Court File No. BK-23-00459641-0031
Estate No.: 31-459641

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF
INTEGRO BUILDING SYSTEMS INC.,
OF THE CITY OF VAUGHAN,
IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES

April 18, 2024

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IN THE MATTER OF THE BANKRUPTCY OF
INTEGRO BUILDING SYSTEMS INC.,
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I N D E X

Tab 1

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Avery's Trucking Inc. (Re), 2013 NSSC 302
Date: September 26, 2013
Docket: B-37255
Registry: Halifax

District of Nova Scotia
Division No. 04 - Yarmouth
Court No. 37255
Estate No. 51-1742614

In the Matter of the Bankruptcy of Avery's Trucking Incorporated

And

In the Matter of the Appeal of WBLI Inc., in its capacity as Receiver of Avery's Trucking Incorporated ("Avery's") of the dispute or disallowance by Haley & Associates Inc., as Trustee of the Estate of Avery's in Bankruptcy (the "Trustee") of WBLI's claim pursuant to Section 81 of the *Bankruptcy and Insolvency Act* (Can) to property of Avery's in the possession of the Trustee.

BETWEEN:

WBLI Inc. in its capacities as Receiver of Avery's Trucking Inc. appointed by Canadian Imperial Bank of Commerce ("CIBC") and Business Development Bank of Canada ("BDC")

APPLICANT

- And -

Haley & Associates Inc. in its capacity as Trustee of the Estate of Avery's Trucking Inc. in Bankruptcy

RESPONDENT

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.

Heard: July 26, 2013

Written Decision: September 26, 2013

Subject: Two banks each held security for the indebtedness to them of a corporation. The corporation made an assignment and the trustee commenced the realization of the estate. The banks then appointed a receiver. The secured indebtedness to the banks significantly exceeds the assets realized by the trustee.

Issue: The trustee claimed it should be paid for its services from the estate in priority to the banks. The bank submitted that as secured creditors their claims against property of the bankrupt corporation take priority over all claims in bankruptcy including the fees and expenses of the Trustee.

Result: It was held that the banks have priority. Therefore the Trustee was not entitled to its fees and expenses. The Trustee's Final Statement of Receipts and Disbursements was disallowed.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET .

IN THE SUPREME COURT OF NOVA SCOTIA
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APPLICANT

- And -

Haley & Associates Inc. in its capacity as Trustee of the Estate of Avery's Trucking Inc. in Bankruptcy

RESPONDENT

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: July 26, 2013

Present: Carl Holm, Q.C. representing the Trustee, WBLI Inc.

Shawn O'Hara representing the Trustee, Haley & Associates

Facts

[1] There are two applications before me respecting the estate of Avery's Trucking Incorporated ("the Bankrupt") which made an assignment in bankruptcy on May 1, 2013. One is that of the Trustee, Haley & Associates, for the taxation of its Final Statement of Receipts and Disbursements (Final Statement). The other is the appeal of WBLI Inc., the Receiver appointed

by two secured creditors of the Bankrupt, namely Canadian Imperial Bank of Commerce (CIBC) and the Business Development Bank of Canada (BDC), of the disallowance by the Trustee of their respective claims to property under Section 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA).*

[2] BDC has a secured claim of $77,579.64 and an unsecured claim of $18,509.35. CIBC has a secured claim of $242,934.79. Proofs of Claims for these respective amounts were filed by BDC on May 6, 2013 and by CIBC on May 15, 2013. The Trustee accepts the quantum of these claims. The Trustee has declined to turn over to the Receiver the property it has realized subject to these securities. It advised the Receiver to file a Proof of Claim Property. The Receiver did so on June 14, 2013. The Trustee responded with a Notice of Disallowance of Claims on June 27, 2013. These secured claims far exceed the value of the assets realized by the Trustee, namely $185,928.80.

[3] There is also a Deemed Trust Claim by the Federal Crown of $75,294.98. CIBC and BDC do not dispute the priority of this claim over their claims.

Also the Trustee admits that the Crown is entitled to be paid but it has refused to pay, pending the taxation of the Final Statement.

[4] The Trustee says that the Final Statement should be approved thereby allowing its fees and expenses as claimed therein to be paid in full in priority to the secured claims of CIBC and BDC.

[5] CIBC and BDC say that their respective secured charges on the assets constitute prior charges which must be satisfied before anything can be available for the Trustee's fees and expenses. They say that, as the amounts secured by these prior charges exceed the receipts, the Trustee is not entitled to anything towards its fees and expenses.

Law

[6] The legal analysis may conveniently start with the following two provisions in the *BIA:*

Section 71

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the

> bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer. (underlining added)

Subsection 128(3)

> The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

[7] These provisions make it clear that the rights of secured creditors stand and are unimpeded by proceedings in bankruptcy. The property over which they hold security does not become part of the property in bankruptcy and is never available to ordinary creditors, unless it is redeemed according to Section 128(3).

[8] The point is authoritatively made in the 2012-13 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sara at page 497, Paragraph 5.

> The effect of ss. 70(1) and 71 with respect to secured creditors is that the interest of a secured creditor in the property of the bankrupt never loses its priority over the claims of other creditors, never passes into the hands of the trustee and never becomes a part of the property in the hands of the trustee to be divided among the creditors proving in bankruptcy, unless the trustee redeems the property by paying out the claim of the secured creditor as permitted by s. 128(3).

[9] The point is refined and deals specifically with the situation in the present case in Paragraph 31 of *Agriculture Credit Corp. of Saskatchewan* v.

Featherstone (Trustee of), [1996] S.J. No. 319 as follows:

> Monies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to existing security interests. This includes monies realized through the efforts of the trustee.

[10] A similar conclusion is found in *Re Stadnick* (1991) 2 C.B.R. (3d) 7 (Sask. Q.B.). In Paragraph 13 reference is made to Subsection 136(1) of the *BIA* which begins with:

> Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows . . .
>
> (ii) the expenses and fees of the trustees . . . .
>
> (underlining added)

Paragraph 16 summarizes the discussion as follows:

> On principle, therefore, unless legislation provides otherwise, the rights of a trustee in bankruptcy are postponed to those of secured creditors.

[11] In answer to the submissions of the secured creditors, the Trustee refers to the provisions of Section 39 of the *BIA* by which the fees of a trustee are to be determined.

[12] I quote from it the following Subsections:

> (1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.
>
> (2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.
>
> (5) On application by the trustee, a creditor or the debtor and on notice to such parties as the court may direct, the court may make an order increasing or reducing the remuneration.

[13] In the present situation there is no creditors' resolution regarding fees; there is nothing left on which to make the 7½ per cent calculation, the receipts being exhausted by the secured claims of CIBC and BDC; and there is no set remuneration to be increased or decreased.

[14] I do not see that Section 39 provides any basis whereby the Trustee can claim any priority over the secured creditors for its fees.

[15] The Trustee's counsel submits that, the Trustee having conscientiously administered the estate should be allowed by me, acting within my discretion, compensation for the services provided.

[16] Reference is made to *Re Maybank Foods Inc.* (1990), 78 C.B.R. (N.S.) 79, a decision of Saunders J. of the Ontario Supreme Court, In Bankruptcy. This decision is very brief. However, it appears that the issue in it was whether a trustee who took initiative to sell certain assets on which the respondent held security was entitled to fees for its efforts. The respondent objected to the trustee being paid fees. This parallels the present case except that the trustee had acted under authority of a court order which had authorized the payment of its fees.

[17] In the present case no such order had been sought or granted. Accordingly I do not see that this case helps the Trustee.

[18] This decision refers to four cases. Note of two of them is germane to this discussion. The first is *Robert F. Kowal Investments Ltd. et al* v *Deeder Electric Ltd* (1975), 59 D.L.R. (3d) 492, (Ont., Holden J.A.). It contains a very extensive review of the law respecting the remuneration of receivers. No mention is made of trustees under the *BIA*. The principles involved are summarized in the following paragraph quoted from the head note:

> A receiver has, in general, no priority for his expenses over a prior secured creditor unless the receiver is appointed with the consent

> of the secured creditor or for his benefit, or unless the expenses are necessary for the protection of the property for the benefit of all creditors including the secured creditor.

[19] In the present case the secured creditors do not see that they have received any benefit from the trustee's efforts. Quite apart from this, the case says nothing of trustees in bankruptcy.

[20] The second is *P.A.T. Local 1590* v *Broome* (1986), 61 C.B.R. (N.S.) 233 (Ontario, Master Browne). It considers only the right of trustees to remuneration for dealing with trust funds which are not property of the bankrupt. It is made clear that apart from any arrangements made with the administrator or beneficiary of a trust, there is no entitlement to fees.

[21] I do not see that these cases assist the Trustee in any way.

[22] The following passage from Holden, Morawetz & Sarra, at page 667 is quite decisive in the point:

> G§100 - Frequently a secured creditor will agree to pay the trustee for taking conservatory measures, such as maintaining heat, surveillance, *etc.* If, however, the secured creditor does not agree to pay for such measures and the trustee incurs expenses incurred in conserving assets covered by the claim of a secured creditor in

> the hope that there will be a surplus for unsecured creditors, the secured creditor will not be liable for such expenses: *Re Joly-Sac Inc.* (1991), 12 C.B.R. (3d) 182, 42 Q.A.C. 140 (C.A.).

So also is the following from Paragraph 17 of *Re Stadnick* :

> Occasions may arise, as here, where no compensation is available for a trustee. This is a contingency which he ought to anticipate and take precautions. He cannot be extricated by pleading some equitable principles to place his claim ahead of secured creditors.

[23] The Trustee should have known when to stop. It took the risk that there would be no surplus to cover its fees and expenses.

[24] There is an entry in the Final Statement under Receipts for a "Retainer" of $5,000.00. Since the hearing I have noted this to counsel. It seems to me that, if this retainer came from funds of the bankrupt company, it should be simply treated as property of the bankrupt just as any other receipt. However, if it was provided by a third party to induce the Trustee to take on the file, I think it could be proper for the Trustee to apply it against its fees. If the parties cannot agree as to how this amount should be characterized, I shall hear the parties and decide the matter.

Conclusion

[25] The Trustee has not presented me with any authority or legal theory on which I can allow its fees and expenses in priority to the secured claims. The Receiver is entitled to the assets realized by the Trustee subject to the payment of the Deemed Trust Claim.

[26] An order will issue:

1. Directing that the property in the hands of the Trustee be transferred to the Receiver after the Deemed Trust Claim is paid,

2. Disallowing the Trustee's Final Statement, and

3. Directing the Trustee to pay the Receiver's costs.

[27] If the parties cannot agree on such costs I shall hear them.

R.

Halifax, Nova Scotia
September 26, 2013

Tab 2

1991 CarswellQue 25
Court of Appeal of Quebec

Joly-Sac Inc., Re

1991 CarswellQue 25, 12 C.B.R. (3d) 182, 29 A.C.W.S. (3d) 1034, 42 Q.A.C. 140, J.E. 91-1706

Re Bankruptcy of JOLY-SAC INC.; RAYMOND, CHABOT, FAFARD, GAGNON INC. and ARMAND GAGNON v. CAISSE DESJARDINS DE FINANCEMENT DE LAVAL

Beauregard, Rothman and Proulx JJ.A.

Heard: October 2, 1991
Judgment: November 6, 1991
Docket: N[o] C.A. Montréal 500-09-000119-859

Counsel: *Maurice Régnier*, pour l'appelante.
Lucien Lachapelle, pour l'intimée.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Table of Authorities

Cases considered:

A. Marquette & fils Inc., v. Mercure, [1977] 1 S.C.R. 547, 10 N.R. 239, 65 D.L.R. (3d) 136 — *referred to*

Perras c. Valla Furniture Co. (1953), 34 C.B.R. 145, [1954] B.R. 10, 1953 CarswellQue 238 (Que. Q.B.) — referred to

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3 —

s. 13(1)

Appeal from dismissal of trustees' motion for recovery of conservatory expenses.

***Beauregard, Rothman and Proulx JJ.A.*:**

5 This is an appeal by the trustees in the bankruptcy of Joly-Sac Inc. from a judgment of the Superior Court dismissing their motion for recovery of expenses incurred by the trustees for the conservation of certain property of the bankrupt on which the Caisse Desjardins de financement de Laval held security. The trustees contend that the expenses were of a conservatory nature and were incurred for the benefit of the Caisse Desjardins as a secured creditor.

. . . . .

6 On August 27, 1982, Joly-Sac made a voluntary assignment under the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and the appellants, Raymond, Chabot, were appointed trustees.

7 The Caisse Desjardins was a secured creditor of Joly-Sac, holding a hypothec containing a dation en paiement clause on its plant and warehouse as well as a commercial pledge on its machinery and equipment.

8 On taking possession of the property of the bankrupt, the trustees obtained insurance on all of its property including the property subject to the hypothec and the commercial pledge of the Caisse.

9 On September 10, 1982, the Caisse remitted to the trustees a proof of claim, as a secured creditor, valuing their security on the property of the debtor at $130,000. In October 1982, the trustees decided to proceed with the sale en bloc of the property of the bankrupt by way of public tender and they advertised in *La Presse* inviting tenders for the purpose. Five tenders were received

and the trustees were authorized by the inspectors to accept the offer made by the Beaudoin group in the amount of $272,000. Had this sale been concluded, the proceeds would have been sufficient to pay all of the secured creditors as well as a proportion of the claims of preferred and ordinary creditors. Unfortunately, the purchaser was unable to obtain the necessary financing for the acquisition, and the sale was not completed, although the trustees were prepared to reduce the price to $232,000.

10 The Caisse was aware that the trustees were attempting to sell the assets of the bankrupt en bloc and, apparently, acquiesced in this attempt.

11 On June 27, 1983, however, the Caisse sent notice to the trustees demanding possession of the property subject to its commercial pledge, which the trustees refused to deliver unless and until the conservatory expenses were reimbursed.

12 On April 6, 1984, the Caisse sent the trustees a 60-day notice indicating its intention of becoming owner of the property under the dation en paiement clause in its deed of hypothec and its intention of taking possession of the immoveable property. The trustees replied that they were renouncing any rights in the property, but only under reserve of their right to be reimbursed for the conservatory expenses they had incurred.

13 The parties admit that the following expenses were paid by the trustees:

As regards the moveable property	
insurance	$1,593.55
surveillance	$716.71

Total	$2,310.26
As regards the immoveable property	
insurance	$3,773.60
electricity	$2,559.43
maintenance & repair	$642.63
heating	$1,468.51
maintenance of land	$500.00
surveillance	$1,709.51

Total	$10,653.68

14 The trial judge dismissed the trustees' motion for reimbursement, concluding, in essence, that these expenses were not incurred for the benefit of the Caisse but solely for the benefit of the ordinary creditors:

> L'intimée nie devoir ces montants. Ces dépenses ne lui profitent nullement et ont été faites dans le but bien arrêté de profiter aux créanciers ordinaires de la faillite et aux syndics requérants. Si l'intimée n'a pas réalisé ces garanties avant c'était suite aux représentations et à la demande des syndics requérants. Voyant le refus du syndic de lui remettre ces biens l'intimée dut procéder alors par voie judiciaire.
>
> Considérant que dès le début de la faillite, le créancier garanti intimé a dénoncé son intérêt quant à certains biens de l'actif de la faillite;
>
> Considérant que les syndics conjoints ont choisi de garder ces biens dans le but de réaliser un profit qui bénéficierait à la masse des créanciers ordinaires;
>
> Considérant que le syndic a exécuté certains faits de conservation sur les biens nantis et hypothéqués en faveur de l'intimée dans le seul but de réaliser des profits au bénéfice des créanciers ordinaires et à son bénéfice;

Considérant que ces frais n'auraient pas été nécessaires si les syndics requérants avaient choisi de remettre les biens nantis et hypothéqués au créancier garanti intimé dès le début de l'administration.

. . . . .

15 While the arrangements between the trustees and the Caisse following the bankruptcy were far from formal or precise, the following conclusions emerge:

16 1. On taking possession of the property of the bankrupt, the trustees decided to try to sell all of the assets en bloc, including the equipment and the building which were subject to the commercial pledge and the hypothec of the Caisse.

17 2. The trustees attempted to do so with a view to realizing proceeds from the sale that would be sufficient to benefit the ordinary creditors after the claims of the Caisse and other secured creditors were satisfied.

18 3. The Caisse implicitly agreed to allow the trustees to attempt to sell the assets en bloc or, at the very least, acquiesced in this and deferred realizing on their own security to permit the trustees to proceed with the sale.

19 4. There was no agreement by the Caisse to pay the insurance, heating or any of the other expenses incurred by the trustees and no authorization given to the trustees to make these payments on behalf of the Caisse.

20 5. Even after the collapse of the proposed sale by the trustees, they continued in possession of the building and the equipment and made no offer, for many months, to deliver possession to the Caisse as secured creditor. Similarly, the Caisse took no steps until June 28, 1983 to obtain possession of the equipment and until April 1984 to acquire ownership of the plant under its dation en paiement clause.

21 The trustees do not suggest that any authorization, express or tacit, was given by the Caisse for the payment of these expenses.

22 They submit, however, that the expenses were incurred for the benefit of the Caisse since they were necessary for the conservation of property that was subject to its security.

23 With respect, I find it difficult to see how these expenses can be viewed as benefits to the Caisse.

24 At the outset, the trustees insured the building and the equipment with all of the other assets because the *Bankruptcy Act* required them to do so (s. 13(1)); (*A. Marquette & fils Inc. v. Mercure*, [1977] 1 S.C.R. 547, 10 N.R. 239, 65 D.L.R. (3d) 136). Had they permitted the Caisse to proceed immediately to realize on its security, there obviously would have been no question of any responsibility on the part of the Caisse for the cost of any insurance premiums attributable to this property. (*Perras v. Valla Furniture Co.* (1953), 34 C.B.R. 145, [1954] Que. Q.B. 10 (C.A.)).

25 It is equally clear that the decision of the trustees to attempt to sell all the assets en bloc was not for the benefit of the Caisse but rather with a view to obtaining some residual benefit from the sale for the ordinary creditors. The Caisse may have been agreeable to this procedure and agreeable to postpone, for a time, exercising its own secured claims, but that did not create any responsibility for the insurance obtained by the trustees. Nor could it have created any obligation for heating, electricity and other similar expenses.

26 There is no doubt, in my view, that the trustees retained possession of the assets subject to the Caisse's secured claims in order to benefit the ordinary creditors and not the Caisse.

27 Whatever ambiguity there was as to who benefitted from these expenses and who should be responsible for them arose, after the collapse of the sale en bloc by the trustees, as a result of the failure of either party to cause the possession of the building and the equipment to be vested promptly in the Caisse. The trustees seem to have been in no hurry to act on the proof

of claim filed by the Caisse and the Caisse seems to have been in no hurry to enforce its rights. Both parties simply left matters in a dormant state for many months.

28 In the absence of anything in the record explaining the delay in remitting possession of these assets to the Caisse, we can only speculate as to the reasons. But there is certainly no more reason to believe that the Caisse was dilatory in enforcing its rights than there is reason to believe that the delays were caused by the trustees in attempting to salvage a sale which would benefit the ordinary creditors.

29 The trial judge concluded, on the evidence as a whole, that the trustees retained possession of the building and the equipment for the benefit of the ordinary creditors and that the expenses incurred by the trustees would not have been necessary if they had remitted possession of these assets to the Caisse at the outset of their administration. I see no error in that conclusion.

30 I would dismiss the appeal with costs.

Appeal dismissed.

Tab 3

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

Citation: Stadnick (Bankrupt), Re
Date: 1991-01-18
Docket: 9522
In The Matter Of The Bankruptcy of James Louis Stadnick, of the Town of Carnduff in the Province of Saskatchewan

Halvorson, J.

Counsel:
J.M. Lee, for the applicant, Agricultural Credit Corporation of Saskatchewan
W.R. Howe, for the trustee, Touche Ross Limited

[1] Halvorson, J.: In this proceeding the applicant challenges the trustee's right to deduct fees and disbursements from funds otherwise payable to the applicant as a secured creditor.

[2] The issue is whether the applicant's general collateral security preempts certain payments owing to the bankrupt from various agencies, or whether the trustee has a prior claim to the payments because he collected them in the course of administration of the estate.

[3] According to the trustee, his position would be untenable if a creditor holding a general security, as contrasted with a specific charge, could claim all of the miscellaneous monies realized through the trustee's efforts. No funds would be available to pay trustee accounts, so trustees would decline to accept bankruptcy work, says counsel. No authority was cited for this proposition.

[4] The applicant contends the scheme of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, clearly indicates a trustee cannot pay himself out of money distributable to a secured creditor, and the *Act* draws no distinction between specific and general security.

[5] During the course of the bankruptcy, monies became payable to the bankrupt in the form of drought assistance, wheat board payments, tax refunds and agricultural rebates. These were not disclosed in the bankrupt's statement of affairs and were unknown to the applicant. Otherwise, the applicant could have seized the credits pursuant to its security before the cheques came into the possession of the trustee. Some $5,500 was realized by the trustee on these cheques. From these and other funds he deducted fees and disbursements exceeding $3,700. The remainder would be disbursed to the applicant.

[6] As indicated, the applicant claims all of the cheque proceeds. However, in recognition of the fact the trustee expended efforts in administering the estate, the applicant would voluntarily compensate the trustee for disbursements and a reasonable fee.

[7] In the applicant's security agreement the bankrupt granted:

> "... a present and continuing security interest in all of my present and after-acquired personal property of whatsoever nature and kind, whether tangible or intangible, and all proceeds derived therefrom. ..."

[8] There can be no doubt this wording is sufficiently broad to include the cheques in question. But, does the trustee acquire a priority for remuneration because the security is general rather than specific in nature?

[9] The definition of "secured creditor" in the *Act* does not distinguish between general and specific charges. Section 2 reads in part:

> "'secured creditor' means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable."

[10] There are no provisions in the *Act* which explicitly extend to the trustee any priority over secured creditors. Nor are general and specific securities treated differently. Respecting fees, s. 39 appears to maintain the precedence of the secured position. The section reads in part:

> "39.(1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.
>
> "(2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exeeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor <u>after the claims of the secured creditors have been paid or satisfied.</u>" (emphasis added)

[11] Moreover, s. 69(2) states that "a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed".

[12] Further, s. 70(1) prescribes that "every assignment made in pursuance of this Act takes precedence over process against the property of a bankrupt ... <u>except the rights of a secured creditor</u>". (emphasis added)

[13] Section 136(1) states that "<u>Subject to the rights of secured creditors</u>, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: ... the expenses and fees of the trustee ..." (emphasis added)

[14] Rule 115(1) further recognizes that trustee expenses are subordinate to

secured creditors. The rule reads in part:

> "115(1) The amount for fees and disbursements to be received by the trustee ... is fixed according to the following percentages of the total receipts remaining after deducting the payments to secured creditors." (emphasis added)

[15] A consideration of the legislative distribution scheme of the *Act* and these provisions in particular, leads to the conclusion, a trustee's remuneration enjoys no priority over secured creditors.

[16] Some support for this reasoning may be found in *Re General Fire-Proofing Co. of Canada Ltd.*, [1936] O.R. 510 (varied [1937] S.C.R. 150). In holding that a trustee's expenses were postponed in favour of secured creditors, the court said at p. 518:

> "... On principle, therefore, unless legislation provides otherwise, the rights of a trustee in bankruptcy are postponed to those of secured creditors. ..."

[17] Occasions may arise, as here, where no compensation is available for a trustee. This is a contengency which he ought to anticipate and take precautions. He cannot be extricated by pleading some equitable principles to place his claim ahead of secured creditors. (see *Re Auto Experts Limited* (1921), 49 O.L.R. 256, *In Re Gulf Sawmills Limited*, [1922] 3 W.W.R. 870, and *Re Carruthers* (1980), 34 C.B.R. (N.S.) 30)

[18] The trustee could have avoided this predicament. Had he taken a deposit on expenses, this could have carried him through until the claims of creditors were filed, at which time he would have learned of the applicant's general collateral security. Thereafter, he should have known that any monies he collected would be claimed by the applicant. To protect himself for fees, the trustee should have obtained in indemnity from the applicant. Failing this, he could have declined to realize on the payables, required the applicant to value its security, or simply left the applicant to enforce its own security. Hindsight is, of course, marvellous.

[19] There will be an order that the trustee amend his "final statement of receipts and disbursements" to reflect the terms of this judgment. He may then reapply to the registrar for a discharge.

[20] The applicant shall have its costs of this proceeding from the trustee.

Order accordingly.

Tab 4

Bankruptcy and Insolvency Law of Canada, 4th Edition § 6:259

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 6. Part V Administration of Estates

V. Sections 127 to 134

§ 6:259. Trustee Claiming against Secured Creditor for Fees and Expenses Incurred in Conserving Assets

See § 2:65 "Insuring Assets".

Section 39(2) makes it clear that the remuneration of the trustee is to be calculated on the amount remaining out of the property of the debtor *after the claims of secured creditors have been paid or satisfied.*

Frequently a secured creditor will agree to pay the trustee for taking conservatory measures, such as maintaining heat, surveillance, *etc.* If, however, the secured creditor does not agree to pay for such measures and the trustee incurs expenses incurred in conserving assets covered by the claim of a secured creditor in the hope that there will be a surplus for unsecured creditors, the secured creditor will not be liable for such expenses: Re Joly-Sac Inc., 1991 CarswellQue 25, 12 C.B.R. (3d) 182, 42 Q.A.C. 140 (C.A.).

A trustee in bankruptcy has no priority for fees and disbursements against the realization from assets on which a secured creditor has a charge. The trustee's fees and expenses are subordinate to claims of secured creditors. If assets are subject to the claims of secured creditors, a trustee should take steps to protect its fees and expenses before undertaking the work of conserving or realizing the assets: Re Gulf Sawmills, 3 C.B.R. 384, [1922] 3 W.W.R. 870 (B.C. S.C.); Re Auto Experts Ltd. (1921), 1 C.B.R. 418 (Ont. S.C.), affirmed (1921), 3 C.B.R. 591, 49 O.L.R. 256, 59 D.L.R. 294 (C.A.); Re Carruthers (1980), 34 C.B.R. (N.S.) 30 (Ont. S.C.); Re Stadnick (1991), 1991 CarswellSask 29, 2 C.B.R. (3d) 7, 90 Sask. R. 12 (Q.B.); Liquid Carbonic Inc. v. Wear-A-Metic Co. (Trustee of) (1989), 75 C.R.B. (N.S.) 107 (Ont. Reg.).

There may be cases in which it is in the interests of unsecured creditors that a trustee in bankruptcy should conduct a sale of the assets of the debtor that are subject to the claims of secured creditors and, in such cases, if the inspectors approve, the court may allow the trustee an increased remuneration: Re Johnston Estate (1925), 7 C.B.R. 203 (Ont. S.C.). However, where a trustee proceeded to collect accounts receivable knowing that they were subject to the security interest of a bank and that there was no surplus for the bankrupt estate, the court refused to allow the trustee any remuneration for collecting the receivables. The court was of the view that the trustee should have made an arrangement with the secured creditor for payment of the fees before proceeding with the collection of the accounts: Re ASI Acoustical Supplies Inc. (1999), 14 C.B.R. (4th) 167, 1999 CarswellBC 2717 (B.S. S.C.).

In Re ASI Acoustical Supplies Inc. (2000), 20 C.B.R. (4th) 178, 2000 BCSC 1466, 2000 CarswellBC 1963 (S.C.), affirmed 2000 BCSC 1838, 22 C.B.R. (4th) 174, 2000 CarswellBC 2585 (S.C.), the registrar was of the view that the trustee could charge the bankrupt estate for disbursements incurred in preserving property covered by the security of a secured creditor until the time that it became clear that there would be nothing available for the bankrupt estate after the claim of the secured creditor was satisfied.

The Registrar of the Nova Scotia Supreme Court denied the claim of a trustee that it was entitled to its fees and expenses over the priority position of the secured creditors. Registrar Cregan referenced ss. 71 and 128 of the *BIA*, which specify that the rights of secured creditors stand and are unimpeded by proceedings in bankruptcy. The property over which they hold security does

not become part of the property in bankruptcy and is never available to unsecured creditors, unless it is redeemed according to s. 128(3) of the *BIA*. The effect of ss. 70(1) and 71 with respect to secured creditors is that the interest of a secured creditor in the property of the bankrupt never loses its priority over the claims of other creditors, never passes into the hands of the trustee and never becomes a part of the property in the hands of the trustee to be divided among the creditors proving in bankruptcy, unless the trustee redeems the property by paying out the claim of the secured creditor as permitted by s. 128(3). The registrar acknowledged that a secured creditor may agree to pay the trustee for taking conservatory measures; however, if the secured creditor does not agree to pay for such measures and the trustee incurs expenses incurred in conserving assets covered by the claim of a secured creditor in the hope that there will be a surplus for unsecured creditors, the secured creditor will not be liable for such expenses. In the result, the registrar concluded that the trustee had not presented any authority or legal theory on which the court could allow its fees and expenses in priority to the secured claims. The receiver was entitled to the assets realized by the trustee subject to the payment of a Crown deemed trust claim: Avery's Trucking Inc. (Receiver of) v. Avery's Trucking Inc. Estate (Trustee of), 2013 CarswellNS 711, 2013 NSSC 302 (N.S. S.C.).

End of Document

Tab 5

1999 CarswellBC 2717
British Columbia Supreme Court

ASI Acoustical Supplies Inc., Re

1999 CarswellBC 2717, [2000] B.C.W.L.D. 372, 14 C.B.R. (4th) 167, 25 B.C.T.C. 384, 93 A.C.W.S. (3d) 17

In the Matter of the Bankruptcy of ASI Acoustical Supplies Inc.

Registrar Wellburn

Heard: February 16, 1999
Judgment: December 6, 1999
Docket: Vancouver 155776VA94

Counsel: *Donald J. Henfrey*, for Trustee.
Sandra M. Lundell (written submission), for Trustee.
Brian Black for himself and for Mr. Willsie.

Subject: Insolvency; Estates and Trusts

Table of Authorities

Cases considered by *Registrar Wellburn*:

Johnston, Re, 7 C.B.R. 203, 29 O.W.N. 53, [1925] 4 D.L.R. 226 (Ont. S.C.) — considered

Mackesey v. Royal Bank (1991), [1992] 2 W.W.R. 60, 86 D.L.R. (4th) 637, *(*sub nom. *Royal Bank v. MacKesey)* 97 Sask. R. 102, *(*sub nom. *Royal Bank v. MacKesey)* 12 W.A.C. 102, 10 C.B.R. (3d) 146 (Sask. C.A.) — considered

Michel, Re (1962), 4 C.B.R. (N.S.) 22 (C.S. Que.) — referred to

Shink v. Gingras, [1962] C.S. 297, 3 C.B.R. (N.S.) 309 (C.S. Que.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46

s. 427 — referred to

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

Generally — referred to

s. 39 — referred to

s. 39(2) — considered

s. 39(5) — considered

s. 70(1) — considered

s. 71(2) — considered

APPLICATION by trustee in bankruptcy for increased remuneration.

***Registrar Wellburn*:**

1 The trustee, MacKay & Company, applies for increased remuneration pursuant to section 39 of the *Bankruptcy and Insolvency Act* in the amount of $34,500. Mr. Black, a creditor, on behalf of himself and another creditor, Mr.Willsie, opposes the amount of remuneration sought.

2 The issue is whether I should approve remuneration for work of the trustee collecting accounts receivable of the bankrupt company which were subject to security held by the Bank of Nova Scotia ("the Bank") subsequantly assigned to Mr. Willsie.

3 When Mr. Black and Mr. Henfrey appeared before me I was concerned as to whether I had jurisdiction to allow fees claimed by the trustee for realizing on assets which were subject to a security interest.

4 Both Mr. Black and the trustee provided written submissions which were unfortunately not brought to my attention until the end of October.

5 MacKay & Company was appointed trustee when ASI Acoustical Supplies Inc. ("the Company") made an assignment into bankruptcy on December 28, 1994. The statement of affairs shows assets of $283,775.05, secured claims of $214,000 and preferred and unsecured debt of $347,942.86.

6 A.E. Liebert, the trustee in bankruptcy, prepared a document entitled "Trustee's Report to the Creditors on Preliminary Administration - Trustees Evaluation of Assets and Security Interests". The report is undated but refers to an inventory taken on January 3, 1995 and appears to have been prepared in mid-January 1995 for the creditors meeting held January 18, 1995. The report states that the trustee is aware of the following possible security interests;

> **1. Bank of Nova Scotia**
>
> We are advised that the Bank is owed approximately $100,000 and that it holds security pursuant to section 427 of the ***Bank Act*** over inventory, an assignment of book debts and general security agreement.
>
> **2. CGC Inc.**
>
> CGC INC is owed $350,792 and has a general security agreement together with specific registered assignments against receivables due from ADCO and IDEAL. These accounts receivable amount to approximately $12,290.

The report also refers to security over vehicles and a super priority of Revenue Canada. It states:

> **Conflict of Interest**
>
> MacKay & Company Ltd. was appointed trustee as a result of the assignment pursuant to the Bankruptcy and Insolvency Act made by the company. We have been in contact with the various creditors holding security interests and have not been appointed in any capacity pursuant to those security interests. We are not, therefore aware of being in a position of conflict of interest.
>
> **Projected Distribution**
>
> In the event of the security interests outlined previously in this report are proven and are valid and enforceable, it is unlikely that there will be funds available for distribution to preferred or unsecured creditors. Nevertheless, we encourage the participation of creditors in the administration of the Estate through the appointment of inspectors as the security interests must be reviewed and it is possible that legal opinions may be required.

7 The Bank also held collateral security in the form of guarantees from Mr. and Mrs. Willsie. There is a letter attached as an exhibit to an affidavit from the solicitors for the Bank to Mr. and Mrs. Willsie, Mr. Black and Karen West asking for their consent to the trustee pursuing recovery of additional monies which may be owed to the Company by third parties. The letter is signed by all four people to whom it was addressed but it does not appear to have been given by the Bank to the trustee as authority for the trustee to collect the accounts receivable.

8 Mr. Henfrey took over the file as trustee on June 1, 1995. In his letter to the official receiver, April 23, 1997, Mr. Henfrey set out the history and the position of the trustee in March of 1995:

> The Bank of Nova Scotia would not agree to any expenditures or take any position with respect to the costs of realization because it did not wish to prejudice its position with respect to the guarantor and its collateral security.
>
> The guarantor was not prepared to give the bank any instructions, he presumably wanting the trustee to continue with the administration, without addressing the issue of how the trustee would be paid. He no doubt hoped that the trustee would continue to pay out the bank, i.e. redeem its claim and if there were sufficient funds left, pay the trustee's fee. We have discussed this with Mr. Willsie who advises he was unaware of what his rights were and how he could have dealt earlier with the bank,
>
> By the end of March, the trustee was clearly apprehensive that there may not be sufficient funds available to accomplish these two objectives. He sought an agreement with the bank that the trustee's proper fees and expenses on realizing on the assets would rank in priority to the Bank's claim, i.e., that the trustee was acting as the agent of the bank and the guarantor in the ongoing administration. The trustee refused to pay over any funds from the sale of the other assets, holding same to protect his fees and disbursements.
>
> The trustee took the position that the costs of realizing were going to have to be paid by someone, otherwise nothing would have been realized. The trustee was not prepared to continue to work under the uncertainty that he might not be paid for his efforts.
>
> It is now clear that the asset realization is insufficient to satisfy the claim of the bank and pay all realization costs. The guarantor has paid out the bank and is negotiating with the trustee concerning our fees and disbursements.

And later in the same letter Mr. Henfrey notes that,

> ... an agency agreement or fee guarantee was proposed but neither the secured creditor nor the guarantor would agree.
>
> The secured creditor and the guarantor still have not agreed to a fee priority or agency appointment, but the trustee continued with the administration in the hope that accounts receivable realization would generate sufficient funds to solve the potential problem.

9 On November 27, 1997 the Bank acted against Mr. Willsie on his guarantee to recover the outstanding amount owed by the company. Mr. Willsie paid the amount outstanding to the Bank and took an assignment of the Bank's security. Notice of the assignment was given to the trustee on December 5, 1996.

10 Mr. Black's position is that the trustee has no interest or legal entitlement in the accounts receivable, and that the trustee has deprived Mr. Willsie from his only means to recuperate his losses: collecting the accounts receivable. Mr. Black asked me not to approve the trustee's remuneration for realizing on the assets which were subject to the Bank's security, and asked that all monies collected subject to the Bank's security interest be paid to Mr. Willsie.

11 Mr. Black's position is supported by the *2000 Annotated Bankruptcy and Insolvency Act*, Houlden and Morawetz at page 461:

> ... where a debtor has made an assignment or has had a receiving order made against him or her, the policy of the Act is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus in the assets covered by the security.

12 Sections 70(1) and 71(2) of *The Bankruptcy and Insolvency Act* deal with secured creditors:

> 70(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of the bankrupt, except those that have been completely executed by payment to the creditor or his agent, and *except the rights of a secured creditor*. (emphasis added)

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, *subject to this Act and to the rights of secured creditors*, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer. (emphasis added)

13 These provisions were considered in *Mackesey v. Royal Bank* (1991), 10 C.B.R. (3d) 146 (Sask. C.A.) Saskatchewan Court of Appeal at page 151:

> The effect of these provisions is that the interest of the secured creditor in the property of the bankrupt never loses its priority over the claims of other creditors, and indeed, never passes into the hands of the trustee and thus never becomes a part of the property in the hands of the trustee to be divided amongst the creditors proving in bankruptcy (unless, of course, the trustee redeems the property by paying out the claim of the secured creditor under s. 128(3)).

14 Section 39(2) of the *Bankruptcy and Insolvency Act* provides for the remuneration of the trustee:

> Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the *debtor after the claims of the secured creditors have been paid or satisfied*. (emphasis added)

15 Subsection 39(5) of the *Act* allows the court to make an order increasing or reducing the remuneration of the trustee.

16 When the assignment was made December 28, 1994, it appeared that there may be some excess recovered over the amount subject to the interests of the secured creditors. However, by the time the trustees' report was prepared it was not anticipated that there would be any amount recovered over and above that payable to the secured creditors.

17 In those circumstances the trustee was obliged to take whatever steps were open to him under the *Bankruptcy and Insolvency Act*, to clarify the issue and to incur as little expense as possible: see *Shink v. Gingras* (1962), 3 C.B.R. (N.S.) 309 (Que. S.C.); *Michel, Re* (1962), 4 C.B.R. (N.S.) 22 (C.S. Que.).

18 It seems to me that the trustee proceeded at his peril to collect the accounts receivable knowing full well that they were subject to security interests, without making arrangements with the secured creditor for payment of the fees.

19 In *Johnston, Re* (1925), 7 C.B.R. 203 (Ont. S.C.), Fisher J. of the Ontario Supreme Court noted: (at page 204)

> If a trustee takes upon himself to realize on the assets belonging to a secured creditor and the secured creditor allows him to do so, instead of realizing at his own expense as he is entitled, the trustee should arrange with the secured creditor to pay him his commission, and if he refuses the trustee is not, in my opinion, entitled to ask the unsecured creditors to pay it.

20 Fisher J. found that in the circumstances of that case it was in the interest of the unsecured creditors that the trustee should conduct a sale of assets of the debtor that were subject to secured claims. He therefore permitted the trustee to apply for remuneration in excess of the statutory fee payable from the cash receipts, meaning the amount remaining after the claims of the secured creditors had been paid.

21 I do not read that case or s 39(5) of the *Act* as providing authority for me to order a secured creditor to pay the trustee remuneration for realizing on its security.

22 I therefore decline to tax the statement of receipts and disbursements as presented and direct that the trustee prepare a revised statement of receipts and disbursements which provides for remuneration for the trustee out of any amount remaining after the claims of the secured creditors have been paid in accordance with their security interests.

23 The revised statement should be circulated to the creditors of the estate for their approval or comments. If there is still a dispute, the matter should be reset before me.

Application dismissed.

Tab 6

Administrative Agreements with Insolvency Practitioners

This communication replaces Directive CA-91-25, reproduced as Directive 12R in the directives issued by the Office of the Superintendent in Bankruptcy, Administrative Agreements with Trustees and Receivers.

The intent of this communication is to outline the Canada Revenue Agency's (Agency) policy for open communication and agreements between the Agency and insolvency practitioners, in cases where the projected recoveries of an insolvent's assets are insufficient to satisfy both the Crown's priority claim(s) and the practitioner's fees and costs. As the establishment of such agreements requires the use of the Crown's funds to facilitate an insolvency process, this communication further outlines the information requirements, necessary for the Agency to complete a thorough review of each request received, prior to entering into agreements that authorize the use of Crown funds.

This policy sets out a general understanding as to when the Agency may, despite the Crown's priority, allow the practitioner's claim(s) to pay part of its fees and costs out of the net proceeds of realization. In cases where Crown priority is not initially identified, reasonable fees and costs relating to subsequently identified priority debt will be allowed, providing that due diligence has been exercised by the practitioner. As soon as a priority debt has been identified, information must be provided to the Agency for pre-approval of any further costs going forward.

The principles outlined will apply in the majority of cases. There may, however, be cases where the circumstances will dictate the need for a customized solution and collection officers, with the assistance of their Headquarters Field Support representatives, are encouraged to work with insolvency practitioners in exploring alternative solutions.

Further information on this subject is provided in the attached **Administrative Agreement with Insolvency Practitioners** document.

Please consult your **Field Support Programs Officer** for any clarification you may need on this policy.

Original signed
by
D.L. Livingston (Ms.)
Director
Accounts Receivable Tax Programs

Background

As introduced in February 1986, and last amended in 1991, Directive 12R deals with the Crown's priority, over other creditors, to recover unremitted source deductions from an insolvent or bankrupt estate. Pursuant to the this policy, where there are not enough proceeds to cover both the costs of administration and the Crown's claim(s), the Canada Revenue Agency (CRA) may agree to let practitioners deduct reasonable costs, associated with the administration of bankrupt estates, from the proceeds of realization before the CRA is paid.

Subsection 227(4.1) of the *Income Tax Act* gives the Crown deemed trust priority over all other creditors, including secured creditors, for amounts of source deductions, against all assets owned or beneficially owned by a debtor. For legislative references, see **Appendix A.**

As a result of the Crown's priority, creditors have been concerned about their potential financial exposure when using the services of a practitioner to petition a debtor into bankruptcy or to enforce their security instruments against assets of an insolvent. In keeping with the CRA's intent to make sure that third parties are adequately compensated for actions, it would be appropriate, in certain circumstances, to clarify the application of Directive 12R.

As noted in the last revisions to Directive 12R, each case brought to the attention of the CRA will be considered on the basis of its own set of circumstances, as presented in the information provided by the practitioner.

Key Legislative Highlights

For clarity, the deemed trust provisions for source deductions include un-remitted amounts of federal and provincial tax, as well as employee contributions of Canada Pension Plan and Employment Insurance that have been deducted or withheld.

Regarding enhanced requirements to pay, the amounts involved include unremitted federal and provincial tax deducted at source, both the employee's and the employer's share of Canada Pension Plan and Employment Insurance contributions (ITA/CPP/EI), amounts that have been collected or are collectible by the debtor (ETA/ATSCA) and any applicable penalties and interest.

Key Focus and Issues

The CRA recognizes the need to expedite decision making wherever possible, to allow the practitioner to take timely actions in their handling of insolvency estates and to provide acknowledgement that reasonable fees and costs may be allowed, when there are not enough estate funds available. The policy is designed to accomplish the following:

- give an employer or designated air carrier or registrant (a person) access to the bankruptcy process;

- provide a mechanism for an insolvency practitioner to effectively administer an insolvent or bankrupt estate; and
- give the Crown the opportunity to maximize recovery by using an insolvency practitioner's expertise.

Process – General

If the first analysis of a debtor's financial affairs indicates that there may not be enough funds to pay the Crown's priority claim(s) and to make sure that the estate has the financial capacity to cover the practitioners fees and costs, the practitioner will contact the CRA at once to outline the facts of the case, provide estimates of the fees and costs anticipated, and discuss the CRA's position regarding the payment of some or all of the said fees and costs with regard to the Crown's priority property claim(s).

Conversely, the CRA must verify the extent of any property claim(s) by completing any necessary reviews of a debtor's books and records as soon as possible.

The CRA, with the help of the Department of Justice Canada as required, will determine whether an agreement should be made, consider the merits of the case, and through discussions with the practitioner, determine the appropriate terms and structure to be reached.

Unless otherwise authorized by the CRA, the proceeds of recovery of an asset should not be used to fund the recovery of more assets. For example, proceeds from the collection of accounts receivable should not be used to recover other assets.

In any situation where an agreement has been established, the practitioner will provide the CRA with regular progress reports, as negotiated by the parties, and report at once any material changes or cost overruns anticipated in the administration of the estate. Time frames will be detailed in the terms of the agreement to be sent with the CRA's letter to the practitioner. Practitioners will not draw fees without approval from the CRA.

For any amounts collected by the practitioner and remitted to the Crown, the CRA will have the same freedom to allocate the funds recovered to the appropriate priority claim, as if the practitioner was not involved.

Agreements will be rejected if it can be shown that delays in receiving requests are due to the practitioner's lack of diligence or as a result of not providing the required supporting information.

Reasonable Fees and Costs

When such funds are not enough to cover the practitioner's fees and costs, the CRA will consider allowing the payment of reasonable fees and costs out of the Crown's priority claim. Such fees and costs are those related, as the case may be, to the general administration of the estate (for example—filing fees, basic trustee's fees, statutory

advertisements, and other fees and costs provided for under the *Bankruptcy and Insolvency Act* (*BIA*) and its tariff) and/or to the realization of an asset against which the Crown's property claim applies (for example—the practitioner's direct expenses in possessing, storing, insuring, and selling such assets).

As stated in Superintendent of Bankruptcy Directive No. 5R, *Third Party Deposits and Guarantees,* it is prudent business practice for practitioners to arrange for third-party deposit and guarantees, when accepting an appointment, to secure recovery of administrative costs. It is important that practitioners look to these third-party deposits and guarantees before seeking recovery of their administrative costs from amounts available for the Crown's priority claim(s). The CRA recognizes that third-party deposits and guarantees cannot be relied upon to cover costs directly related to asset realization for the benefit of the Crown.

The CRA will **not** allow a practitioner to deduct the following fees and costs before paying a priority claim:

a) fees and costs that are more than the net realizable value of the assets against which the Crown's property claim applies;
b) fees and costs associated with actions taken for an asset, against which the Crown's property claim applies, that have resulted in direct financial benefit to other creditors;
c) fees and/or costs that relate to the action of a petitioning creditor, in placing a debtor into bankruptcy;
d) fees and costs associated with any proposal under the *BIA* or a reorganization plan under the *Companies' Creditor Arrangement Act* (CCAA) or receivership action started before the bankruptcy;
e) fees and costs attributable to a secured creditor for enforcing his or her security interest;
f) fees and costs associated with actions that were not authorized by the CRA; and
g) fees and costs for general office expenses of the practitioner.

In allowing reasonable fees and costs out of the Crown's priority claim(s), agreements for this allowance by the CRA are not binding on other creditors (including creditors for such things as construction lien claims or unpaid wages) holding a priority over fees and costs for administration of the estate. To avoid potential conflicts where there are surplus funds realized by the practitioner above the CRA's priority claim, the practitioner will have to negotiate with creditors holding priority over fees and costs separately in such cases. Also, the practitioner has to tell the CRA about the situation before asking the CRA for allowance of reasonable fees and costs. In those situations where the priority claims of other creditors are not known until after an agreement with the CRA is established, it will be necessary for the practitioner and the CRA to review the arrangement and make amendments as required.

All amounts recovered by the practitioner, related to an agreement with the CRA, will not be subject to costs or levies that would normally be charged or payable for amounts collected by the practitioner under the guidelines in the BIA..

Conservatory Measures Required

The CRA acknowledges that to preserve the value of the property of the bankrupt, it may be necessary in exceptional cases for a practitioner to incur certain fees and costs before an administrative agreement can be finalized with the CRA. The following are examples of costs that may be required before the establishment of an administrative agreement:

- Cases where conservatory measures are required
    - section 18(a) of the *Bankruptcy and Insolvency Act* (BIA) permits the practitioner before the first meeting of creditors to "take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value" without a court order.
- Fees and costs required to ensure assets are not depleted by third parties before being identified, inventoried, and realized upon by the practitioner, including those for:
    - securing the assets
    - insuring the assets
    - insuring the premises

When the CRA has agreed that an administrative agreement is necessary, the reasonable fees and costs related to conserving assets, upon which the Crown's priority claim(s) exists, will be allowed wherever appropriate.

To minimize up front costs, an **urgent** request for administrative agreements will be expedited through the process, using a special routing slip. The urgent routing slip, attached at Appendix B, will include a brief summary of the request and will flag the account for priority attention by CRA staff.

The information requirements for these urgent cases are identical to those outlined in this communication and depend on the type of situation involved.

Enhanced Requirements to Pay

In the normal course of business, the CRA will always (where permitted by legislation) proceed with recovery of accounts receivable owing to a bankrupt through the use of enhanced requirements to pay. This action is necessary to protect the Crown's claim(s) against the accounts receivable owing to the debtor from the claim(s) of other secured creditors.

The CRA recognizes that there will be exceptional instances where practitioner expertise is needed to maximize recovery of the accounts receivable, for example—in situations where a third party disputes the liability or looks to offset amounts owed against uncompleted work, repairs, or other services rendered but not paid by the bankrupt.

Finalizing an agreement authorizing a practitioner to collect accounts receivable for the CRA requires information to show the following:

- the existence of impacts related to disputes over performance, warranties, and set-offs; and
- the benefits of using the practitioner's expertise.

Where the CRA authorizes a practitioner to collect amounts that could otherwise be collected under subsection 224(1.2), the following minimum guidelines apply:

- The practitioner will make a full disclosure to the CRA of all amounts payable to the tax debtor at the time the arrangement is proposed.

- The practitioner will maintain and provide, on request, an accounting of the amount(s) received, including the date received and the name of the source of payment.

- The practitioner will hold any amounts so collected in trust for the Crown.

- Amounts collected by the practitioner will be remitted to the CRA, within a reasonable time frame, as negotiated between the parties.

- No costs or levy will be charged or payable for amounts collected by the practitioner under these guidelines.

- Amounts collected by the practitioner will not be used to fund other collection activity, regardless of whether the Crown would benefit from such action.

Where there are existing enhanced requirements to pay in effect from the CRA and on the issuing of any new enhanced requirements to pay, where agreements with the practitioner have been finalized by the CRA, a letter to third parties (see **Appendix C**) will be issued, outlining the action taken and directing them to forward any amounts captured to the practitioner, until advised otherwise.

The practitioner, upon examining and determining the nature and extent of a third party's liability to pay any monies to the tax debtor, should only agree to accept less than the third party's recorded liability after discussion and the written agreement of the CRA.

In situations that involve the recovery of amounts subject to enhanced requirements to pay, the reasonable fees and costs negotiated should reflect the difficulty the trustee encountered in recovering the amount involved. Only those fees and costs directly attributable to actions taken for the Crown's benefit (such as legal fees, prorated trustees fees, GST, postage/courier fees), in accordance with the agreement negotiated with the practitioner, will be allowed.

Revenu Québec, in recovering GST amounts for the Crown, will be responsible for entering into administrative agreements with practitioners and receivers. In those estates where related liabilities exist (that is—source deductions and GST), any request for an administrative agreement will be handled through the Quebec Region's insolvency group.

Policy and Process –Tiered Approach

There are various situations in which the CRA may be asked to enter into an agreement with a practitioner for the payment of reasonable fees and costs. With this amended policy, CRA processes will use a tiered approach to deal with the key scenarios encountered by practitioners and the CRA.

In keeping with the policy intent for authorizing the use of Crown funds, this approach provides clear guidelines and information requirements, to practitioners and CRA staff. The approach will promote expedited processing of requests while ensuring the fullest protection of the Crown's priority interests.

The tiered approach includes standardized request forms for use by practitioners, along with formal response letters to be used by the CRA to convey decisions and/or requests for more information. Formalizing this communication process will promote timeliness, as well as completeness in review and responses to requests, and help practitioners to provide all necessary information.

The tiered approach involves the following:

- expedited approach for summary administration bankruptcy files
- routine approach for ordinary administration bankruptcy files
- special cases, including:
    - conversion from summary administration bankruptcies to ordinary administration bankruptcies
    - conversion from proposal to bankruptcy
    - enhanced requirements to pay
    - receiverships

Summary Administration

Summary Administration files generally provide a limited amount of estate funds through which the costs associated with administering an estate may be deducted. These cases involve limited assets (including surplus income payments) and may or may not involve a secured creditor taking action against a bankrupt's assets.

If a debtor entering into bankruptcy has limited or no assets (and the CRA has approved an administrative agreement), the CRA will usually recognize and allow a practitioner's reasonable administrative fees and costs. In these summary administration estates, Rule 128 of the *BIA*, "Trustee Fees and Disbursements in Summary Administration," outlining the administrative fees and costs that a trustee can normally deduct from the assets available within an estate, will normally be used by the CRA in establishing the reasonable fees and costs allowed.

Where a secured creditor has not released its secured charge and is pursuing this interest against the assets of the bankrupt debtor, and the estate does not have enough assets to cover the administrative costs of the estate as a result, the CRA will not usually enter into an administrative agreement with a practitioner. Exceptions will be considered by the CRA case by case. However, the CRA will allow the reasonable fees and costs associated with the realization of an asset that provides a direct benefit to the Crown.

To let the CRA review and make decisions quickly in these scenarios, the limited information requirements, required from the practitioner, are as noted in the letter shown in **Appendix D**.

Upon review, where no more information is needed and no change in circumstances occurs, the CRA will work towards providing a response to requests within **two business days** of their receipt by the responsible collection officer.

Exception – Conversions of Summary Administration files to Ordinary Administrations
In cases where a summary administration file is converted to an ordinary administration file, any pre-existing agreement with the CRA for allowance of fees and costs must be revisited, and an updated request must be submitted to the CRA for a review and decision.

Ordinary Administration
Ordinary Administration bankruptcies can be much more involved and complex in nature, requiring more detailed information and extensive review by the CRA. These filings may involve large debts and several competing creditor claims, including those of secured creditors making a charge against a bankrupt's assets. As with summary administration files, such scenarios may result in limited estate funds available to cover the costs of administering the estate.

Under these circumstances and in recognition of the Crown's priority claim against all assets of a debtor, the CRA will only consider agreements for the allowance of a practitioner's reasonable administrative fees and costs in those instances where the secured creditor(s) has released its secured charge, in whole or in part, against the debtors assets, and funding for administrative costs from third-party sources is not available.

In estates that involve a petitioning creditor (or a secured creditor who has employed the services of the trustee to realize upon their security interest in a bankrupt debtor's property), reasonable fees and costs will be limited to the practitioner's direct expense in possessing, storing, insuring, repairing, preparing for sale, and selling assets generating proceeds towards payment of the Crown's priority claim(s). Practitioners will be expected to recover the costs of general administration of the estate from the petitioning or secured creditor.

To facilitate completion of a thorough review and quick decision making by the CRA, the information required from the practitioner is outlined in the letter shown in **Appendix E**.

Upon review, where no more information is needed and no change in circumstances occurs, the CRA will work towards providing a response to requests within **five business days** of their receipt by the responsible collection officer.

Conversions from a Proposal under the Bankruptcy and Insolvency Act (BIA) to a Bankruptcy
The CRA recognizes that there are cases where, on failure of a proposal filed under the BIA, the file may be converted to an ordinary administration bankruptcy.

In these cases, the guidelines and information requirements are equivalent to those for ordinary administration bankruptcies noted above. However, the reasonable fees and costs allowed in these cases will be limited to those that accrue after the assignment into bankruptcy. This will prevent the CRA from being blindsided with a large trustee fee without notice and review. The limit will also reinforce the need for debtors, upon retaining the services of a practitioner, to provide adequate security for fees associated with their proposal.

Receiverships
Receiverships include any legal or equitable proceeding started by the court or a secured creditor (further to a security agreement) during which a receiver is appointed to possess and realize upon some or all of the assets of a debtor and distribute the proceeds to secured creditors.

Since the circumstances under which a receiver may be appointed will vary, where the existence of the Crown's priority claim(s) to the debtor's assets may conflict with the administration of an estate, the allowance of reasonable fees and costs associated with realization of assets encumbered by the Crown's priority charges will be considered case by case. More policy direction on receiverships will be provided in another document.

Final Accounting Information Required by the CRA

After the acceptance of an agreement to allow reasonable fees and costs, the CRA requires the following accounting information, relating to the administration of the bankruptcy estate and of all actions directly related to realization of the assets to which the Crown's priority claim(s) attach:

- interim and final statement(s) of receipts and disbursements (as applicable)
- trustee's final accounting including detailed time charges (as applicable)

Request and Response Procedures

As indicated previously, standardized request forms for use by practitioners, along with formal response letters to be used by the CRA to convey decisions and/or requests for more information will be used in all cases.

Formalizing this communication process will promote timeliness and completeness in review and responses to requests, and help practitioners to provide all of the necessary information.

1) **Practitioner Requests**
To ensure timely actioning of a practitioner's request, the CRA has developed standardized request letters for use in providing information to the Agency for review. The letters identify key information, as outlined in this policy, which the CRA requires to complete both its review and its decision-making process. The letters and a routing slip are given in appendices B, D, and E:

- Appendix B – Routing Slip for Urgent Requests
- Appendix D – Request Letter for Summary Administration Estates
- Appendix E – Request Letter for Ordinary Administration Estates and all other special circumstances

2) **Agency Response to Practitioners**

The prescribed letters will be used by CRA staff for responses to all requests, and, in the case of disallowance, will clearly outline the reasons and/or more information needed by the CRA to make a decision.

Practitioners are instructed to send all requests as follows:

- to the assigned officer (if an officer is assigned to the account); or
- If there is no assigned officer, requests should be sent to the responsible 12R intake site[1] for assignment of the request to an officer.

[1] A listing of 12R contact sites for cases with no assigned officer within each region will be provided to all practitioners.

Appendix "A" - Legislation

The Crown's property claim(s) arises by operation of the law pursuant to the following:

Legislative Reference	**Trust Monies**	**Enhanced Requirement to Pay**
Income Tax Act	227(4) & (4.1)	224(1.2)
Excise Tax Act		317(3)
Air Travellers Security Charge Act		75(3)
Canada Pension Plan Act	23(3) & (4)	
Employment Insurance Act	86(2) & (2.1)	

Appendix B – Routing Slip for Urgent Requests

Attached, please find an "**urgent"** request for an Agreement between **(representative name)** and Her Majesty the Queen, in regards to the bankruptcy of XYZ.

Please be advised that on the **(date),** XYZ filed an assignment in bankruptcy, pursuant to the Bankruptcy and Insolvency Act, and that **(representative's name and address**) has agreed to serve as a trustee in bankruptcy ("trustee") for XYZ.

We submit this "**Urgent"** request for an agreement due to the following circumstances that require us to take immediate actions to preserve the condition and control of assets to which priority provisions apply (Insert summary below containing all details relative to the urgency of the file, including any applicable timeframes):

Please find attached our request letter, along with the information required to assist you in your review.

Should you have any questions or require additional information, please contact:

Insert Trustee Contact Name and Telephone Number

Appendix "C" Enhanced Requirements to Pay

Attention:

Dear Sir:

Re:

The attached Enhanced Requirement to Pay is being issued, pursuant to subsection 224(1.2) of the Income Tax Act, to capture any funds which you have payable or may have payable to the above noted party.

The above noted party is the subject of insolvency proceedings and that the authority to intercept any funds owing to this party, as provided in subsection 224(1.2) of the Income Tax Act, is not impeded by any stay of proceedings associated with those proceedings.

Further to an agreement between the Canada Revenue Agency and **"insert Representative's Name"**, any amounts subject to this Enhanced Requirement to Pay are to be directed to **"insert Representative' name"** until the Canada Revenue Agency provides you with other instructions.

Pursuant to subsection 224(4) of the Income Tax Act, failure to comply with the terms of this Enhanced Requirement to Pay may result in an assessment and legal action against yourself for any amount that you fail to remit to the trustee.

If you require further information with respect to this matter, please contact our office at the telephone provided in this letter.

Yours truly,

Appendix D – Request Letter for Summary Administration Estates

RE: Agreement between (representative name) and Her Majesty the Queen, in regards to the bankruptcy of XYZ

Please be advised that on the **(date),** **XYZ** filed an assignment in bankruptcy, pursuant to the Bankruptcy and Insolvency Act, and that **(representative's name and address)** has agreed to serve as a trustee in bankruptcy ("trustee") for XYZ.

Subject to verification by the Canada Revenue Agency ("Agency"), XYZ is indebted to the Agency for approximately (pick applicable liability(ies):

1) **(liability)** of source deductions, under the account # **(123456789RP)**,
2) **(liability)** of Good and Services Tax (GST), under the account # **(123456789RT),**
3) **(liability)** of Air Traveller's Security charge, under the account # **(123456789RG)**.

The books and records for XYZ are located at:

(Representative's name) has confirmed the assets and estimated net realizable value for the estate of XYZ are as follows (list all applicable assets individually):

(Representative's name) is seeking Agency's consent to claim(s) reasonable administrative fees and costs out of the net proceeds of realization, prior to the payment of amounts otherwise payable pursuant to the (1) Crown's deemed trust claim(s) under subsection 227(4) of the *Income Tax Act*, and/or (2) Crown Enhanced Requirement to Pay under subsection 224(1.2) of the *Income Tax Act*, subsection 317(3) of the *Excise Tax Act*, and/or subsection 75(3) of the *Air Travellers Security Charge Act.*

Based on the preliminary review of the estate, the estimated administrative fees and costs, before disbursements, would approximate **(dollar amount).** The anticipated amount to be received by the Agency, would approximate **(dollar amount).**

To facilitate the Agency's review, attached please find the following information:

- Initial Assignment form
- T1013 – Completed Third Party Authorization form (if not already on file with CRA)
- Copies of 3rd Party deposits/guarantees or confirmation that none have been received
- Estimated costs of realization per asset/category of assets (e.g. for inventory)

Please contact our office, should you require additional information or wish to further discuss this estate.

Appendix E – Request Letter for Ordinary Administration Estates and all other Special circumstances

RE: Agreement between (representative name) and Her Majesty the Queen, in regards to the bankruptcy of XYZ

Please be advised that on the **(date),** **XYZ** filed an assignment in bankruptcy, pursuant to the Bankruptcy and Insolvency Act, and that **(representative's name and address)** has agreed to serve as a trustee in bankruptcy ("trustee") for XYZ

Subject to verification by the Canada Revenue Agency ("Agency"), XYZ is indebted to the Agency for approximately (pick applicable liability (ies):

4) **(liability)** of source deductions, under the account # **(123456789RP)**,
5) **(liability)** of Good and Services Tax (GST), under the account # **(123456789RT),**
6) **(liability)** of Air Traveller's Security charge, under the account # **(123456789RG)**.

The books and records for XYZ are located at:

(Representative's name) has confirmed the assets and estimated net realizable value for the estate of XYZ are as follows (list all applicable assets individually):

(Representative's name) is seeking Agency's consent to claim(s) reasonable administrative fees and costs out of the net proceeds of realization, prior to the payment of amounts otherwise payable pursuant to the (1) Crown's deemed trust claim(s) under subsection 227(4) of the *Income Tax Act*, and/or (2) Crown Enhanced Requirement to Pay under subsection 224(1.2) of the *Income Tax Act*, subsection 317(3) of the *Excise Tax Act*, and/or subsection 75(3) of the *Air Travellers Security Charge Act.*

Based on the preliminary review of the estate, the estimated administrative fees and costs, before disbursements, would approximate **(dollar amount).** The anticipated amount to be received by the Agency, would approximate **(dollar amount).**

To facilitate the Agency's review, attached please find the following information:

- Initial Assignment form
- Financial Statements
- Appraisal reports (where completed and/or available)
- Valuation details and type of valuation
- Estimated costs of realization per asset/category of assets (e.g. for inventory)
- A copy of security agreements
- Estimated timeframe for liquidation
- Summary of extraordinary items (i.e. conservatory measures required and timeframes) where applicable
- T1013 – Completed "Authorizing or Cancelling a Representative" form (if not already on file with CRA)

- Copies of 3rd Party deposits/guarantees or confirmation that none have been received

Please contact our office, should you require additional information or wish to further discuss this estate.

_____
Representative Name

Tab 7

CITATION: Cosa Nova Fashions Ltd. v. The Midas Investment Corporation, 2021 ONSC 3989
COURT FILE NO.: CV-21-00656398-00CL
DATE: 20210602

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION, Applicants

AND:

THE MIDAS INVESTMENT CORPORATION, Respondent

BEFORE: S.F. Dunphy J.

COUNSEL: *David P. Preger*, for the Applicants

Raymond M. Slattery, for the Receiver, Rosen Goldberg Inc.

MAURICE J. NEIRINCK, for the Respondent Midas Investment Corporation

Robert A. (Bob) Klotz, for Auto World Imports

Symon Zucker, for John Kavanagh, guarantor

HEARD at Toronto: May 31, 2021

ENDORSEMENT (Revised)

[1] The Receiver brought this motion seeking (i) a general order approving its activities as set forth in its first report; (ii) an order approving a sales process for the two properties (Yonge Street and Eastern Avenue) that it has been appointed over; and (iii) an order

requiring the tenant of the 90 Eastern Avenue property to comply with its obligations under paragraph 5 of the Receivership Order dated April 6, 2021 by disclosing all documentation in relation to its tenancy to the Receiver.

[2] I do not think the first order sought is necessary or useful in the context of a receivership although I recognize that many receivers are in the habit of asking for them. A generic approval of actions adverted to in the Receiver's Report is meaningless in the absence of specific issues being raised and decided. I have been asked to approve a sales process and any orders I make in that regard will include all findings necessary to lead to that order. I have no basis to approve on a generic basis the Receiver talking to this or that stakeholder or reading this or that document and I decline to do so. As and when an action – such as the sales process – needs approval, approval or directions can be sought.

[3] I also think that the third item – ordering Mr. Klotz' client to comply with the April 6 Receivership order – ought to have been entirely unnecessary. Mr. Klotz advises that his client is bound to the defendant Midas by certain contractual confidentiality obligations. The Receiver was appointed over all of the debtor Midas' "assets, undertakings and properties" and thus stands clothed with all of the authority Midas had in relation to the property which includes any contractual obligations of the kind adverted to by Mr. Klotz. This is the very nature of the appointment made. Further, paragraph 5 of the appointment order obliged Mr. Klotz' clients to make available for inspection and copying all records in its possession or control excepting only records to which solicitor-client privilege attached or "due to statutory provisions prohibiting such disclosure". Neither exception is applicable here and Mr. Klotz' objection that he needed a direct order naming his client in order to comply or a waiver from the debtor was baseless. The necessity for immediate disclosure is obvious with suggestions being made of unusual and unknown (to the Receiver) transactions involving Mr. Klotz's client allegedly pre-paying several years' worth of rent or possessing an undisclosed agreement to purchase the property. The Receiver shall have the requested order directed at the tenant of Eastern Avenue and that tenant shall comply without delay.

[4] I turn now to the substantive purpose of this attendance i.e. sale process approval. The process proposed is as standard as such processes can be. The Receiver has canvassed potential listing agents and made a reasoned selection. It has obtained indications of value to help inform its conduct of the process and seeks the court's approval to enter into listing agreements for the two properties. The proposed listing agreements do not provide for a fixed listing price nor for commissions to the listing brokers unless a sale takes place. This latter should alleviate Mr. Kavanagh's concerns as guarantor about the consequences of paying up on his guarantee or Midas' concern about discharging the mortgage or taking an assignment of it.

[5] There were requests to adjourn this motion made at the outset. I turned them all down.

[6] Mr. Klotz pleaded lack of time to “seek instructions”. He has had four business days to do so at the very least and quite a bit longer given the month and more spent in pursuit of baseless objections to providing the Receiver with the information about the 90 Eastern tenant that is needed. Mr. Klotz was not able to articulate a single interest or even category of interest that his client as tenant might have in permitting the Receiver to start a sales process. His client can discuss what it will with the Receiver after it has disclosed the information that ought to have been disclosed almost two months ago.

[7] Mr. Kavanagh took no position on the motion but as guarantor merely wished to ensure that he would not have to pay commission to sales agents if he exercises his right as guarantor to pay out and receive an assignment of the mortgage he has guaranteed. He was swiftly satisfied on that count.

[8] Midas also suggests that it will imminently be in a position to redeem the security. Once again, it can do so at any time but the mere prospect that it might – a prospect that the parties knowledgeable of the tortured history of this file take with a grain or two of salt – is no reason to delay starting the process.

[9] It is to be devoutly hoped that one or the other of the proposals to pay out this applicant and discharge or take an assignment of the mortgage will be realized. However, this saga has dragged on for years and the magic of compounding is adding more and more to the debt and cementing the fear in the mind of the mortgagee that it will end up suffering a material shortfall. Delay is causing the debt to increase by the day and very possibly the secured creditor’s deficit with it. With the summer months rapidly approaching, it is critical to get the sale process underway without further delay. I am satisfied with the reasonableness of the marketing process proposed by the Receiver. That process is adequately described in the Receiver’s report. It should begin and begin NOW.

[10] I am approving the sales process described in the Receiver’s report and authorizing the Receiver to enter into the listing agreements it has recommended entering into. I do so with these small conditions:

(a) The sealing order requested shall apply to the confidential appendices – containing the listing proposals and the appraisals – but shall not apply to the redacted listing proposals that I am ordering be prepared and circulated to the parties today;

(b) The sealing order shall be until the earlier of (i) further order; (ii) the completion of a sale of the subject properties or (iii) six months from today;

(c) The Receiver shall prepare and circulate to the parties forthwith redacted copies of the listing proposals redacted only to remove information relative to the value of the properties; and

(d) The approval shall of the sales process shall be suspended until Wednesday June 2, 2021 at which point any party with a concrete objection to voice in relation to the approval of the listing proposals will be heard.

[11] I wish to explain or expand upon these conditions.

[12] As to the first two, I find a sealing order is plainly reasonable here both given the history of the proceeding and the nature of the information to be sealed. There is a reasonable apprehension that some of the parties' past behaviour may prove to be reliable guides to their future behaviour. Were that to be the case, the potential for mischief to the sales process is obvious. Further, appraisal values are something the receiver needs to evaluate the attractiveness of offers or expressions of interest that may come up as the process unfolds – that same information if made public could impact the way in which prospective buyers evaluate the properties in question. Buyers will perform their own valuations and the third-party valuation data should stay sealed until its revelation cannot reasonably be expected to frustrate or negatively impact the very sales process for which the information was sought.

[13] As regards the third condition, I find that the Receiver has been a bit overcautious in seeking to seal the listing proposals in addition to the appraisals. The only objection to revealing them now that was made was that some of them discuss ranges of potential values which could impact the sales process. That objection – potentially a valid one – is easily dealt with by requiring a redacted set of those documents to be circulated without the offending valuation estimates.

[14] The last condition was inserted to recognize the fact that while the parties have had an adequate opportunity to review the sales process as described in the Monitor's report, but they have not seen the actual documents. They shall have until Wednesday morning to do so. Redacted copies of the listing agreements – redacted only to remove references to opinions regarding value – will enable all of the parties to satisfy themselves that the proposed agreements conform to the description of them given by the Receiver in its Report.

[15] Accordingly, an order shall go in the terms of (b), (c) and (d) of the Notice of Motion. The approval of the marketing and sales process is suspended until Wednesday, June 2, 2021 pending further submissions if any that may be made after reviewing the redacted listing proposals. Unless a further order is made at that time, the approval order is effective as and from May 31, 2021. The sealing order shall be restricted in time in the manner indicated above.

[16] This substance of this endorsement was delivered orally and my orders were effective as of May 31, 2021. This endorsement was released to the parties in writing this day (June 1, 2021) and paragraph 3 hereof was revised in an immaterial respect following the re-attendance of the parties on June 2, 2021.

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_____

S.F. Dunphy J.

Date: June 2, 2021

Court File No. BK-23-00459641-0031
Estate No.: 31-459641

IN THE MATTER OF THE BANKRUPTCY OF INTEGRO BUILDING SYSTEMS INC., OF THE CITY OF VAUGHAN, IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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