises, has had no

involvement with the banking activities of the debtor, has had no signing authority and whose activities have been observed by a representative of a secured creditor, is not a receiver: *MGI Packers Inc. v. Livestock Financial Protection Board* (2001), 2001 CarswellOnt 2540, 27 C.B.R. (4th) 101 (Ont. S.C.J. [Commercial List]).

In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 2002 CarswellAlta 1531, 46 C.B.R. (4th) 95, 2002 ABQB 430, 316 A.R. 128, the Alberta court of Queen's Bench held that in insolvency situations, *ex parte* receivership orders should only be granted where emergency exists and full, fair and candid disclosure has been provided to the court, including facts adverse to the applicant. An emergency is a circumstance where the consequences that the applicant seeks to avoid are immediate and would cause irreparable harm. See annotation by Mark Lavigne to the case at 46 C.B.R. (4th) 95.

To obtain the appointment of a receiver and manager, a creditor does not have to show that it will suffer irreparable harm if the appointment is not made: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 1995 CarswellOnt 39, 30 C.B.R. (3d) 49 (Ont. Gen. Div.).

The fact that the appointment of a receiver and manager will cause hardship to the debtor and that the receiver and manager may not have the same expertise as the principals of the debtor company in operating the business are not reasons for refusing to appoint a receiver and manager: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., supra.*

In considering whether to appoint a receiver, the court should consider the effect of such an order on the parties, and, since it is an equitable remedy, the conduct of the parties: *Royal Bank v. Chongsim Investments Ltd.* (1997), 1997 CarswellOnt 988, 46 C.B.R. (3d) 267, 32 O.R. (3d) 565 (Gen. Div.).

The two main classes of cases in which a receiver will be appointed are first, where ordinary legal remedies are defective to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realization. An example of this type of case occurs where a mortgagee appoints a receiver to protect its rights. The order appointing the receiver does not create any rights; it is only effective to protect existing rights (see *McLennan Ross v. Paramount Life Ins. Co.* (1986), 63 C.B.R. (N.S.) 265 (Alta. Q.B.)); second, a receiver will be appointed to preserve property from some danger that threatens it. In this situation, the applicant must prove that the property in question is imperiled, and if the applicant fails to do so, the court will refuse to appoint a receiver: *Tim v. Lai* (1984), 53 C.B.R. (N.S.) 80 (B.C. S.C.).

Where the principal owing under a debenture is in arrears and where the security is in jeopardy, the court will appoint a receiver: *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.).

The court will not appoint a person as receiver whose ethics are questionable or who is in a position of conflict: *Montreal Trust Co. v. 385070 Alberta Inc.* (1993), 1993 CarswellAlta 421, 20 C.B.R. (3d) 140, 10 Alta. L.R. (3d) 201, 17 C.P.C. (3d) 391, 140 A.R. 101 (Master).

A receiver is appointed to receive rents and profits, to receive and preserve property and to realize property. If the receiver is required to carry on and superintend a trade or business, the receiver is also appointed as a manager. Where both functions are required, the court appoints a receiver and manager: *Wahl v. Wahl (No. 2)* (1972), 16 C.B.R. (N.S.) 272 (Ont. H.C.).

A receiver appointed by the court is a receiver of the court, not of the parties who sought the appointment: *Braid Builders Supply & Fuel Ltd. v. Genevieve Mtge. Corp.* (1972), 17 C.B.R. (N.S.) 305 (Man. C.A.). A receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed or of anyone, except the court that appointed him: *Royal Trust Co. v. Montez Apparel Industries Ltd.* (1972), 17 C.B.R. (N.S.) 45 (Ont. C.A.); *Royal Bank v. Vista Homes Ltd.* (1984), 54 C.B.R. (N.S.) 124 (B.C. S.C.).

The court will not permit a collateral attack in some other proceeding to be made on the appointment of a receiver. The only exception to the principle is (a) where the original proceeding in which the receiver was appointed has been resolved in favour of the plaintiff; (b) the original proceeding was commenced without reasonable and probable cause; and was motivated by fraud, malice or bad faith, and (c) the plaintiff has suffered damage as a result of the initiation of the earlier proceeding or as

a result of a judgement subsequently set aside as fraudulently obtained: *Nash v. CIBC Trust Corp.* (1996), 7 C.P.C. (4th) 263, 1996 CarswellOnt 1540 (Ont. Gen. Div.).

In the case of a court-appointed receiver, the court has an obligation to decide who is the appropriate person to be appointed. This obligation cannot be delegated to the security holder applying for the appointment; the court will, however, give careful consideration to the person suggested by the security holder: *Federal Trust Company v. Frisina* (1976), 28 C.B.R. (N.S.) 201 (Ont. H.C.). The person appointed must be disinterested and impartial and able to deal with the rights of all persons with an interest in the property in a fair and evenhanded manner; and it is essential that the person appear to have these qualities. If the circumstances disclose a reasonable probability of a conflict of interest, that person should not be appointed: *Federal Trust Company v. Frisina, supra.* The person appointed should be in a position to give an appearance of impartiality, and if he or she is not in that position, the person should not be appointed as receiver-manager: *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 56 C.B.R. (N.S.) 7 (B.C. C.A.).

Where a secured creditor has the right by its security document to appoint a receiver, in deciding whether or not a court-appointed receiver should be appointed, the court must look at all of the circumstances and, in particular, at the nature of the assets and the rights and relations of the interested parties. The fact that the moving party has a right under its security document to appoint a receiver is an important factor but so is the question whether the appointment is necessary to enable the receiver to carry out its work and duties more efficiently. The court will consider the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and whether the appointment is the best way of facilitating the work and duties of the receiver: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

If a private appointment of a receiver and manager has been made pursuant to a debenture, the court will not make an order appointing the same person as a court-appointed receiver and manager unless good reason is shown for making the appointment. If there is no serious interference with the privately appointed receiver and manager, no disputes with other secured creditors, additional borrowing powers are not required, and the ordinary legal remedies are sufficient to preserve the property pending realization, the court will refuse to make an order appointing a receiver and manager: *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.); *Macotta Co. of Can. Ltd. v. Condor Metal Fabricators Ltd.* (1979), 35 C.B.R. (N.S.) 144 (Alta. Q.B.); *Royal Bank v. Cal Glass Ltd.* (1978), 29 C.B.R. (N.S.) 302, 8 B.C.L.R. 345, 94 D.L.R. (3d) 84 (S.C.); *Royal Bank v. Cam-Steam (1987) Ltd.* (1988), 68 C.B.R. (N.S.) 187 (N.B. Q.B.).

Where a private appointment has been made under a mortgage of a receiver-manager and the debtor is refusing to cooperate with the receiver-manager, the court may make an order confirming the appointment of the private receiver-manager, requiring the debtor to deliver control and possession of the property to the receiver-manager and authorizing the receiver-manager to exercise all the powers granted to it by its security: *Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership* (1994), 25 C.B.R. (3d) 139, 18 O.R. (3d) 201, 1994 CarswellOnt 271 (Gen. Div. [Commercial Div.]); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

There is a distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity: the receiver need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the court and acts in a fiduciary capacity with respect to all interested parties: *Ostrander v. Niagara Helicopters Ltd.* (1973), 19 C.B.R. (N.S.) 5 (Ont. S.C.); *Royal Bank v. Vista Homes Ltd.* (1984), 54 C.B.R. (N.S.) 124 (B.C. S.C.); *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.* (2004), 2004 CarswellBC 52, 2004 BCSC 40, 1 C.B.R. (5th) 1, 30 B.C.L.R. (4th) 177, 20 R.P.R. (4th) 62 (B.C. S.C.).

The appointment of a receiver before making a demand for payment does not invalidate the appointment of the receiver, where the receiver after its appointment takes no irreversible measures or measures that are prejudicial to the debtor in the period before the expiration of the demand: *Island Ford Sales Ltd. (Trustee of) v. Ford Credit Can. Ltd.* (1983), 48 C.B.R. (N.S.) 155, 59 N.S.R. (2d) 235, 125 A.P.R. 235, 25 B.L.R. 14 (T.D.).

In deciding whether it is just and convenient to appoint a receiver, the court will consider such matters as whether the appointment causes irreparable harm to the debtor, the risk to the security holder, the preservation and protection of the property covered by the security, and the balance of convenience: *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 58 D.L.R. (4th) 447, 98 A.R. 250 (Q.B.); *Pirbhai Estate v. Pirbhai* (1988), 70 C.B.R. (N.S.) 175 (B.C. S.C.).

In *Lloyd's Bank Can. v. Lumberton Mills Ltd.* (1988), 73 C.B.R. (N.S.) 258 (B.C. C.A.), two judges of the British Columbia Court of Appeal expressed doubts concerning the validity of an order appointing a receiver-manager of "all the property, assets and undertaking of the debtor" where the debenture did not contain such wording. The judges were of the opinion that the order should be restricted to the assets covered by the debenture and made subject to existing encumbrances.

If a debtor consents to the appointment of a receiver, it will not be permitted to attack the appointment, provided the consent has been given voluntarily: *Royal Bank v. Lane* (1991), 10 C.B.R. (3d) 307, 81 Alta. L.R. (2d) 289, 1991 CarswellAlta 299, [1991] 6 W.W.R. 344, 2 B.L.R. (2d) 109, (*sub nom. ABC Color & Sound Ltd. v. Royal Bank*) 117 A.R. 271, 2 W.A.C. 271 (C.A.), leave to appeal to S.C.C. refused 10 C.B.R. (3d) 307n, [1992] 2 W.W.R. lxxiii (note), 125 A.R. 160 (note), 14 W.A.C. 160 (note), 138 N.R. 407 (note). If there is no danger to the property that is the subject-matter of the proceedings, and the appointment of a receiver would have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 7 C.B.R. (3d) 216, 95 Sask. R. 211, 1991 CarswellSask 42 (Q.B.).

The Ontario Superior Court of Justice, on a motion by a court-appointed receiver to approve a sale of assets to a secured creditor, held that it will show considerable deference to the receiver and will be disinclined to second-guess the various decisions of the receiver in connection with the sales process and the adequacy of the receiver's efforts. The court also held that a receiver's insistence for compliance with a deadline for the submission of offers in accordance with the sales process does not detract from the inherent fairness of the sales process and ensures that all interested parties will be governed by the same ground rules and the same deadlines; the receiver accorded no unfair advantage to the secured creditor in insisting on compliance with the offer deadline: *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 2005 CarswellOnt 1846, 11 C.B.R. (5th) 207 (Ont. S.C.J.), additional reasons at (2005), 2005 CarswellOnt 243 (Ont. S.C.J.).

It is not unreasonable for a receiver and manager to require the secured creditor that is seeking the appointment to indemnify it against any claims arising out of the proper performance of its duties: *Bank of Montreal v. Lundrigans Ltd.* (1992), 12 C.B.R. (3d) 170, 92 D.L.R. (4th) 554, 100 Nfld. & P.E.I.R. 36, 318 A.P.R. 36, 1992 CarswellNfld 17 (Nfld. T.D.).

If a security document, assigning rents and leases, gives power to appoint an agent to manage the mortgaged premises, this document will not confer authority to the creditor to appoint a receiver and manager of the debtor's entire business: *Standard Trust Co. (Liquidator of) v. Turner Crossing Inc.* (1992), 15 C.B.R. (3d) 79, [1993] 2 W.W.R. 382, 1992 CarswellSask 31 (Sask. Q.B.).

Under the Ontario *Business Corporations Act,* a trustee under a trust indenture cannot be appointed as a receiver or receiver and manager of the assets of the debtor corporation or of a guarantor of the debt obligations under the trust indenture. If the appointment of a receiver or a receiver and manager is required, the person appointed must be some person other than the trustee under the trust indenture.

If a person has been appointed as receiver, the person cannot be appointed as trustee in bankruptcy unless the person complies with the provisions of s. 13.3(2). If a person has been appointed as trustee in bankruptcy, the person cannot be appointed as receiver unless the person complies with the provisions of s. 13.4. See *post* L§4 "Effect of Bankruptcy on the Appointment of Receiver and Manager".

In *Re Terrace Sporting Goods Ltd.* (1979), 31 C.B.R. (N.S.) 68 (Ont. S.C.), a receiver of a company to which a debtor owed money filed a petition in bankruptcy in which he named himself as the suggested trustee in bankruptcy. In making the receiving order, the court appointed the receiver as trustee. In these circumstances, the trustee is required at the first meeting of creditors to comply with s. 13.4 of the Act.

In *Skyroters Ltd. v. Bank of Montreal* (1980), 34 C.B.R. (N.S.) 238 (Ont. S.C.), a company associated with the auditor for the debtor company was appointed receiver. While pointing out the undesirability of such an appointment, the court found that in the circumstances of the particular case, the matter was not of significance.

The Ontario Divisional Court held that it is appropriate to appoint a receiver at the request of a secured creditor in the context of a debtor's *CCAA* proceedings and to permit the secured creditor to enforce on its security where there is evidence before the court that the assets and property subject to the secured creditor's security are in jeopardy of material deterioration: *I.F. Propco Holdings (Ontario) 36 Ltd. v. 1228851 Ontario Ltd.* (2002), 2002 CarswellOnt 6613, [2002] O.J. No. 1667 (Ont. Div. Ct.).

The defendant debtor moved to set aside an *ex parte* order appointing an interim receiver on the basis of an error in principle and the plaintiff creditor moved to appoint a receiver over the defendant. The Ontario Superior Court of Justice declined to review the decision to appoint the interim receiver as the appropriate remedy would have been an appeal. The court, having reviewed the facts, then appointed a receiver. The court held that the question of appearance of lack of impartiality must be approached from the perspective of a reasonable and intelligent person who is objective and in possession of the relevant facts; and here, the evidence was that the receivers in Canada and the U.K. were members of the same franchise, but there was no overlapping ownership and no profit sharing between them, they were not the same entity, and there was no evidence of actual lack of impartiality: *Westernbank Puerto Rico v. Inyx Canada Inc.* (2007), 2007 CarswellOnt 5470, 36 C.B.R. (5th) 133 (Ont. S.C.J.).

Where a defendant owed a plaintiff funds as the result of indebtedness from a previous guarantee and the plaintiff obtained default judgment, the court dismissed the plaintiff's motion to appoint a receiver by way of equitable execution to liquidate the assets of the defendant. The court held that no evidence was presented to warrant appointment of a receiver, the defendant had not attempted to contrive a corporate structure to defeat creditors, it had been honest and forthright about assets, and the plaintiff still had the remedy of requesting the sheriff seize share certificates to satisfy the judgment: *Pacific & Western Bank of Canada v. Chyzyk* (2007), 2007 CarswellSask 644, 2007 SKQB 421, 38 C.B.R. (5th) 118 (Sask. Q.B.).

Factors to consider in the determination of whether it is appropriate to appoint a receiver include: (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; (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 in 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 that 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 on the parties; (1) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver. The court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. Here, it was just and convenient to grant a receivership order. The receiver would be authorized to engage only in such sales as would occur in the ordinary course of business, and the order appointing the receiver did not authorize the receiver to have conduct of the sale of the business, although the creditor could renew the application for sale in the event of a material change of circumstances: *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 2010 CarswellBC 855, 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]).

The Ontario Superior Court of Justice confirmed the appointment of a private receiver, but in doing so, the court broadened the inquiry beyond a review of the required elements of default under the security agreement. Given that there had previously been an unsuccessful receivership application, the court considered the confirmation application as if it were a fresh receivership application: *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 2010 CarswellOnt 3588, 68 C.B.R. (5th) 287 (Ont. S.C.J.).

The Alberta Securities Commission held hearings regarding allegations of misrepresentation and fraud, and found that the principals of the debtor companies were responsible for false or misleading statements in offering materials and had engaged

in conduct that amounted to fraud on the shareholders. The Alberta Court of Queen's Bench granted a motion by the investors to appoint a receiver. There was a real risk of irreparable harm in the wasting of the debtor companies' assets. The receiver would be able to preserve assets and investigate the whereabouts of any other assets. There was no evidence of harm to the debtor companies by placement of the receiver: *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.).

The Ontario Superior Court of Justice reviewed the basis for the appointment of a receiver under s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (*CJA*). Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days, referencing *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 1989 CarswellOnt 191, 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 62 D.L.R. (4th) 277 (Ont. C.A.); and *Toronto Dominion Bank v. Pritchard* (1997), 1997 CarswellOnt 4277, 154 D.L.R. (4th) 141 (Ont. Div. Ct.), leave to appeal refused (1998), 1998 CarswellOnt 641 (Ont. C.A.). Under the loan agreements, the credits were on demand, and as well, the creditor had the right to cancel the credits at any time at its sole discretion and over 70 days had passed since demand for payment was made. Under s. 243 of the *BIA* and s. 101 of the *CJA,* a court may appoint a receiver if it is "just and convenient to do so", having regard to all the circumstances and, 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 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. 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. Here, it was preferable to have a court appointed receiver rather than privately appointed receiver. The prospect of more litigation was a consideration: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, 2011 ONSC 1007 (Ont. S.C.J.).

See Peter P. Farkas, "Why are There so Many Court-Appointed Receiverships?", 20 Nat. Insol. Rev. 38; Paul Macdonald and Brett Harrison, "Receivership Orders — Where Do We Go From Here?", 21 Nat. Insol. Rev. 65.

The Ontario Court of Appeal dismissed the appeal of a debtor from an order appointing a receiver. In so doing, the court commented on the jurisdictional basis for granting the order: *Prime Restaurants of Canada Inc. v. 1470568 Ontario Ltd.* (2010), 2010 CarswellOnt 10203 (Ont. S.C. [In Chambers]), affirmed by (2011), 2011 CarswellOnt 126, 73 C.B.R. (5th) 257, 2011 ONCA 9 (Ont. C.A.).

The Ontario Superior Court of Justice appointed a receiver over a business notwithstanding pending appeal of arbitration. The court held that the hope of winning an arbitration appeal should not result in an open time limit to repay the outstanding amount where the demand had been made three months ago. The GSA held by a creditor entitled it, on the occurrence of a demand that had not been cured, to appoint a receiver or to apply to a court for the appointment of a receiver. Newbould J. noted that although more than three months had passed since demand was made, the debtor company had not cured the default and had committed four further payment defaults. Justice Newbould observed that a reasonable time for payment is permitted before a receiver will be appointed by a court; however, if difficulties in obtaining replacement financing do not permit an open-ended time for repayment beyond days, the hopes of winning an arbitration appeal could not put a debtor on any stronger basis. Justice Newbould accepted the creditor's view that if the debtor was unable to pay for inventory when due, it would face the choice between continuing to ship inventory without any reasonable likelihood of payment and insisting on COD terms for inventory, which would either increase its financial exposure or suffer reputational effects. Newbould J. was concerned about the quality of management and the negative prospects for a turnaround of the negative equity. The court appointed a receiver with the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator were to be successful, it would be open to the debtor to apply to vary or rescind the order: *Canadian Tire Corp. v. Healy* (2011), 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]).

The Ontario Divisional Court dismissed a motion for leave to appeal an order appointing an investigative receiver. The motions judge, Brown J., had concluded that the respondents had not been completely forthcoming to the trustee about the financial transactions; there were serious concerns about the flow of funds between the bankrupt respondents and use of those funds; misrepresentations were made to the trustee and the court about the true state of certain proceeds from the retirement residences;

and there were serious questions whether the debtor's investment in the retirement residences was by way of debt or equity. On review, Justice Lederman held that Brown J. had considered the principles applicable to the appointment of a receiver under s. 101 of the *Courts of Justice Act*. The motion judge had also applied the test for interlocutory injunctions and determined that it was just and convenient to appoint a receiver. The order of Brown J. made it clear that the receiver was to have limited powers and was not to operate the business or take possession of the assets, and the debtor was to remain in possession of its current and future assets and could continue to carry on business in a manner consistent with the preservation of its business and property. The appointment of an investigative receiver in the circumstances was just and convenient to assist the trustee in fulfilling its mandate to ascertain the true state of affairs. The motion was dismissed: *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 8054, 81 C.B.R. (5th) 265, additional reasons at (2011), 2011 CarswellOnt 10661, 2011 ONSC 5699 (Ont. Div. Ct.).

The Ontario Superior Court of Justice granted a receivership order under the Ontario *Securities Act*. The debtors, supported by their creditors, took the position that the receivership was not necessary. Certain creditors also contended that there was no jurisdiction to appoint the receiver under the *Securities Act* on constitutional grounds. Section 129 of the Act permits the Ontario Securities Commission (OSC) to apply to the court for an order appointing a receiver. Such an order may be made where the court is satisfied that the appointment is in the best interest of the company's creditors or the security holders or if it is appropriate for the due administration of Ontario securities law. The court was satisfied that the appointment of the receiver was in the best interests of the creditors and that it was appropriate for the due administration of Ontario securities law. Justice Morawetz held that the criteria for determining what is in the best interest of creditors, security holders for the purposes of the appointment of a receiver pursuant to securities legislation, was broader than the solvency test. The criteria should take into consideration all the circumstances and whether in the context of the circumstances it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders, the court citing *Ontario (Securities Commission) v. Factorcorp Inc.* (2007), 2007 CarswellOnt 7515, [2007] O.J. No. 4496 (Ont. S.C.J.), and *Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.* (2009), 2009 CarswellOnt 4241 (Ont. S.C.J. [Commercial List]). Further, the court held that where there is a history of mismanagement, no evidence of an alternative resolution, evidence that investors' interests will not be served by maintaining the *status quo* and evidence that the company is not in a better position than a receiver to protect investors' interest, it is appropriate to appoint a receiver. In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of the assets purchased with investor funds had been compromised, it is in the investors' best interest that a receiver be appointed, such that the investors are provided with an independent and verifiable review and analysis. Morawetz J. was of the view that an assessment of whether the appointment of a receiver is appropriate for the due administration of Ontario securities law must take into consideration the purposes of the Act, specifically, whether such an appointment is consistent with the goals of protecting investors and protecting the integrity of the capital markets. In this respect, Morawetz J. noted that, pursuant to s. 122 of the Act, it is an offence to mislead staff of the OSC during the course of an examination taken as part of an investigation. Justice Morawetz observed that the remedy of an appointment of a receiver takes into account the importance of a neutral court officer to oversee the claims process, the evaluation process and to provide appropriate recommendations as the administration of the estate: *Ontario Securities Commission v. Peter Sbaraglia, Mandy Sbaraglia, CO Capital Growth Corp. and 91 Days Hygiene Services Inc.* (December 23, 2010), Morawetz J. (Ont. S.C.J.).

The Ontario Superior Court of Justice granted a receivership order and dismissed the debtors' cross-application for an initial order under the *CCAA*. There had been ongoing default by the debtors in respect of their obligations to the secured creditors; and at the time of one advance, the debtors were in breach of their representations in a credit facility agreement. Justice Mesbur noted that a forbearance agreement also contained a promise from the debtors not to commence any restructuring or reorganization proceedings under the *BIA* or *CCAA*. Since the forbearance agreement, the debtors' financial position had deteriorated further, and the creditor terminated the forbearance agreement and advised that it would apply to court to have a receiver appointed. In determining whether a receiver should be appointed, the court will consider all the circumstances of the case, particularly, the effect on the parties of appointing the receiver, including potential costs and the likelihood of maximizing return on and preserving the subject property; the parties' conduct; and the nature of the property and the rights and interests of all parties in relation to it. The fact that the creditor has a right to appoint a receiver under its security is an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets. In this case,

the credit agreement itself specifically contemplated appointing a receiver. Given the debtors' failure to come up with even a rudimentary restructuring plan, the court found that it was time for a receiver to take control and manage the business to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders: *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench appointed a receiver over two properties, one of which was an operating hotel. Subsequently, the court amended and expanded the receivership order to include a related entity that was discovered to have operations intrinsically involved with the entities in receivership: *Romspen Investment Corp. v. Hargate Properties Inc.* (2011), 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49, 2011 ABQB 759 (Alta. Q.B.).

The Ontario Superior Court of Justice granted an application for the appointment of a receiver over the objections of the debtor, who had argued that it was not proper to proceed by way of application that gave rise to a final order as opposed to an interlocutory order. Justice Morawetz found that it was an application to appoint a receiver that resulted in a final order and the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver. Morawetz J. noted that the contractual remedy provided for in the mortgage that contemplated the appointment of receiver was such that the relief could not be seen to be extraordinary in nature: *Business Development Bank of Canada v. 2197333 Ontario Inc.* (2012), 2012 CarswellOnt 2062, 2012 ONSC 965 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed an application to appoint a receiver and manager and to approve a "quick flip" to a related party. The distinctive feature of the application was that the applicant secured creditor, debtor and purchaser were related entities, sharing common ownership. Brown J. was of the view that the circumstances typically necessitating the appointment of a receiver were not present in this case and the applicant did not lead evidence identifying the need for a court order in order to ensure that the receiver could do its job. Justice Brown inferred from the materials that the reason the applicant sought a court appointment of a receiver had more to do with the terms of the approval of the proposed sale, i.e., effectively dispensing with the requirement to comply with Part V of the Ontario *PPSA*, which would apply in the case of an appointment of a private receiver, than with the need of the secured creditor for the assistance of the court in enforcing its rights. A court will consider (i) whether the receiver has made a sufficient effort to get the best price and has not act improvidently, (ii) the interests of all parties, (iii) the efficacy and integrity of the process by which offers are obtained, and (iv) whether there has been unfairness in the working out of the process. The duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to related party, the overall fairness of the proposed related-party transaction. Brown J. was not satisfied that there was evidence demonstrating that close scrutiny had been made by the proposed receiver of the validity of the security. The lack of such evidence was particularly troublesome because a proposal under the *BIA* was reported as not a viable option because that creditor was unwilling to compromise its secured debt. Finally, the court was concerned that no valuation of the assets was filed, and concluded that there was a lack of evidence to assess whether the proposed receiver acted to get the best price and did not act improvidently. The dismissal was on a without prejudice basis to the ability of the applicant to reapply on better evidence: *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 2012 CarswellOnt 5829, 89 C.B.R. (5th) 78, 2012 ONSC 2788 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench, in the context of an oppression application, reviewed the considerations to be taken into account on an application to appoint an inspector and an interim receiver. Section 231 of the Alberta *Business Corporations Act* ("ABCA") grants the court the authority to appoint an inspector to conduct an investigation of a corporation. Justice Lee held that in order to have an inspector appointed, there must be an appearance of behaviour that is oppressive, unfairly prejudicial, or unfairly disregarding to the applicants' interests, or an appearance of fraud or dishonesty in connection with the formation, business or affairs of the corporation. Oppression and fraud do not have to be proven, but must appear as a distinct possibility, the judge citing *Kowch v. Gibraltar Mortgage Ltd.* (2010), 2010 CarswellAlta 2780, 90 C.B.R. (5th) 84 (Alta. Q.B.). Lee J. held that the standard of proof is one of "appearance, an outward show" of oppressive or fraudulent behaviour, citing *Western Canadian Oil Management Services Inc. v. Arlyn Enterprises Ltd.* (2008), 2008 CarswellAlta 1173, 2008 ABQB 521 (Alta. Q.B.). With respect to the appointment of an inspector, Lee J. noted that it was an extraordinary remedy and the following considerations should be assessed prior to granting such an order: whether the applicants still need access to important information; whether there are better routes, such as litigation, which can be used to acquire that information; and whether

an investigation is prohibitively expensive, in light of the corporation's resources. The primary purpose of an investigation is to bring to light facts that otherwise might be inaccessible to shareholders and security holders. Justice Lee also held that the appointment of receiver-manager is an extraordinary remedy, which should be used sparingly, having regard to all of the circumstances. The test for the appointment of a receiver-manager is comparable to that of the test for injunctive relief. The test for injunctive relief consists of: there must be a serious issue to be tried; it must be determined that the applicant would suffer "irreparable harm" if its application was refused; and an assessment must be made to determine which of the parties would suffer greater harm on the granting or the refusal of the appointment of a receiver-manager pending a decision on the merits, the "balance of convenience" test. In this case, while there was a serious issue to be tried, the applicant had not established irreparable harm necessitating the appointment of a receiver-manager to remedy. This case did not involve the need to preserve or protect the property of the companies: *Murphy v. Cahill* (2012), 2012 CarswellAlta 1198, 2012 ABQB 446 (Alta. Q.B.).

See Joe Healey, "Case Comment: In the Matter of the Receivership of Paramount Truck Lines Ltd. — Whose Cost is it Anyway?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) 849-860.

The Alberta Court of Queen's Bench reviewed the appointment of a receiver, as well as the scope of the general security agreement in terms of whether it was enforceable against oil and gas under the ground, once the oil and gas came out of the ground. Justice Lee noted that the Alberta Court of Appeal in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 2009 ABCA 127, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) stated that a remedial order to appoint a receiver "should not be lightly granted" and the chambers judge should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; carefully balance the rights of both the applicant and the respondent; and consider the effect of granting the receivership order, and if possible use a remedy short of receivership. Justice Lee found that the security documentation in this case authorized the appointment of a receiver. After applying the factors, Lee J. came to the conclusion that a remedial order to appoint a receiver and manager was just, convenient and appropriate in the circumstances. Justice Lee also concluded that the oil and gas lease, which granted a right or licence to access, drill for and extract the resource or substance from the ground, was a proprietary interest within the purposive contemplation of Alberta's *PPSA*. The receivership order was granted; however, the receiver was to have no power of sale, except as further ordered by the court, until a specified date: *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 CarswellAlta 153, 99 C.B.R. (5th) 178, 2013 ABQB 63 (Alta. Q.B.).

The Ontario Superior Court of Justice analyzed the basis for approval of a "pre-pack" credit bid sale in a proposed receivership of debtors that operated four retirement residences. Justice Brown noted that "quick flip" or pre-pack transactions are becoming more common in the distress marketplace. In certain circumstances, a quick flip involving the appointment of a receiver and then immediately seeking court approval of a pre-packaged sale transaction may well represent the best, or only, commercial alternative to a liquidation, citing *Re Tool-Plas Systems Inc.*, 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]). The court will still assess the need for a receiver and the reasonableness of the proposed sale and will scrutinize with care the adequacy and the fairness of the sales and marketing process in quick flip transactions. The court will assess the impact on various parties and whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed. Justice Brown noted that the need for such a robust and transparent record is heightened where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors. On the evidence, Brown J. was satisfied that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thus ensuring a place to live for the residents and maintaining current levels of employment. The record confirmed a professional and prolonged effort to elicit interest in the properties from third party purchasers; but it appeared that market conditions were such that interest could not be generated at a level that would cover the senior secured indebtedness. Brown J. was satisfied that the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances and that the proposed sale agreement gave proper treatment to claims: *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 CarswellOnt 15278, 2013 ONSC 6905 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed a receiver over the books and records of the corporate defendants. After an extensive review of the facts, Newbould J. commenced his analysis by referencing s. 101 of the Ontario *Courts of Justice Act*, which provides that a court may appoint a receiver where it appears to the court to be just or convenient to do so. A court must have regard to the circumstances of the case and the rights of the parties. The court held that there was no pre-condition to the exercise of the court's discretion to appoint a receiver. Each case depends on its own facts, and in this case, the court found that a strong case in fraud had been established and that equity cried out for the need to have all books and records produced. While proving a strong case in fraud can obviously be of great significance in establishing the need for a receiver, Newbould J. was of the view that it was not a *sine qua non*. However, in this case, there had been established a strong case in fraud. Justice Newbould was also of the view that the solicitor's trust records were of crucial importance to understanding what had happened to the money. In the result, Newbould J. concluded that the plaintiff was entitled to the appointment of a receiver: *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial list]).

The Ontario Superior Court of Justice reviewed the governing principles respecting the appointment of a receiver-manager. The Court held that the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly. The appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy. There must be due consideration for the effect on the parties, as well as consideration of the conduct of the parties. The court must have regard to all the circumstances, but in particular, the nature of the property and the rights and interests of all parties. Evidence of irreparable harm must be clear and not speculative. An assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. After considering all of the material filed by counsel, Maranger J. came to the conclusion that it was not appropriate, in this case, to appoint a receiver-manager. It should be noted that this case did not involve a contractual right to appoint a receiver after default: *McMurtry v. McMurtry*, 2013 CarswellOnt 17380, 14 C.B.R. (6th) 306, 2013 ONSC 7259 (Ont. S.C.J.), additional reasons 2014 CarswellOnt 1766, 14 C.B.R. (6th) 314, 2014 ONSC 1002 (Ont. S.C.J.).

The British Columbia Supreme Court considered competing applications relating to the debtor. One group sought protection under the *CCAA*. The other group applied for the appointment of a receiver. The project involved the development of a small scale LNG liquefaction facility which was planned to be in operation for the gas year 2015-16. Justice Masuhara held that in regard to obtaining a stay and the appointment of a monitor under the *CCAA*, the test generally is where the circumstances exist that make the order appropriate. As stated in s. 11, the debtor is required to show that there is a reasonable possibility of a restructuring. Masuhara J. was of the view that an opportunity to form a plan was warranted. The application for a stay of the initial one-month period was granted. Masuhara J. noted that certain entities did not neatly fit within the definitions of the *CCAA*; however, the court exercised its broad authority to include those entities under an initial order. Masuhara J. observed that resolution would probably have to occur within a narrow window. Therefore, the inclusion of these entities would be appropriate and Masuhara J. was not aware of any prejudice at this point that would affect the inclusion. The Court concluded that there was a reasonable possibility for a restructuring and *CCAA* protection was granted: *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 CarswellBC 3990, 2013 BCSC 2358 (B.C. S.C.).

In additional reasons in the proceeding of *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]), the Ontario Superior Court of Justice considered cost submissions and fixed costs of the plaintiffs at approximately $250,000. Justice Newbould observed that in dealing with costs on a partial indemnity basis, Rule 57.01(1) provides that a court may consider a number of factors. While the language is "may" rather than "shall", generally most or all of these factors enter into the equation in any case. Overall, the objective is to fix an amount that is fair and reasonable to the unsuccessful party; it is not a line by line exercise. Newbould J. observed that in this case, no information whatsoever was provided as to how the amounts were arrived at. In addition, Newbould J. observed that none of the defendants had provided any information as to the hours spent by their counsel on any particular task for the billing rates actually charged. Justice Newbould observed that in many commercial cases, it is more difficult for a plaintiff to construct a case than to defend it. The plaintiff

is on the outside looking in, whereas the defendant knows what he or she has been about. In this particular case, Newbould J. stated that the problem had been exacerbated by the complete lack of accounting that should have been provided to the plaintiff and by the steps taken to thwart the plaintiff and advisors from reviewing relevant records both before and after this action was commenced. Newbould J. noted that these issues were referred to in his previous endorsement in which he held that the plaintiff had established a strong case in fraud and very serious breaches of agreement. The fact that the hearing of the motion took just under one day did not mean that the matter was simple dispute. After taking into account the factors contained in Rule 57.01(1), including what amounts the unsuccessful defendants in this case could reasonably expect to pay, and considering what was fair and reasonable to the defendants, Newbould J. fixed the fees to be paid to the plaintiff: *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court reviewed the factors to be considered by the court on a motion to appoint a receiver: (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; (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 in 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 that should be granted cautiously and sparingly; and (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently. Here, Edwards J. concluded that it was just and convenient to appoint a receiver and manager of the undertaking, property and assets: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 2014 NSSC 128 (N.S. S.C.).

The Ontario Superior Court of Justice was faced with competing applications for the appointment of a receiver and the making of an initial order under the *CCAA*. Five of the *CCAA* applicants owned vacant land and operated as land holding companies. They had no employees. Justice Brown described the condo project as involving a partially constructed residential building. The trades had registered six construction liens against the project, with certificates of action registered. Construction had ceased on the project. Justice Brown noted that both an order appointing a receiver and an initial order under the *CCAA* require a court to consider and balance the competing interests of the various economic stakeholders, and the specific factors to be taken into account are very circumstance-oriented. Justice Brown noted that the evidence established the indebtedness of borrowers on the loan, the maturing of the loan facility, the demands for payment, the failure the borrowers to repay the amount demanded, and the validity of the security held on the properties. Those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. Brown J. found that the evidence established that it was the failure of the borrowers to abide by the terms of the commitment letter, as amended by second supplements and a forbearance letter, which led them to commit acts of default. Justice Brown found no confidence in the borrowers/*CCAA* applicants' ability to complete the construction of the project; found the proposed financing for the *CCAA* proceedings would be wholly inadequate to complete construction; and there was no credible evidence to suggest that the *CCAA* applicants were anywhere close to finding sources to fund the costs to complete construction and to resolve the existing lien claims. In the result, Brown J. dismissed the application for an initial order under the *CCAA* and appointed a receiver and construction lien trustee: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 7939, 19 C.B.R. (6th) 131, 2014 ONSC 3480, [2014] O.J. No. 273 (Ont. S.C.J. [Commercial List]).

A creditor sought appointment of a debtor company whose principals were embroiled in divorce proceedings and the debtor was in default on payments and had ceased to operate. The court granted the motion for appointment of a receiver, finding that it was unlikely the principals would ever be able to address the debts; the applicant creditor had given ample opportunity for them to turn around the business; and the business was insolvent and not in operation for some time. The court endorsed factors cited in a number of judgments, and in this case, made a decision based on the risk to the security holders and the need to safeguard the assets; a reasonable apprehension of depletion or waste of the assets; the fact that the creditor had a right to

appoint a receiver; the need for a court appointment of receiver to enable the receiver to carry out its duties more effectively; the conduct of the parties in failing to make any reasonable progress in finding alternative financing to repay the indebtedness and in failing to devise a reasonable business plan; and because it was the most practical and prudent approach to maximizing return to the parties, including the unsecured creditors, to proceed with a sale: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 2014 NSSC 128 (N.S. S.C.).

The Ontario Superior Court of Justice awarded costs to the successful applicant in a receivership application. Costs were awarded on a full indemnity basis, but the court reduced the amount sought to an amount that the court felt was reasonable in the circumstances. Justice Brown held that while the applicant was entitled to full indemnity costs by virtue of the mortgage, a contractual right to the costs of enforcement proceedings is subject to the court's overriding duty to ensure that costs awarded are fair and reasonable. When a party, relying on a contractual term, seeks an award of full indemnity costs, the party must demonstrate that the costs sought are reasonable full indemnity costs. Brown J. noted that the principle of indemnification for reasonable costs requires the appropriate delegation to less expensive time-keepers of legal tasks that do not require the skill and expertise of a senior counsel. Where, because of the size of the firm, delegation may not be possible, then a party can only seek recovery for the less skilled work performed by senior counsel at a lower rate commensurate with the nature of the work. Consequently, Brown J. determined that some reduction of the applicant's costs was merited and he fixed the reduction at 10% of the amount of legal fees claimed. In addition, Brown J. determined that the 33.9 hours claimed by senior counsel for research in the basic tests for the appointment of a receiver and the granting of an initial *CCAA* order was excessive and he allowed five hours. The amount claimed for reply materials was excessive and the court reduced it by approximately 50%: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 CarswellOnt 7939, 19 C.B.R. (6th) 131, 2014 ONSC 3480 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted a receivership order against the debtor notwithstanding that its wholly owned Colombian subsidiary had filed for creditor protection in Colombia. Newbould J. noted that in accordance with the facility agreement, the occurrence of an event of default granted the creditor the right to seek the appointment of a receiver. As well, s. 101 of the Ontario *Courts of Justice Act* permits the appointment of a receiver where it is just or convenient. The court must have regard to all circumstances, but in particular, the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver, because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. Justice Newbould accepted that, in the circumstances, the appointment of a receiver was necessary to stabilize the corporate governance: *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, 2014 CarswellOnt 12419, 18 C.B.R. (6th) 300, 2014 ONSC 5205 (Ont. S.C.J. [Commercial List]).

The Court of Appeal for Ontario set aside a number of orders in a receivership proceeding. The Court reviewed cases in which a receiver was appointed with powers to investigate (an "investigative receiver"). Blair J.A. stated: "The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course." Justice Blair noted that the primary evidence in support of the application was a three-page affidavit sworn by the respondent and copies of affidavits from Canada Revenue Agency (CRA). The materials did not disclose that the CRA investigation had been terminated four months before the respondent brought the *ex parte* application. Through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities. Justice Blair noted that all of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act* (*CJA*), which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Blair J.A. specifically noted that the appeal did not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor did the appeal concern a class proceeding or other form of representative action. Blair J.A. held that it was apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity and was intended to empower the receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond the respondent. Blair J.A. set aside the receivership orders as

they stood on a fundamentally flawed premise and were unjustifiably overreaching in the powers they granted. Blair J.A. noted the procedural concerns arose out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure. Blair J.A. discussed the relatively new notion of an "investigative receiver", so named for the powers the receiver is granted. In addressing the framework of the proceeding, Blair J.A. noted that the initial and subsequent orders were sought and obtained by relying on s. 101 of the *CJA*. The respondent was an unsecured judgment creditor with a judgment based on fraud. Blair J.A. contrasted this situation with the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order, rather than by private appointment. He also noted that this case did not involve the appointment of a receiver under insolvency legislation, such as the *BIA* or under the *Securities Act*. Blair J.A. noted that the idea of appointing a receiver or monitor with investigative powers has emerged in recent years. The Court of Appeal had not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. Blair J.A. acknowledged that the idea of appointing a receiver to investigate into the affairs of a debtor is not in itself unsound. Rather, it is the runaway nature of the use to which the concept had been put in this case that gave rise to the problem. Justice Blair held that whether it is labelled an "investigative" receiver or not, there is much to be said in favour of such a tool, when it is utilized in appropriate circumstances and with appropriate restraints. There are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions, including even, in proper circumstances, the affairs of and transactions concerning related non-parties, would be a proper exercise of the court's "just and convenient" authority under the *CJA*. Justice Blair stated that the principles governing the appointment of any receiver remain in play. Two "bookend" considerations are particular germane. On the one hand, the authority of the court to appoint a receiver where it appears just or convenient to do so is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, the appointment of a receiver is an extraordinary and intrusive remedy, and should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. Blair J.A. stated that it is the tension between these two considerations that defines the parameters of receivership orders in aid of execution. Blair J.A. noted that the authorities have held that: the appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to discovery; the primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations; generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property; and finally, in all cases, the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. Justice Blair cautioned that *ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons. It is otherwise impossible to determine subsequently what was at issue and the basis for the order made. Blair J.A. acknowledged that the application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard was entitled to deference. However, Blair J.A. was of the view that the failure to disclose that the very investigation on which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure. The initial and subsequent orders were set aside: *Akagi v. Synergy Group (2000) Inc.*, 2015 CarswellOnt 7407, 25 C.B.R. (6th) 260, 2015 ONCA 368 (Ont. C.A.).

A secured creditor applied pursuant to s. 243(1) of the *BIA* for the appointment of a receiver over substantially all the assets of the debtor. The debtor was a "farmer" within the meaning of the Saskatchewan *Farm Security Act*, S.S. 1988-89, c. S-17.1 (*FSA*) and contested the appointment. The *FSA* requires a creditor to submit a notice of intention, wait a 150-day notice period, and engage in mandatory review and mediation. The trial judge found no conflict between the provisions of the *BIA* and the *FSA*; the Court of Appeal overturned that decision and the Supreme Court of Court allowed a further appeal, setting aside the Court of Appeal's finding. The Supreme Court of Canada held that under the doctrine of federal paramountcy, a conflict arises where there is operational conflict or where the operation of provincial law frustrates the purpose of the federal enactment. Paramountcy is to be narrowly construed, favouring harmonious interpretations. Here, there was no operational conflict as it was possible to comply with both statutes. Section 243 of the *BIA* has the simple purpose of establishing a regime for appointment

of a national receiver, aimed at avoiding a multiplicity of proceedings and resultant inefficiency. Under the *BIA*, appointment of a national receiver cannot be made before expiry of the 10-day notice period. Part II of the *FSA* affords protection to farmers against loss of farmland by imposing a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. The Court further held that the provisions did not frustrate the purpose of the federal legislation. The words and discretionary nature of s. 243 of the *BIA* do not suggest that it is a comprehensive remedy exclusive of provincial law. The evidence did not support the argument that the 150-day period frustrated the purpose of allowing for appointment of a national receiver. The *FSA* was not constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, 2015 SCC 53 (S.C.C.).

Two individuals carried on business through a nominee corporation "L". The defendant was the auditor for L. The two individuals manipulated L's financial records and were later convicted of fraud. The Supreme Court of Canada ("SCC") held that the auditor should not be liable for L's increase in liquidation deficit that followed the auditor's provision of negligent services in relation to solicitation of an investment. The auditor helped prepare and approved of a press release that misrepresented the basis for reporting of profits arising from an agreement; and the release was prepared on the eve of a public offering for which the auditor was to prepare a "comfort letter". The purpose of these documents was to inform investors of L's financial position. However, the Court held the auditor liable for the increase in L's liquidation deficit that followed the statutory audit. Shareholders were unable to discharge their function of supervising management and safeguarding the interests of the corporation by reason of the auditor's negligence. As a consequence, L's corporate life was artificially prolonged, resulting in deterioration of its finances. There was sufficient evidence of liability based on impaired shareholder supervision. The SCC held that an auditor may owe a duty of care to its client in relation to a particular undertaking. Stage one of the inquiry is to assess "proximity" in the *prima facie* duty of care analysis, which entails asking whether the parties are in such "close and direct" relationships that it would be "just and fair having regard to that relationship to impose a duty of care in law." If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. So long as a risk of foreseeable injury can also be shown, or has already been shown through an analogous precedent, the first stage of the inquiry is complete. However, the SCC held that a finding of proximity based on a previously established or analogous category must be grounded not only on the identities of the parties, but on examination of the specific relationship at issue in each case. Where an established proximate relationship cannot be found, the court must undertake a "full proximity analysis" to determine whether a close and direct relationship exists that gives rise to a common law duty of care. In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance, which gives rise to an obligation by the defendant to take reasonable care. The "end and aim" principle limits liability of the basis that the defendant cannot be liable for a risk of injury against which he or she did not undertake to protect. By assessing all relevant factors arising from the relationship between the parties, the proximity analysis determines the existence of a relationship of proximity and the scope of rights and duties that flow from the relationship. Reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence. An injury to a plaintiff will be reasonably foreseeable if the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation, and such reliance would be reasonable in the circumstances. Both proximity and reasonable foreseeability must be proven in order to establish a *prima facie* duty of care. Where a *prima facie* duty of care is recognized, the analysis advances to stage two: are there any "residual policy considerations" that may negate the imposition of a duty of care? By residual, the SCC held that it meant considerations not concerned with the relationship between the parties. Only in rare cases should liability be denied. The SCC held that the trial judge and the Court of Appeal erred because no *prima facie* duty of care arose in respect of the defendant's assistance in soliciting investment and the resulting increase in the debtor's liquidation deficit. However, there was nothing to negate the duty of care in the 1997 audit and the trial judge did not err in finding that the defendant auditor should not have signed off on the audit. The auditor violated its duty of care and should be liable for the increase in the debtor's liquidation deficit that followed that breach of the duty: *Deloitte & Touche v. Livent Inc (Receiver of)*, 2017 CarswellOnt 20138, 2017 CarswellOnt 20139, [2017] 2 S.C.R. 855, 55 C.B.R. (6th) 1, 2017 SCC 63 (S.C.C.).

The Ontario Superior Court of Justice dismissed the motion of the borrowers who had sought to set aside the consent judgment granted in favour of the bank. The borrowers had provided security to the bank that expressly provided that, in the event of default by the borrowers, the bank was entitled to demand payment of the entire indebtedness owing by the borrowers and to

appoint a receiver and/or receiver-manager. The borrowers' financial situation deteriorated, the bank agreed to a moratorium on principal payments to a specified date and the parties later entered into a forbearance agreement following a mediation. The borrowers did not honour that agreement or two further forbearance agreements. The bank obtained a receivership order, and subsequently entered into a consent judgment. Justice Beaudoin agreed that a misrepresentation may be sufficient to set aside an order made on consent, but the evidence of any such misrepresentations must meet a strict test. After reviewing the evidence, Beaudoin J. concluded that there was no evidence of any misrepresentation that would justify the setting aside of the consent termination order. Moreover, Beaudoin J. found that the receiver had fulfilled its obligation to disclose relevant information. In the result, the borrowers' motion was dismissed; there was no genuine issue requiring a trial and summary judgment was granted dismissing the claims against the bank and the receiver in the subsequent action by application of the doctrine of *res judicata: Bank of Montreal v. Cardinal*, 2016 CarswellOnt 4233, 34 C.B.R. (6th) 196, 2016 ONSC 1980 (Ont. S.C.J.).

The British Columbia Supreme Court appointed a receiver after the bank did not extend a forbearance agreement. The application was brought pursuant to s. 39 of the *Law and Equity Act* and s. 243 of the *BIA*. The *Law and Equity Act* states that the court may appoint a receiver where it is just or convenient to do so. Justice Fitzpatrick stated that there was some divergence in British Columbia concerning the test to be applied in respect of appointing a receiver in these circumstances. On the one hand, there are two decisions of Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 CarswellBC 1084, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279, 2003 BCSC 640, [2003] B.C.J. No. 1057 (B.C. S.C. [In Chambers]) and *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 CarswellBC 813, 93 C.B.R. (5th) 57, 24 C.P.C. (7th) 1, 2012 BCSC 437 (B.C. S.C. [In Chambers]). In both decisions, Burnyeat J. took the view that where a receivership order is sought by a secured creditor and default under the security is proven, a receiver should be granted as a right unless there is some other compelling reason why the order should not be made. On the other hand, Masuhara J.'s decision in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) referred to various factors that may be considered in determining whether it is appropriate to appoint a receiver; that reasoning followed in *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]). Fitzpatrick J. noted that both of these decisions are to the effect that while it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, no such presumption of appointment should be made; rather, the court should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver; citing also *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, 1993 CarswellBC 2061, [1993] B.C.J. No. 2352 (B.C. S.C.). Justice Fitzpatrick noted that she followed *Maple Trade* and *Textron* in her decision in *Cascade Divide Enterprises Inc. v. Laliberte*, 2013 CarswellBC 384, 1 P.P.S.A.C. (4th) 10, 2013 BCSC 263 (B.C. S.C.) and indicated that she was following the same approach in this case, which called for a robust review of all the circumstances. She held that the bank's forbearance was based on the respondents agreeing to do certain things, including providing the bank with disclosure of information that would provide the bank with information about the state of its security. The respondents did not live up to their obligations under the forbearance agreement and despite defaults and the bank's attempt to secure compliance without acting on its security, they failed to respond. Fitzpatrick J. was satisfied that it was just and convenient to appoint the receiver in this case. However, she was mindful of some evidence that suggested that some sales were underway. Accordingly, Fitzpatrick J. restricted the receiver's powers to less than what had been sought by the bank until the receiver could get a better sense of the situation, such as whether sales were underway, with the parties to report back to the court: *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 CarswellBC 3547, 42 C.B.R. (6th) 290, 2016 BCSC 2348 (B.C. S.C.).

An appellant was a director, the chief executive officer and majority shareholder of the debtor corporation. When the bank began providing loans and credit facilities to the debtor, the appellant signed a personal guarantee of all of the debtor's obligations to the bank. The parties then signed a second loan agreement that superseded and incorporated the earlier agreement, which linked the credit limit to the debtor's accounts receivable and required a specific level of tangible net worth at all times as well as a requirement to provide the bank certain financial information on a regular basis. The loan agreement was subject to a facility letter that provided that the line of credit would be repayable on demand, and that the bank could accelerate the payment of the loan upon the occurrence of any event of default. The bank subsequently issued a notice advising that the debtor was overdrawn on its line of credit, had been in breach of the tangible net worth and disclosure requirements. After a further period of time, a demand letter was sent, advising that the debtor had ten days to permanently repay the indebtedness. The debtor filed a notice of intention to make a proposal in bankruptcy. The bank sought and received summary judgment against the appellant guarantor.

The Court of Appeal for Ontario dismissed the appeal of the guarantor, finding that while a debtor is entitled to a reasonable time to pay, that determination is fact-specific and dependent on the conduct of the parties before and after the demand. Here, the debtor was afforded a reasonable time to pay following the issuance of the demands. The Court of Appeal held that the interpretation of the guarantee is a question of mixed fact and law, and the motion judge's interpretation was, therefore, entitled to deference: *Toronto-Dominion Bank v. Konga*, 2016 CarswellOnt 20377, 44 C.B.R. (6th) 189. 2016 ONCA 976 (Ont. C.A.).

The Ontario Superior Court of Justice determined that a party claiming a possessory lien pursuant to the *Repair & Storage Liens Act* (*RSLA*) over seven trucks had to deliver the trucks to the court-appointed receiver. The receiver was then authorized to sell the trucks and place the proceeds in trust. Such authorization was without prejudice to the claim of the party asserting the lien. Justice Rady referenced the s. 69.3 stay, s. 70 that provides that every bankruptcy order takes precedence over all judicial or other attachments, garnishments, judgments, executions or other process against the property of a bankrupt and s. 243(1), which provides for the appointment of a receiver in circumstances where it is just or convenient to do so. Section 247 of the *BIA* imposes on a receiver the duty to act honestly and in good faith and to deal with the property of the insolvent in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all interested persons. Justice Rady also noted that ss. 3-6 of the *RSLA* set out the scheme pursuant to which a repairer has a lien against an article that the repairer has repaired. Justice Rady held that once a receiver is appointed, it is the receiver's duty to liquidate the assets, pay all costs and expenses of the receivership, and distribute the net proceeds among the creditors of the company in order of priority. A receiver owes a duty to the court that appointed it and to the creditors generally. Here, the court order prevailed, and the receiver was entitled to take possession of the liened articles, without prejudice to the claimant's possessory lien claim to be determined at another time. Rady J. held that such an interpretation was consistent with the necessity for the receiver to maintain control over the debtor's assets to ensure their advantageous and orderly disposition for the benefit of all creditors: *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 2017 ONSC 368 (Ont. S.C.J.).

The Newfoundland and Labrador Court of Appeal dismissed the appellant debtors' appeal of an order appointing a receiver under s. 243 of the *BIA*. The appellants sought to set aside the order of the applications judge appointing the receiver on the basis that the receiver was in a conflict of interest resulting from its previous acceptance of a mandate from one of the banks to assist the appellants in financial restructuring efforts that had been unsuccessful. The Court held that the standard of review on a question of law is that of correctness; and the standard of review for findings of fact is one of "palpable and overriding error." In this case, the engagement letter, signed by the three appellant companies, acknowledged the mandate of the accountancy firm and expressly stated that the appellants understood that the firm was "not precluded from accepting any other mandate in respect of the company, including but not limited to appointments under statute or by court order, should circumstances so warrant." Justice Harrington noted that the engagement letter precluded the appellants from seeking to revoke the mandate given to the receiver. The firm could not be found to be in a conflict of interest position given the clear mandate set forth in the engagement letter. No attempt had been made by the appellants to challenge the validity of the engagement letter on the basis of *non est factum*, duress, unconscionability, or otherwise. Harrington J.A. rejected the argument that the firm had been in a conflict of interest in acting as receiver. The second issue raised was whether the applications judge had erred in failing to include a realization or claims plan in the receivership order, given that the two banks were not the sole creditors. Justice Harrington concluded that it was not necessary for the court to revisit the receivership management plan that had been agreed on by the parties and ordered by the court. In the result, the appeal was dismissed.

The British Columbia Supreme Court granted a receivership order pursuant to the *British Columbia Securities Act* (*BCSA*) and imposed a constructive trust in favour of the investors: *British Columbia (Securities Commission) v. Bossteam E-Commerce Inc.*, 2017 CarswellBC 1231, 2017 BCSC 787 (B.C. S.C.). For a discussion of this judgment, see F§5(8) "Trust Property — Constructive Trusts".

The New Brunswick Court of Queen's Bench dismissed a motion for injunctive relief. The intended plaintiffs sought to enjoin the receiver from selling certain property, alleging that the secured creditor had acted precipitously in appointing a receiver as none of the companies were insolvent. Clendening J. held that the creditor had a valid general security agreement ("GSA") with the intended plaintiffs; that the intended plaintiffs had breached the covenants of that agreement on more than one occasion, including by allowing the government to gain priority by not paying the property taxes. The GSA defined what may occur on

a default, including the right to appoint a receiver. In reviewing the evidence and arguments presented by counsel, Clendening J. found no triable issue. The evidence pointed clearly to the fact that the creditor had a good and valid cause in law to demand full payment. There were no facts before the court to establish that the intended plaintiffs would suffer irreparable harm if the injunction was not granted. The balance of convenience fell in the creditor's favour and injunctive relief should not be granted: *Eaglewood Specialty Products et al v. Royal Bank et al*, 2017 CarswellNB 303, 50 C.B.R. (6th) 246, 2017 NBQB 136 (N.B. Q.B.).

The Saskatchewan Court of Queen's Bench considered competing applications, one for the appointment of a receiver under the *BIA* and the *PPSA*, and the other for an initial order and a stay of proceedings under the *CCAA*. The Court granted the receivership application. Since early 2015, the creditor had accommodated financial difficulties being faced by the debtor and had agreed, under various forbearance agreements, to interest only payments in return for various undertakings of the debtor. The creditor took the position that the debtor had breached those undertakings. The creditor gave notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded payment in full of the indebtedness owed to it. The debtor failed to pay. The debtor was in the business of drilling oil wells, and took the position that its financial difficulties were the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. It debtor argued that the economic climate in the Western Canadian oil industry is improving, and it expected a substantial improvement in its cash flow. Justice Scherman held that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith, and due diligence; and that an applicant under s. 243 of the *BIA* bears the burden of satisfying the court that it would be just and convenient to appoint a receiver in the circumstances. Justice Scherman found, on the evidence, that there had been elements of bad faith in the debtor's dealings with the creditor. Good faith of the applicant is a baseline consideration for a court in considering *CCAA* applications. In this case, the debtor had provided inaccurate information relating to its accounts payable, and it also made a significant payment to another creditor that was in breach of its agreement with the forbearing creditor. Scherman J. concluded that it was not appropriate to make an initial order pursuant to the *CCAA* application; it was just and convenient that a receiver be appointed. Justice Scherman indicated that the court was fully alive to the consequences that appointing a receiver may have upon employees, unsecured creditors, shareholders, and business associates. However, he was satisfied on the evidence that the creditor had provided significant relief from the contractual terms over a two-year period, and thus had already effectively provided the debtor with much of the remedial opportunity contemplated by the *CCAA*: *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 CarswellSask 399, 50 C.B.R. (6th) 220, 2017 SKQB 228 (Sask. Q.B.).

The Nova Scotia Supreme Court dismissed a bank's motion to appoint an interlocutory receiver. While Moir J. accepted the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, it is prominent in trials or hearings for a final order. The interlocutory receivership in Nova Scotia is a temporary remedy. The approach the Nova Scotia *Rules* adopted leaves the final receivership order to default, summary judgment, trial of an action, or hearing of an application. Moir J. indicated that this embraces the policy against prejudgment that underlines the reasoning in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 (S.C.C.), *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), and *Google Inc. v. Equustek Solutions Inc.*, 2017 CarswellBC 1727, 2017 CarswellBC 1728, 2017 SCC 34 (S.C.C.): "Is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all the circumstances of the case. This will necessarily be context-specific" (*Google*, at para. 25). Justice Moir found that granting the interlocutory receivership sought by the bank would not be just and equitable in all the circumstances, including the short time between this application and the date for the final hearing: *Bank of Montreal v. Linden Leas Limited*, 2017 CarswellNS 607, 51 C.B.R. (6th) 270, 2017 NSSC 223 (N.S. S.C.).

The New Brunswick Court of Queen's Bench declined to expand a receivership order to include an affiliated company of the principals of the debtor and its property and assets. The Court has the power to appoint a receiver or receiver and manager where it is just or convenient to do so, and in deciding, the court will have regard to all the circumstances, but in particular, the nature of the property and the rights and interests of all parties. 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 also 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. Here, Justice McNally was

not satisfied that it would be just or convenient to expand the initial receivership order to include the affiliated company and its property and assets, because the secured creditor had a prior first charge security on the real estate; the collateral mortgage was not in default; there was no risk that the real property could be removed and no evidence that it might be deteriorating; no appraisals of the affected properties were provided; and there appeared to be no need for a receivership order to secure the real property that the debtor was currently occupying: *LA PHARMACIE DE CAP-PELÉ LTÉE. et al (Receivership)*, 2017 CarswellNB 584, 55 C.B.R. (6th) 177, 2017 NBQB 229 (N.B. Q.B.).

The British Columbia Supreme Court declined to appoint a receiver. Justice Burke held that the applicant creditor had to satisfy the court that it was "just and convenient" to appoint a receiver pursuant to s. 243 of the *BIA*, citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) for a list of factors the court may consider: 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 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 loan documentation; h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor; i) the principle that appointment of a receiver is extraordinary relief that should be granted 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 on the parties; l) the conduct of the parties; m) the length of time that a receiver may be in place; n) the cost to the parties; o) the likelihood of maximizing return to the parties; and p) the goal of facilitating the duties of the receiver. While it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, the court should review the matter holistically and decide whether, in the circumstances, it is just and convenient to appoint a receiver. Burke J. concluded that it would not be just and convenient to appoint a receiver; there were *bona fide* triable issues between the parties, including the existence and amount of debt and whether a debt was extinguished by settlement. In this case, Burke J. was of the view that there was no emergency or risk of dissipation of assets, and found that very few, if any, of the factors in *Maple Trade* were applicable: *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 CarswellBC 3624, 2017 BCSC 2385 (B.C. S.C.).

A bank that granted a secured loan to a farm corporation with a live herd as the guarantee successfully brought a motion to the court for appointment of a receiver pursuant to s. 243 of the *BIA*. Rosinski J. of the Nova Scotia Supreme Court considered factors such as: whether irreparable harm may be caused if no order were made, although it is not essential for a creditor to establish irreparable harm; the risk to the security holder, taking into account the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; the nature of the property; the apprehended or actual waste of the debtor's assets; the preservation and protection of property pending judicial resolution; the balance of convenience between the parties; the creditor's right to appoint a receiver under the loan documents; the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor; the principle of appointment of a receiver being extraordinary relief to be granted sparingly; whether the appointment is necessary to enable the receiver to carry out its duties more efficiently; the effect of the order on the parties; the conduct of the parties and the length of time that a receiver may be in place. Here, the Nova Scotia Supreme Court held that although the creditor was entitled to appoint a receiver under the loan documentation, a court-appointed receiver was necessary to enable the receiver to carry out its duties more efficiently. Rosinski J. held that the debtor had significant equity in the herd, and that the herd was an ever-changing herd of live assets that required intensive monitoring, handling and care by trained and experienced personnel, which realistically, was family members of the debtor, under the auspices of the receiver: *Bank of Montreal v. Linden Leas Limited*, 2018 CarswellNS 497, 61 C.B.R. (6th) 322, 2018 NSSC 82 (N.S. S.C.).

On an application by the Ontario Securities Commission, the Ontario Superior Court of Justice appointed a receiver over the objections of the debtor. Justice Hainey noted that under s. 243 of the *BIA*, the court has the power to appoint a receiver where it is "just or convenient to do so". In making this determination, the court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties in relation thereto. Where a party has the right to appoint a

receiver under its security, the court should consider whether a court appointment will enable the receiver to carry out its duties more efficiently: *Ontario Securities Commission v. Paramount Equity Financial Corporation et al.*, 2018 CarswellOnt 12179, 62 C.B.R. (6th) 47, 2018 ONSC 4326 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court appointed a receiver pursuant to s. 243 of the *BIA*. Justice Brothers noted that the test to be applied was whether it was just and convenient in the circumstances to appoint a receiver; and in making this decision, the court will consider all the circumstances, the particular nature of the property, and the rights and interests of all the parties. Here, the creditor held first priority security; the company was in default of its obligations; the creditor had made demand for payment and had issued a notice of intention to enforce security; the time periods for repayment had expired, without payment being made; the creditor was in a position to enforce its security should it choose to do so; the appointment of a receiver would allow for the company's property to be preserved and protected pending liquidation; and the receiver, as an officer of the court, would provide transparency and reassurance to the company's creditors that the liquidation of the property would be handled expeditiously and in a commercially reasonable manner. Justice Brothers also granted an administration charge and a funding provision. With respect to the request for a sale process order, Brothers J. noted that the principal asset owned by the company was real property (six condominium lots). The receiver recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders. An offer had been received to purchase the real property, and in order to maximize the value for creditors and to minimize the risk of losing this offer, the receiver requested that the offer be a stalking horse in a court-supervised sale process. Justice Brothers found that the offer was in line with opinions of value provided by realtors; the property had been listed for two years and no acceptable offers had been received; and the largest creditor supported the stalking horse sale process. Justice Brothers noted that a stalking horse bidding process is an accepted means of realization in insolvency matters in Canada, as it establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained. In approving the process, Brothers J. considered: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets: *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 CarswellNS 714, 64 C.B.R. (6th) 289, 2018 NSSC 235 (N.S. S.C.).

The Ontario Superior Court of Justice dismissed the applicant's motion to appoint an asset-based lender and investment banker to conduct a sales process on behalf of the interim receiver and the debtor. All parties agreed that some certainty for the business was required and it was agreed that the implementation of the sales process as an ongoing concern would benefit all stakeholders. Justice Beaudoin held that receivers are officers of the court and have obligations to the court to act honestly and in good faith towards all stakeholders. Beaudoin J. determined that the interim receiver could consult with the asset-backed lender if it could assist in the sale process, but the proposed agent was not a court-appointed official. In any event, the interim receiver would have to seek further directions from the court and obtain the court's approval for any sale: *Hanson v. Estate of Stephan Maisonneuve*, 2018 CarswellOnt 19083, 2018 ONSC 6533 (Ont. S.C.J.).

The Ontario Superior Court of Justice addressed concerns raised by the debtor as to issues of potential conflict of a receiver and its legal counsel. Justice McEwen noted that the unequivocal evidence that was given on behalf of proposed interim receiver confirmed that it had no prior relationship with the debtor. McEwen J. noted that it is well-known that various professional firms regularly interact with each other in insolvency proceedings; and in the absence of an actual conflict, McEwen J. was of the view that there was nothing improper. Justice McEwen therefore appointed the interim receiver and, if necessary, receiver to effect the sale: *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2018 CarswellOnt 19726, 2018 ONSC 6894 (Ont. S.C.J.).

The Alberta Court of Queen's Bench granted the application of the secured creditor for orders deeming refused a joint proposal made by three related corporations, lifting the stay of proceedings, and appointing a receiver and manager: *Re Schendel Management Ltd.*, 2019 CarswellAlta 1457, 2019 ABQB 545 (Alta. Q.B.). For a discussion of this judgment, see E§40 "Termination of a Proposal by the Court Before the Meeting of Creditors".

The Nova Scotia Supreme Court granted an order expanding the powers of a receiver-monitor to a full receivership. Justice Gabriel was satisfied that both the general security agreement and the collateral mortgage provided the bank with the ability to appoint a receiver. Justice Gabriel noted that, in order to determine whether to grant the relief sought, it was necessary to

consider the nature of the receivership sought; whether the companies were insolvent within the meaning of the *BIA*; and if it was just or convenient that the remedy sought be granted. Justice Gabriel noted that it is important to appreciate the distinction between a privately-appointed receiver and one appointed by the court. A privately-appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager is an officer of the court and acts in a fiduciary capacity with respect to all interested parties; it derives its powers and authority from the order of the court appointing it. In this case, there were a number of creditors, including lien claimants, tax authorities, and workers' compensation claimants, which favoured a court-appointed receiver, accountable to the court and the various interests involved. Here, the companies were clearly insolvent within the meaning of the *BIA*. The factors to consider in determining whether it is appropriate to appoint a receiver include: (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; (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 balance of convenience to the parties; (d) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (e) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; and (f) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently. Gabriel J. concluded that the order sought was necessary and it was both just and convenient, given the present factual matrix: *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 CarswellNS 540, 72 C.B.R. (6th) 118, 2019 NSSC 243 (N.S. S.C.).

The Court of Appeal for Ontario dismissed an appeal from a decision of the application judge that a proceeding had been properly commenced as an application under r. 14 of the Rules of Civil Procedure. The appellant debtor company appealed from an order appointing a receiver over its assets, undertakings and property. The Court of Appeal held that there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *BIA* for authority to appoint a receiver as the general security agreement specifically allowed the respondent to appoint a receiver on the debtor's default. The application was one of three proceedings arising from the parties' failed business relationship in development of renewable energy projects in Barbados and the Dominican Republic. The application judge was appointed to case manage the proceedings on the commercial list of the Ontario Superior Court of Justice. The judge concluded that the debtor had breached and repudiated its obligations and was therefore required to repay the respondent the equivalent of $2 million USD, and in the event that it failed to make payment within 30 days, the judge appointed an interim receiver over its assets for 30 days to determine if a "sensible plan of repayment" could be made, failing which, the respondent would be entitled to have the interim receiver appointed as receiver. The debtor did not repay the amounts ordered and the receiver was appointed. On appeal, Roberts J.A. determined that the application was properly brought under r. 14 of the Rules of Civil Procedure. The respondent's omitting to state the rule or statute under which the application was brought, was a procedural, not a substantive, requirement that did not invalidate an application that otherwise complied in substance with r. 14.02. Justice Roberts noted that it has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. The Court held that that it was open to the application judge to conclude that the documents proffered by the debtor, including proposed fresh evidence, fell far short of demonstrating the debtor's position. The judge's interpretation was reasonable and was owed deference on appeal. Justice Roberts commented that absent reviewable error, deference must be shown to the reasonable case management decisions of the highly specialized judges who sit on the commercial list. Roberts J.A. saw no error in the exercise of the application judge's discretion to appoint the receiver; it was qualified to act as receiver and it was independent. The fact that the receiver had worked professionally with respondent's counsel on other unrelated matters did not raise a disqualifying conflict or prevent it from complying with its professional obligations to the court. The receiver is an officer of the court, accountable to the court and all interested parties. The grant of limited liability to the receiver permits the orderly execution of its duties without the concern that it will be subject to needless litigation, especially in the circumstances of this case, with a recalcitrant debtor who has already objected to the appointment. However, the limitation of its liability does not mean that the receiver can act with impunity; its conduct of the receivership is subject to the court's scrutiny, a process in which the debtor will actively participate: *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 CarswellOnt 15397, 2019 ONCA 779 (Ont. C.A.).

The British Columbia Supreme Court dismissed an application to appoint a receiver over a retirement community. The applicant held first ranking security over a portion of the lands and building. The application was opposed by a much larger secured lender ("other secured lender") who held first ranking security on another portion of the lands. The applicant sought an order appointing a receiver not only over the lodge building, but of other parts of the retirement community not secured by its mortgage and over which the other secured lender had priority. Justice Grauer noted that the lodge is not a separate business; the retirement community is managed as a whole, with no separate accounting. Without this information, prospective purchasers quickly lost interest because they could not ascertain the potential profitability and hence, the value of the property. The other secured lender opposed the application, maintaining that the remedy sought was excessive and unnecessary. The appointment of a receiver over the property would have the effect of displacing its priority subject to its first mortgage. The parties did not disagree about the general test applicable to the appointment of receivers, as set out in cases such as *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 CarswellBC 3547, 42 C.B.R. (6th) 290, 2016 BCSC 2348 (B.C. S.C.) where Fitzpatrick J. held that it is appropriate to review the matter holistically and decide whether, on the whole of the circumstances, it is in fact just and convenient to appoint a receiver. Grauer J. concluded that the appointment of a receiver, at least at this stage, was not just and convenient. Although the applicant had the right to appoint a receiver, the changes to the property since the security was granted, and the effect of the appointment of a receiver on the parties, the prospects of sale, and the security of the other secured lender, all weighed against the appointment of a receiver, particularly when viewed in the context of the risks to the applicant in relation to the value of its security. The application for the appointment of a receiver was dismissed, and the respondents were ordered to provide all documents reasonably required by the applicant within 21 days: *Computershare Trust Company of Canada v. Meadows Development Ltd.*, 2019 CarswellBC 3318, 73 C.B.R. (6th) 312, 2019 BCSC 1945 (B.C. S.C.).

End of Document