Court File No. CV-24-00719692-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

- and –

1000088317 ONTARIO INC.

Respondent

APPLICATION UNDER s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 and s. 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss. 67(1)(a) and (e) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 and Rules 3 and 14.05(2), (3) (g) and (h) of the *Rules of Civil Procedure*

FACTUM OF THE APPLICANT

(Receivership Application)

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PART I – OVERVIEW

1. This application by Business Development Bank of Canada ("**BDC**") is for the appointment of MNP Ltd. ("**MNP**") as Court-appointed receiver of the assets, undertakings, and properties of the respondent, 1000088317 Ontario Inc. (the "**Debtor**").

2. BDC is the Debtor's primary secured creditor pursuant to the Loan Agreement and the Security, including the Mortgage (as these terms are defined below) in respect of the property municipally known as 11553 Tenth Line, Halton Hills, Ontario (the "**Real Property**"). The Real Property is a commercial property from which a trucking freight delivery and logistics business was operated.

3. As security for the Debtor's indebtedness, BDC also holds corporate guarantees from each of True North Freight Solutions Inc. ("**True North**") and North Shore Logistics Inc. ("**North Shore**", and together with True North, the "**Operating Companies**"), which are supported by general security agreements granted by each of the Operating Companies.

4. The Debtor is the holding company that owns the Real Property and True north and North Shore are the operating companies. Pursuant to the Priority Agreement (as defined below) between BDC and Bank of Montreal ("**BMO**"), BDC holds first-ranking security with respect to the Debtor's assets (and BMO has a subordinated interest therein), and BMO holds first-ranking security with respect to the assets of the Operating Companies (and BDC has a subordinated interest therein).

5. BMO does not object to the relief being sought by BDC on this application.

6. For the following reasons, BDC submits that its Security is in jeopardy and the appointment of a receiver is necessary to protect the interests of BDC and other stakeholders:

   a. **The Debtor has ceased carrying on business and is insolvent.** Following a May 1, 2024 site visit by BDC, it appears that the Debtor has ceased operations. Further, bankruptcy orders were issued against the Debtor's Operating Companies on May 6, 2024. The Debtor therefore has no means by which to generate revenue in order to repay its significant indebtedness to BDC, totaling $17,765,351.00 as of May 1, 2024. Moreover,

the Debtor is now two (2) months in arrears on BDC's loan, which arrears currently total $209,360.30.

b. **BMO obtained an interim receivership order and bankruptcy orders have since been issued against the Operating Companies.** On April 12, 2024, BMO brought an *ex parte* application for the appointment of BDO Canada Limited ("**BDO**") as an interim receiver, and the Honourable Justice Steele issued the interim receivership order (the "**IR Order**") on that same day. BMO's material filed on its interim receivership application confirms that BMO is owed in excess of $20,000,000.00 by its borrower, True North. On May 6, 2024, BMO obtained bankruptcy orders against each of the Operating Companies.

c. **There has been no contact from the Debtor or its principals despite attempts by BDC in this regard.** The Debtor has not responded to various communications by BDC regarding BDC's various concerns, including issuance of the IR Order, BMO calling its loans, and the Debtor's loan arrears to BDC. Further, the Debtor has provided no indication of how it intends to address BMO's ongoing proceedings against the Operating Companies, and it has become apparent that no other exit scenario is available to BDC.

d. **The Debtor appears to have HST arrears and has failed to confirm continuing insurance coverage for the Real Property.** Given the Debtor's failure to respond to BDC, BDC has been unable to confirm whether the insurance coverage for the Real Property, which expired on January 25, 2024, was renewed and whether there is currently any insurance coverage in place. Further, the Debtor's 2023 year-end financials confirmed HST owing of $124,858 and, in the circumstances, it is not unreasonable to expect that this amount has not been paid and may have increased in the interim.

e. On April 23, 2024, BDC issued formal demands for repayment of the indebtedness owing to it by the Debtor and a notice of intention to enforce security ("**NITES**") pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("**BIA**"). BDC's demands and the NITES expired on May 3, 2024 and the indebtedness remains outstanding to date. Thus, BDC is contractually and statutorily entitled to the appointment of a receiver pursuant to the Loan Agreement, the Security, section 101

of the *Courts of Justice Act* ("***CJA***"), section 243 of the *BIA*, and section 67 of the *Personal Property and Security Act* R.S.O. 1990 c.P10 ("***PPSA***").

Affidavit of Ruth Thomson sworn May 3, 2024 ("*Thomson Affidavit*"), Application Record, Tab 4, paras. 17-21, 23-35 and Exhibits B, C, D, K, L, N, O, P.

7. Further, it has been held that in cases involving a default under a mortgage, such as in the present case, seeking the appointment of a receiver is not extraordinary relief. It is submitted that, in such circumstances, a mortgagee has a *prima facie* right to seek the appointment of a receiver and such relief should generally be granted as a matter of course. As the Debtor has defaulted under the Mortgage, BDC therefore respectfully submits that this is an appropriate case to appoint a receiver.

***BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 42-44.**

PART II – FACTS

The Parties

8. BDC is the senior secured creditor of the Debtor, and at all material times, the Debtor was indebted to BDC pursuant to the Loan Agreement and the Security. In this regard, as of May 1, 2024, the Debtor was indebted to BDC pursuant to the Loan Agreement and the Security in the amount of $17,765,351.69.

***Thomson Affidavit,* Application Record, Tab 4, paras. 3-4.**

9. Harvinder Randhawa ("**Mr. Randhawa**") and Manpreet Bal ("**Ms. Bal**", and together with Mr. Randhawa, the "**Directors**") are the sole registered directors of the Debtor. Further, the Debtor is the holding company that owns the Real Property and True North and North Shore are the operating companies. Pursuant to the Priority Agreement, BDC holds first-ranking security with respect to the Debtor's assets, including its Mortgage in respect of the Real Property, and BMO holds first-ranking security with respect to the assets of the Operating Companies

***Thomson Affidavit,* Application Record, Tab 4, paras. 5-7.**

BDC's Loan

10. In accordance with the terms of a letter of offer dated December 21, 2021, as same may have been amended from time to time (the "**Loan Agreement**"), BDC granted to the Debtor a loan in the amount of $18,000,000.00 (the "**Loan**"). The Loan Agreement provides, *inter alia*:

a. The Debtor is required to make all payments that are required to be made pursuant to the Loan Agreement as and when due;

b. The Debtor is required to comply with certain financial covenants and reporting requirements to BDC, including delivering to BDC such financial and other information and documentation that BDC may reasonably require;

c. All priority payables, including source deduction and HST remittances and municipal taxes, are to be kept current;

d. All assets subject to BDC's Security, including the Real Property, must be fully insured; and

e. It is an event of default, entitling BDC to cancel the Loan Agreement, demand repayment in full, and to realize on its Security if, among other things:

   i. The Debtor fails to pay to BDC any principal, interest or other amount as and when due;

   ii. The Debtor fails to observe any covenant, provision, term or condition contained in the Loan Agreement or the Security;

   iii. The Debtor ceases to operate or becomes the subject-matter of insolvency proceedings and/or there is a material deterioration in the financial condition of the Debtor or any guarantor; or,

   iv. The Debtor fails to immediately advise BDC of any event of default.

***Thomson Affidavit,* Application Record, Tab 4, paras. 9-10 and Exhibit B.**

BDC's Security

11. It was a condition of granting the Loan under and pursuant to the Loan Agreement by BDC that the following security be granted to BDC (collectively, the "**Security**"), *inter alia*:

a. A first-ranking charge/mortgage (the "**Mortgage**") granted by the Debtor in favour of BDC in the principal amount of $18,000,000.00 and an assignment of rents, which were registered against title to the Real Property on January 26, 2022;

b. A general security agreement granted by the Debtor in favour of BDC granting a first-ranking security interest over the Debtor's personal property (the "**GSA**");

c. The guarantee of True North for the full balance of the Loan, which guarantee is supported by a general security agreement granted by True North in favour of BDC;

d. The guarantee of North Shore for the full balance of the Loan, which guarantee is supported by a general security agreement granted by North Shore in favour of BDC; and

e. The guarantee of the Directors for 50% of the balance of the Loan.

***Thomson Affidavit,* Application Record, Tab 4, para. 11 and Exhibits C-H.**

12. The Security expressly provides that BDC is entitled to appoint a receiver in the event of default (para. 15.1(a) of the GSA, and paragraphs 11.1(h) and (i) and 11.2 of the Mortgage's standard charge terms).

***Thomson Affidavit,* Application Record, Tab 4, para. 12 and Exhibits C and E.**

13. BDC's security interest granted by the GSA was perfected by registration pursuant to the PPSA on January 24, 2022. A search of the PPSA registry confirms that as of April 28, 2024, in addition to BDC, there is one other secured creditor with a PPSA registration, being BMO, with a registration dated February 13, 2023.

***Thomson Affidavit,* Application Record, Tab 4, para. 13 and Exhibit I.**

The BDC and BMO Priority Agreement

14. BDC and BMO, along with the Debtor and the Operating Companies, entered into a priority agreement dated February 23, 2023 (the "**Priority Agreement**").

***Thomson Affidavit,* Application Record, Tab 4, para. 14 and Exhibit J.**

15. BDC understands that BMO's borrower is True North and that True North's obligations to BMO are secured by the guarantees of the Debtor, North Shore and the Directors.

***Thomson Affidavit,* Application Record, Tab 4, para. 15.**

16. The Priority Agreement provides for the following priorities as between the security held by each of BDC and BMO:

a. BDC holds its first-ranking Mortgage registered on title to the Real Property and BMO holds a second-ranking charge on title to the Real Property in the principal amount of $17,800,000.00;

b. BDC holds first-ranking security on the personal property of the Debtor with BMO holding a second priority ranking regarding this property; and

c. BMO holds first-ranking security on the personal property of the Operating Companies with BDC holding a second priority ranking regarding this property.

***Thomson Affidavit,* Application Record, Tab 4, para. 16 and Exhibit J.**

Recent Developments

BMO Obtains the IR Order and Bankruptcy Orders

17. On April 12, 2024, BMO brought an *ex parte* application for the appointment of BDO as an interim receiver in respect of the assets, undertakings and properties of True North, BMO's borrower, as well as the Debtor and North Shore, being BMO's corporate guarantors. The Honourable Justice Steele issued the IR Order on that same day.

***Thomson Affidavit,* Application Record, Tab 4, para. 17-18 and Exhibit K.**

18. The affidavit filed in support of BMO's application identified a significant number of defaults and concerns relating to the operations of True North, as well as the Debtor and North Shore, including the following:

a. Failure to maintain required insurance coverage and arrears in respect of these policies in excess of $1,500,000;

b. Payroll arrears of between $600,000 and $1,000,000 owing to truck drivers;

c. Arrears in HST remittances of approximately $1,900,000 for the period of April 2022 to November 2023, and $800,000 in source deduction remittances;

d. Failure to file HST returns since December 2023, and failure to pay corporate income taxes assessed at $1,763,883 as at March 12, 2024;

e. Various ongoing financial and other reporting breaches;

f. Various discrepancies and irregularities in the reporting of accounts receivable for True North and North Shore;

g. Little management and oversight of the companies' business affairs and there being no clear path forward for continued operations; and

h. There being no availability under the BMO credit facilities such that BMO was of the view that the operating entities had little ability to continue operating.

***Thomson Affidavit,* Application Record, Tab 4, para. 19 and Exhibit L.**

19. BMO's material filed on its interim receivership application also confirms that BMO is owed in excess of $20,000,000.

***Thomson Affidavit,* Application Record, Tab 4, paras. 20-21.**

20. On March 25, 2024, Armour Insurance Brokers Ltd. registered a caution on title to the Real Property (the "**Caution**").

***Thomson Affidavit,* Application Record, Tab 4, para. 22 and Exhibit M.**

21. Since issuance of the IR Order, BMO has obtained bankruptcy orders against the Operating Companies on May 6, 2024.

Defaults Under BDC's Loan Agreement and Security, and BDC's Demands for Payment

22. In light of the IR Order and BMO calling its loans, BDC enquired with the Directors about the Debtor's failure to make the required March and April BDC Loan payments resulting in Loan

arrears of $209,360.30, which remain outstanding. The Debtor and the Directors have not returned or acknowledged communications from BDC.

***Thomson Affidavit,* Application Record, Tab 4, paras. 24.**

23. At this time, there were various breaches and defaults under and pursuant to BDC's Loan Agreement and Security, including, *inter alia*, issuance of the IR Order as against the Debtor, BMO issuing demands for payment and notices of intention to enforce security pursuant to s. 244 of the *BIA*, the registration of the Caution on title to the Real Property, BDC's Loan being two months in arrears totaling $209,360.30, and the Directors failing to respond to BDC's enquiries.

***Thomson Affidavit,* Application Record, Tab 4, paras. 25-26.**

24. As a result of these ongoing defaults by the Debtor, BDC demanded payment of the indebtedness owing to it pursuant to the Loan Agreement by letters dated April 23, 2024 sent to the Debtor, True North, North Shore and the Directors by May 3, 2024. BDC further delivered NITES to each of the Debtor, True North and North Shore in accordance with section 244 of the BIA.

***Thomson Affidavit,* Application Record, Tab 4, para. 27 and Exhibit N.**

25. As of May 1, 2024, the Debtor's indebtedness to BDC pursuant to the Loan Agreement and the Security totaled $17,765,351.69 (exclusive of further accrued interest, fees, disbursements, costs and HST)**.**

***Thomson Affidavit,* Application Record, Tab 4, para. 28 and Exhibit O.**

The Need to Appoint a Receiver

26. For the reasons detailed in paragraphs 1-7 above, BDC submits that it is just and convenient that a receiver be appointed for the protection of the Debtor's estate and for the protection of the interests of BDC and other stakeholders.

***Thomson Affidavit,* Application Record, Tab 4, paras. 17-21, 23-35 and Exhibits B, C, D, K, L, N, O, P.**

27. As outlined above, BDC's security with respect to the Real Property is its first-ranking Mortgage and BMO, which holds a second-ranking mortgage on the Real Property, has confirmed that it has no objection to BDC seeking the appointment of a receiver in respect of the Debtor's assets.

***Thomson Affidavit,* Application Record, Tab 4, para. 35 and Exhibit Q.**

PART III – ISSUE

28. BDC submits that this application raises the following issue which should be answered in the affirmative:

(i) Whether an order in the form of the draft order annexed as Schedule "A" to the notice of application herein, should be issued appointing MNP as receiver, without security, over the Debtor's assets, undertakings, and properties.

PART IV – LAW

The Jurisdiction of the Court to Appoint a Receiver

29. A receiver may be appointed by this Court where it is "just and convenient" to do so. Further, the Court may make any order required to ensure the protection of the interests of any secured creditor, including binding declarations of right and injunctive relief.

30. Section 101 of the *CJA* provides:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> ***Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 101(1)**

31. Section 243(1) of the *BIA* similarly provides that:

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers available.
>
> ***Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, s. 243(1)**

32. Subsections 67(1)(a) and (e) of the *PPSA* provide:

> Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured

or any person who has an interest in collateral which may be affected by an order under this section, the court may,

(a) make an order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34(3) or 35(4); […]

(e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

***Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 67**

Factors to Consider When Appointing a Receiver

33. In order to determine whether it is just or convenient to appoint a receiver, a Court will have regard to all of the circumstances of a particular case. In particular, the following considerations have been held to be relevant:

a. The moving party has a right under its security to appoint a receiver;

b. The security is in jeopardy; and,

c. Whether it is in the interests of all concerned to have a receiver appointed by the Court. This analysis includes an examination of the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the working duties of the receiver and manager.

***Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 at paras. 10-13 (ONSC)**

34. Where a debtor is in default of its secured obligations to a lender and there is evidence that the lender's security is in jeopardy, it is just and convenient that a receiver be appointed.

***Canadian Commercial Bank v Gemcraft Ltd.*, 3 C.P.C. (2d) 13 at para. 6 (Ont. Sup. Ct.)**

***Ontario Development Corporation v Ralph Nicholas Enterprises Ltd.*, 57 C.B.R. (N.S.) 186 at para. 20 (Ont. S.C.J. in bankruptcy)**

35. The secured creditor does not need to demonstrate that it will suffer irreparable harm if a receiver is not appointed where that creditor has a contractual right to the appointment of a receiver.

***Callidus Capital Corp. v. CarCap Inc.*, 2012 ONSC 163, at para. 42 (Gen. Div.) [Comm. List]**

***Swiss Bank Corp. (Canada) v Odyssey Industries Inc.*, 30 C.B.R. (3d) 49 at paras. 28 and 38 (Ont. Gen. Div.) [Comm. List]**

***Royal Bank of Canada v 605298 Ontario Inc.,* [1998] O.J. No. 4859 at para. 8 (Gen. Div.)**

36. In situations where the security documentation itself provides for the appointment of a receiver, Courts have held that the extraordinary nature of the remedies sought is less essential to the inquiry. In essence, it is submitted that where a secured creditor is contractually entitled to the appointment of a receiver, the loan is in default, and the 10-day NITES period has expired, it is just and convenient for the Court to assist in the orderly liquidation of a debtor's estate through the appointment of a Court-appointed receiver.

***Bank of Nova Scotia v Freure Village on Clair Creek, supra* at para. 12.**

***Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 at para. 42.**

37. The burden on the applicant creditor is further reduced when dealing with a default under a mortgage. In such cases, it is submitted that the mortgagee has a *prima facie* right to seek the appointment of a receiver, and such relief is generally to be granted to that mortgagee as a matter of course.

***Confederation Life Insurance Co. v. Double Y Holdings Inc.,* [1991] O.J. No. 2613 at para. 20 (Gen. Div.)**

***BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, 2020 ONSC 1953 at para. 42-44 (Gen. Div.) [Comm. List]**

***Business Development Bank of Canada v. 170 Willowdale Investments Corp.*, 2023 ONSC 3230 at para. 52 (Gen. Div.) [Comm. List]**

38. Moreover, a debtor defaulting under its loan is sufficient justification for the appointment of a receiver. It is just and convenient to appoint a receiver where the debtor has breached the terms of agreement with the secured creditor, and in particular, credit agreement terms and forbearance agreement terms.

***Royal Bank v Brodak Construction Services Inc.*, 2002 CanLII 49590 (ONSC) at para. 11.**

***Royal Bank of Canada v 605298 Ontario Inc., supra,* at paras. 8, 9 (Gen. Div.)**

***Royal Bank of Canada v. 1731861 Ontario Inc.*, 2023 ONSC 3292, at para. 33 (Gen. Div.) [Comm. List]**

39. It is also just and convenient to appoint a receiver where the debtor fails to provide any evidence that there is "reasonable certainty" of the ability to repay the indebtedness in the near future, or at all.

***Royal Bank of Canada v. 1731861 Ontario Inc., ibid,* at para. 33 (Gen. Div.) [Comm. List]**

40. It is therefore submitted that the present case is an appropriate case for the appointment of a Court-appointed receiver. In this regard, the Debtor has breached numerous provisions of BDC's loan and security agreements, BDC has issued demands, the ten-day notice period provided for in the NITES has expired and, for the reasons detailed above, BDC's security is in jeopardy.

PART V – ORDER REQUESTED

41. BDC respectfully requests the following relief:

(a) an order, if necessary, dispensing with service and filing of the within Application, declaring that service of this application has been validly effected on all necessary parties and declaring that this application is properly returnable in Toronto, Ontario;

(b) an order pursuant to s. 101 of the *CJA* and/or s. 243(1) of the *BIA* and/or ss. 67(1) (a) and (e) of the *PPSA* appointing MNP as Court-appointed receiver, without security, over all of the assets, undertakings and property of the Debtor

(c) an order ancillary to the receivership requested above in the form of the draft order annexed as Schedule "A" to the notice of application herein, as a result of the circumstances described in the affidavit filed in support of this application;

(d) costs of the application on a substantial indemnity basis; and

(e) such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of May, 2024.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 (ONSC)
2. *Canadian Commercial Bank v Gemcraft Ltd*., 3 C.P.C. (2d) 13 (Ont. Sup. Ct.)
3. *Ontario Development Corporation v Ralph Nicholas Enterprises Ltd.*, 57 C.B.R. (N.S.) 186 (Ont. S.C.J. in bankruptcy)
4. *Callidus Capital Corp. v. CarCap Inc.,* 2012 ONSC 163 (ONSC) [Comm. List]
5. *Swiss Bank Corp. (Canada) v Odyssey Industries Inc.*, 30 C.B.R. (3d) 49 (Ont. Gen. Div.) [Comm. List]
6. *Royal Bank of Canada v 605298 Ontario Inc*., [1998] O.J. No. 4859 (Gen. Div.)
7. *Bank of Montreal v Sherco Properties Inc*., 2013 ONSC 7023 (ONSC) [Comm. List]
8. *Confederation Life Insurance Co. v. Double Y Holdings Inc.,* [1991] O.J. No. 2613 (Ont. Gen. Div.)
9. *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, 2020 ONSC 1953 (Ont. Gen. Div) [Comm. List]
10. *Business Development Bank of Canada v. 170 Willowdale Investments Corp.,* 2023 ONSC 3230 (ONSC) [Comm. List]
11. *Royal Bank v Brodak Construction Services Inc*., 2002 CanLII 49590 (ONSC)
12. *Royal Bank of Canada v. 1731861 Ontario Inc.*, 2023 ONSC 3292 (Gen. Div.) [Comm. List]

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

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

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Personal Property Security Act, R.S.O. 1990, c. P-10

Court orders and directions

67. (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);

(b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);

(c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;

(d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;

(e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

(f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and

(g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

1985 CarswellOnt 404
Ontario Supreme Court High Court of Justice

Canadian Commercial Bank v. Gemcraft Ltd.

1985 CarswellOnt 404, [1985] O.J. No. 477, 2 W.D.C.P. 233, 32 A.C.W.S. (2d) 49, 3 C.P.C. (2d) 13

Canadian Commercial Bank (Plaintiff) and Gemcraft Limited (Defendant)

Montgomery J.

Heard: July 11, 1985
Judgment: July 11, 1985
Docket: No. 4066/85

Counsel: *B. Tait, Q.C.*, for plaintiff.
W.D.R. Beamish, for defendant.

Subject: Civil Practice and Procedure; Corporate and Commercial

Montgomery J. **(orally):**

1 This application by Canadian Commercial Bank (the "bank") is for the appointment of a receiver and manager of the property, undertaking, and assets of Gemcraft Limited ("Gemcraft").

2 The bank contends default under some of its loan agreements. Because of deterioration in the financial condition of Gemcraft; the bank says its security is in jeopardy. The bank holds fixed and floating charges contained in a debenture dated the 30th day of September 1980, a general assignment of book debts dated August 29, 1978 and security given pursuant to s. 178 of the Bank Act, S.C. 1980, c. 40.

3 In January and February 1984 the bank agreed to issue an income debenture to Gemcraft as part of the restructuring of credit arrangements. The effect of the $1.5 million dollar income debenture gave Gemcraft a lower interest rate with no interest payable unless a profit was made. Principle is not due under the instrument until December, 1988. The bank would receive the interest by way of dividends from a Canadian corporation pursuant to a provision of the Income Tax Act, S.C. 1970-71-72, c. 63. Gemcraft was authorized to draw on the income debenture so long as it maintained sufficient current receivables as defined in the margin requirements of the instrument. Gemcraft has received all but $221,000 under the income debenture but it is $784,000 short of its required receivables under the instrument. This in my view constitutes a continuing default under the financing agreements. All of the security held by the bank stands as security for the repayment of all present and future indebtedness.

4 Gemcraft's position is that the bank holds $81,000, erroneously received as interest under the income debenture. It is common ground that an error in the customer's financial statements in 1983 of some $1.3 million dollar overstatement of inventory made it appear that a profit existed when it did not. The bank concedes that $81,000 held by it is to be credited against loan accounts rather than being construed as interest under the income debenture. This, however, does not cure the default. Gemcraft says it is entitled to apply the remaining $221,000 under the income debenture against the loan accounts. The bank quite properly in my view says that is our money, it is not yours. The margin requirement is $784,000 short. Until that short fault is remedied no further draw will be allowed by the bank.

5 I am satisfied that this default triggers the acceleration clause in the 1980 agreement. It is not necessary that the income debenture contain an independent acceleration clause. The 1984 letter agreement provides that the security for the income debenture is the 1980 agreement and the $10 million dollar debenture.

6 A further default exists. The mis-statement of inventory in 1983 perpetuated in ensuing financial statements constitutes a continuing default under the 1980 agreement. For these reasons the bank is entitled to the appointment of a receiver and manager under the terms of the 1980 agreement. I am also persuaded that the appointment is just and convenient under s. 114 of the Courts of Justice Act, S.O. 1984, c. 11. I conclude that the bank's security is in jeopardy.

7 An order will issue appointing Price Waterhouse Ltd. as receiver and manager of the property, assets and undertaking of Gemcraft. Costs to the applicant.

Application granted.

1985 CarswellOnt 206
Ontario Supreme Court, In Bankruptcy

Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.

1985 CarswellOnt 206, 33 A.C.W.S. (2d) 243, 57 C.B.R. (N.S.) 186

ONTARIO DEVELOPMENT CORPORATION and ROYNAT INC. v. RALPH NICHOLAS ENTERPRISES LTD.

Gray J.

Heard: October 15-16, 1985
Judgment: October 28, 1985
Docket: No. 5473/85

Counsel: *S. Block* and *M. Rotsztain*, for plaintiffs.
M.L. Solmon, for defendant.

***Gray J.*:**

1 Two motions are involved in this matter. The first is a motion by the plaintiffs for an order appointing a receiver and manager of the Alpine Hotel in Thunder Bay. The second is a motion by the defendant to set aside the interim possession order granted by Saunders J. on 6th September 1985. At the close of argument on 16th October, judgment was reserved by me on both motions and I further ordered that the orders of the court then outstanding were to continue until the disposition of these motions.

2 The Alpine Hotel is owned by the defendant and the plaintiffs loaned the defendant $1,150,000 which enabled the defendant to purchase the hotel in July 1982, at which time the defendant gave the plaintiffs a debenture for $1,150,000. The defendant defaulted in its obligations under the debenture and by an agreement, the defendant agreed to pay $700,000 by 16th April 1985. It failed to do so. Demand was subsequently made for the payment of $1,363,963. By an agreement dated 28th June 1985, the defendant agreed to make payment of $700,000 by 31st July 1985. Again, there was default and the time for payment was extended to 15th August and then again to 30th August and the defendant continued to default.

3 The closing portion of para. 9 of the 28th June 1985 agreement dealing with the rights of lenders to enforce security reads thus:

> then the Lenders shall be entitled, notwithstanding any of the provisions of this Agreement to immediately enforce their security or exercise such other remedies available to them without any further notice to the Company, and the acknowledgement and consent referred to in paragraph 5 hereof shall be effective. The Company agrees that in any such event, it shall not in any manner challenge the rights of Lenders to so proceed, defend the proceedings or cross-claim, or commence any proceedings to prevent the Lenders from so proceeding.

4 Schedule A to the agreement is an acknowledgement and consent executed by the defendant.

5 The financial condition of the defendant was, and still is, desperate. Even without making the payments owing under the debenture at 26th September 1985, arrears of approximately $150,000 were owing to government bodies and numerous trade creditors remained unpaid.

6 The plaintiffs appointed one Stetsko, a chartered accountant and licensed trustee in bankruptcy in Thunder Bay, as receiver and manager and instructed him to enter and take possession of the defendant's premises. I quote now from para. 10 of the plaintiffs' factum:

Because of attempts by the Defendant's representatives to regain possession of the hotel after the Plaintiffs' initial entry, the Plaintiffs applied to Mr. Justice Saunders on September 6, 1985 and obtained an order for interim possession and custody under Rules 44 and 45. The application was brought, *ex parte*, under Rule 44.01(2) and based on the consent of the Defendant in the June 28 agreement waiving further notice of steps by the Plaintiffs to enforce their security. Mr. Justice Saunders was advised that the Plaintiffs were proceeding to cease operations of the hotel.

7 I will deal with this later. On 11th September 1985 the defendant brought a motion to set aside the order of Saunders J. and an adjournment was granted by Callaghan J. (as he then was) on terms which permitted the defendant to re-enter the hotel and operate it. A further adjournment to 15th October 1985, to permit completion of the cross-examinations was granted by Steele J., hence this hearing before me on 15th October 1985.

8 The plaintiffs' position is that an order should go in the form of the order appearing at p. 3 of the motion record, vol. 1, by reason of the provision of s. 114 of the Courts of Justice Act.

9 The defendant's position is that the plaintiffs, who are seeking equitable relief, should be denied that relief because they do not come to the court with "clean hands". The receiver and manager should not be appointed but rather John Hobbs & Co. should be appointed as a court monitor with the defendant being permitted to operate the business in the interim and with the court-appointed monitor to have the power to obtain an appraisal and report to the court as to what should be done in the interim with the assets and the property pending final disposition of the issues between the parties.

10 The complaints that the defendant makes concern the happenings from 30th August onwards, and I am urged to find that an appraisal should be made to decide whether the hotel should be sold empty or as a going business.

11 The conclusion I have reached is that the order should go for the appointment of the receiver and manager, substantially in the form of the draft order appearing at p. 3 of the motion record, vol. 1. There is, in my view, no need to give the defendant more time because it is obvious that this hotel enterprise cannot succeed at this time. Its 1985 revenues have been grossly overstated and the hotel has survived thus far by non-payment of many of its current trade debts. I will deal briefly in a moment with certain other financial aspects but I do not propose to exercise my discretion in favour of the defendant because of inaccurate statements made on its behalf. The so-called confederated management proposal and commitment is not a viable proposal and I find difficulty with the evidence of the deponents Nicholas and Friesner.

12 The plaintiffs financed the Alpine Hotel on two previous occasions and on both occasions the hotel failed.

13 Counsel for the defendant, at some considerable length, reviewed the conduct of the plaintiffs' representatives after 30th August, particularly with respect to the closure of the hotel and the allegation that Saunders J. was not told by the plaintiffs that they had shut down the business.

14 With respect to this latter allegation, I was advised that Saunders J. was advised that the plaintiffs were ceasing operations and all of this in the context of the manner in which the plaintiffs were taken out of possession. Counsel for the plaintiffs clearly stated to me that Saunders J., on the ex parte application, was advised that the plaintiffs were going to empty the hotel. I am not accepting the evidence of the affidavits in the supplementary record upon which I reserved judgment.

15 The important matter to decide on this motion is whether, at common law, or under the provisions of ss. 19, 56, 57 or 59 of the Personal Property Security Act, there is an obligation on a secured party to preserve intangible property such as goodwill by not going into possession and by continuing to operate the business.

16 There may well be an obligation under the Personal Property Security Act requiring a secured party to use reasonable care in the custody and preservation of collateral property in his possession even when the debtor is in default, but I fail to see that there is any obligation at common law or under the Personal Property Security Act requiring a secured party's representative to continue with the real property in such a way as to require continuation of a financially unsound business, the result of which continuation would simply add to the debt already owed to the secured creditor. It is not required. The authority for this proposition is *Re B. Johnson & Co. (Bldrs.) Ltd.*, [1955] Ch. 634, [1955] 3 W.L.R. 269, [1955] 2 All E.R. 775 (C.A.).

17 I was asked to conclude that the collateral property in this case consisted of certain goodwill. My reading of the material convinces me that at this point in time, this hotel business has virtually no existing goodwill. It would not be prudent or commercially reasonable to require the continued operation of this hotel business. The concept of the monitor merely is a request for further delay to permit possible payment of a portion of the indebtedness and the receiver and manager, if appointed, can decide in all the circumstances whether to operate or close the hotel.

18 I read the decision of Anderson J. in *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (S.C.), with care and I have concluded that it does not stand for the proposition on its facts that a receiver cannot sell. The receiver, in that case, did not get the power to sell because of the unusual facts of the case.

19 As I said previously, the order shall go for the appointment of the receiver and manager, substantially in the form of the draft order appearing at p. 3 of the motion record, vol. 1. I make this order under s. 114 of the Courts of Justice Act.

20 It is just and convenient to make the appointment where the principal owing under the debenture is in arrears and where the security is in jeopardy: Kerr on Receivers, 16th ed. (1983), p. 52; *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148.

21 In the result, therefore: (1) the application to set aside the order of Saunders J. dated 6th September 1985 is dismissed; (2) the conditions set forth in paras. 2, 3, 4 and 5 of the order of Callaghan J. (as he then was) are at an end; and (3) an order will go substantially in the form set forth in para. 3 of the draft order appearing at p. 3 of motion record, vol. 1.

22 The costs of the plaintiffs' motions for the appointment shall be costs to the plaintiffs on a solicitor and his own client basis in accordance with the provisions of Sched. A at p. 38 of motion record, vol. 1.

Order accordingly.

1995 CarswellOnt 39
Ontario Court of Justice (General Division — Commercial List)

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

SWISS BANK CORPORATION (CANADA) v. ODYSSEY INDUSTRIES INCORPORATED and WESTON ROAD COLD STORAGE COMPANY

Ground J.

Heard: December 7 and 15, 1994
Judgment: January 31, 1995
Docket: Docs. 94-CU-80416, B 280/94

Counsel: *Frank Newbould, Q.C.* , for plaintiff.
Alan J. Lenczner, Q.C. and *Linda L. Fuerst* , for defendants.

***Ground J.*:**

1 This is a motion brought by the plaintiff, Swiss Bank Corporation (Canada) (”Swiss Bank”) for the appointment of a receiver and manager of the property, undertaking and assets of the defendants, Odyssey Industries Incorporated (”Odyssey”) and Weston Road Cold Storage Company (”Weston”).

Factual Background

2 Odyssey and Weston are part of a group of entities controlled by Joseph Robichaud (”Robichaud”) which carry on business in Ontario, Quebec and the Maritime Provinces. The business is based upon the storage of frozen foods in large cold-storage warehouse facilities. Other entities controlled by Robichaud either carry on, or carried on, similar business in Western Canada and in the United States.

3 Odyssey, a corporation controlled by Robichaud, was a holding company. It held 100% of the equity of Associated Freezers of Canada Inc. (”AFC”). AFC operated the freezer business under leases from limited partnerships controlled by Robichaud which held the beneficial ownership of the various cold-storage warehouse facilities. As a result of various transactions recently undertaken by one or more of the Robichaud entities, it is in issue as to which corporation or entity manages the business, or has beneficial ownership of the various warehouse properties at this time.

4 Seven cold-storage warehouse plants are registered in the name of 606327 Ontario Limited (”606327”). They are situated in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. Until recently, 606327 held the properties in trust for a limited partnership registered in Ontario as The Polar-Freez Limited Partnership (”Polar-Freez”). Ninety percent of the limited partnership units of Polar-Freez were owned by AFC.

5 Two cold-storage warehouse facilities are owned by the defendant Weston which is a limited partnership registered in Ontario.

6 On December 13, 1988, Swiss Bank advanced approximately $47.5 million (the “Odyssey Loan”) to Associated Investors Partnership (”Associated Investors”), one of the partners of which was Odyssey. The loan was repayable on demand. Associated Investors advanced the funds to Odyssey.

7 The security Swiss Bank received for the Odyssey Loan included:

(a) assignments by Odyssey of $30 million and $39 million mortgages (the "Polar-Freez Mortgages") from 606327 to Odyssey, each mortgage being registered over the seven cold-storage warehouse plants beneficially owned by Polar-Freez. The mortgage terms included an obligation to pay all taxes when due; and

(b) a fixed and floating charge debenture (the "Odyssey Debenture") in the amount of $47.5 million given by Odyssey over all of its assets as a general and continuing collateral security. The Odyssey Debenture contained standard provisions dealing with events of default and remedies, including the right to apply to a court for the appointment of a receiver and manager.

8 The Odyssey Loan was payable on demand. By letters dated July 22, 1994, Swiss Bank demanded payment of outstanding arrears and principal to be made no later than September 6, 1994. Payment was not made. Principal outstanding as of November 20, 1994 was $48,959,148.48. As of November 20, 1994, there was $1,178,241.19 of arrears of interest owing.

9 Municipal property taxes on the seven Polar-Freez properties are in arrears of approximately $2.5 million. These arrears have existed over various periods of time within the past two years.

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to exceed $10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

11 The security Swiss Bank received for the Weston Loan included:

(a) a collateral mortgage in the amount of $13 million over the two warehouses owned by Weston. The mortgage provided that Weston was to pay all municipal taxes when due;

(b) a general security agreement over the assets and undertaking of Weston containing standard terms describing the events of the default and remedies available, including the right of Swiss Bank to apply to court for the appointment of a receiver and manager; and

(c) guarantees by Odyssey and Robichaud of the indebtedness of Weston to the amounts of $13 million and $3.5 million respectively.

12 Principal payments on the Weston Loan of $150,000 were due on December 31 each year commencing in 1990. No payments of principal were made and therefore as of December 31, 1993, and thereafter, $600,000 in principal payments were in arrears. The Weston Loan agreement provided for a hedge account to be funded by Weston. The purpose of this account was to provide protection to Swiss Bank as a hedge against any adverse movements in foreign exchange rates in the event that Weston transferred its obligations into Swiss francs. An initial deposit of $1 million was made by Weston to the hedge account at the end of December 1989 as required. Further payments of $350,000 per annum commencing on December 31, 1990 were required; however, the only payment made was a further $15,000 payment on July 31, 1992. The hedge account is in arrears of $1,040,000. Municipal tax arrears against the Weston properties of approximately $1 million have been outstanding for approximately two years.

13 By letter dated July 22, 1994, Swiss Bank demanded payment in full of outstanding principal plus interest by September 6, 1994. Payment was not made. Principal outstanding as of November 29, 1994 was $11,334,907.93. Loan interest payments have been in default since March 31, 1994. The amount of interest outstanding to November 29, 1994 is $203,686.70.

14 In the Spring of 1994, the Robichaud Group presented a restructuring plan that included a reverse take-over of a new Robichaud corporation named Polar Corp. International ("Polar Corp.") by a V.S.E.-traded corporation.

15 The restructuring plan contemplated: (i) Polar Corp acquiring the seven warehouses from Polar-Freez; (ii) a transfer of AFC's ownership interest in Polar-Freez to a corporation named Pacific Eastern Equities Inc. ("Pacific Eastern"), a corporation controlled by Robichaud with no substantial assets; (iii) a winding-up of AFC under s. 88 of the *Income Tax Act* , and conveyance of its assets to Odyssey; (iv) a sale of the leasehold interest of Odyssey (now the tenant) in the seven warehouses to Polar Corp.

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

> If:
>
> > (a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;
> >
> > (b) any payment required under Section 2.20 shall not be made when due;
> >
> > (c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or
> >
> > (d) by 5 p.m. on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,
>
> this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

17 It appears to be agreed that the conditions set out in s. 2.21 of the Master Agreement were not fulfilled.

Submissions

18 It is the position of counsel for Swiss Bank that the transfers of assets contemplated by the Master Agreement did in fact take place and that the cancellation of the leases to AFC which were assigned to Odyssey on the wind-up of AFC constituted a breach of the covenant of Odyssey contained in the Odyssey Debenture not to dispose of any part of the charged premises except in the ordinary course of business. It is his further submission that, if I should find that the transactions contemplated by the restructuring plan did not in fact take place, there is still ample evidence before the court that the Odyssey Loan and the Weston Loan were in default and that Swiss Bank is entitled to the appointment of a receiver.

19 With respect to the restructuring plan, counsel for Swiss Bank points out that a number of the letters and memoranda and several statements contained in the affidavits of Robichaud, all submitted to the court, refer to the transactions as having taken place and the assets having been transferred in accordance with the restructuring plan. There is no reference anywhere to the transfer documents being held in escrow pending the approval by Swiss Bank to the restructuring plan. He submits that the Master Agreement is of no legal effect in that Swiss Bank gave notice that it was not satisfied as to the tax aspects of the restructuring plan and, accordingly, the situation remains as it was before the Master Agreement was entered into.

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of $1,100,000; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of $2,500,000; that there are principal payments of $600,000 in arrears on the Weston Loan, and that the annual payments of $350,000 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of $203,000; that there are municipal tax arrears on the Weston properties in amounts in excess of $1,000,000; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey

Debenture has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the *Bank Act* , S.C. 1980-81-82-83, c. 40 (the "*Bank Act* ") in that the loan could not be made by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

22 Second, counsel alleges that Swiss Bank is in breach of certain provisions of the commitment letters for both the Odyssey Loan and the Weston Loan by refusing to agree to certain conversions of the loans from Swiss francs to Canadian dollars on several occasions at the request of the borrowers made pursuant to the terms of the commitment letters. In refusing to allow such conversions, counsel submit that Swiss Bank was not only in breach of the terms of the commitment letters, but was also in breach of its fiduciary duty to the borrowers in that Swiss Bank had undertaken to give advice to the borrowers as to the structure of the loans and as to currency conversions.

23 Third, counsel for Odyssey and Weston point out that Swiss Bank is not seeking the appointment of an interim receiver pending trial of this action, but is seeking the appointment of a court appointed receiver and manager to take over the business, undertaking and assets of Odyssey and Weston to enforce the security held by Swiss Bank and effect repayment of the Odyssey Loan and the Weston Loan. Counsel submit that under the provisions of s. 101 of the C.J.A., a receiver and manager may be appointed where it appears to a judge of the court to be just or convenient to do so, and that, in seeking the appointment of a receiver and manager, Swiss Bank is seeking an equitable remedy. It is the position of counsel for Odyssey and Weston that to appoint a receiver in this case would be unjust and inequitable. They submit that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed pending the trial of the oppression action commenced by Swiss Bank. There are certificates of pending litigation registered against the properties and there is an outstanding order restricting the disposition of any assets of Odyssey and Weston. In addition, Robichaud and the Robichaud group are prepared to give an undertaking to the court that there will be no expenditures of cash outside the ordinary course of business pending the trial of the action. It is further submitted that, if it is determined at trial that the assets have been transferred in accordance with the restructuring plan, there is very little in Odyssey for a receiver to administer and that, if it is determined that the assets remain in Odyssey and Polar-Freez, a sale of such assets by the receiver would result in a substantial tax liability and Swiss Bank would not recover an amount which would substantially decrease the principal amount of the Odyssey Loan. In addition, counsel submits that to appoint a receiver would be inequitable in view of Swiss Bank's acquiescence in the asset transfer since the Spring of 1994. Further, it is submitted, the appointment would result in extreme hardship to the borrowers, that Swiss Bank does not come to court with clean hands in view of its refusal to permit conversions of the loans and that any receiver and manager appointed to run the business of Odyssey and Weston would not have the background and experience of Robichaud in the operation of the business.

24 With respect to the diversion of funds to affiliates in the United States, counsel for Odyssey and Weston submit that there is no evidence that the transfer of the deposit receipts was for any improper purpose or was not in the ordinary course of business in view of the history of relationships among the Robichaud group of companies and, in any event, does not constitute evidence that the security for the Swiss Bank loans was in jeopardy or materially affect the ability of the borrowers to repay such loans.

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to

have taken place. Section 5.4 of the Master Agreement provides:

> In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

26 One could become embroiled in a metaphysical debate as to whether the effect of such section is that the transactions having taken place have been reversed or that the transactions are deemed never to have taken place. Whichever is the case, there has either been a default under the Odyssey Debenture which has been rectified, or no default under the Odyssey Debenture has taken place. Accordingly, it is not, in my view, grounds for the appointment of a receiver and manager by Swiss Bank. I am also not satisfied that the rather confused transactions involving the term deposits in the United States constitute grounds for the appointment of a receiver. It appears that the transfers of the term deposits to the United States were for valid business reasons, i.e. to provide security for the performance of a lease or for the approval of a proposal under c. 11. There is no evidence to support the contention of counsel for Swiss Bank that the failure to reflect one of the transfers of such term deposits on the books of AFC was part of some nefarious plot to divert assets of the Robichaud Group companies. Accordingly, I am not persuaded that these transactions constitute a basis for determining that the security for the loans was in jeopardy, or that the ability of Odyssey and Weston to pay the loans was materially effected by these transactions so as to satisfy the court that it would be just and convenient on this ground to appoint a receiver and manager.

27 It appears, however, that the other defaults under both the Odyssey Loan and the Weston Loan referred to by counsel for Swiss Bank, would of themselves provide ample justification for the appointment of a receiver and manager. One must then consider the submissions made by counsel for Odyssey and Weston that, in this case, it would be unjust and inequitable to order such appointment.

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

29 The second submission of counsel for Odyssey and Weston is that there would be no substantial benefit to Swiss Bank resulting from the appointment in that, if it is determined that the assets have been transferred to Polar Corp., there is very little in Odyssey for a receiver to administer. Having found that the effect of the termination of the Master Agreement is that either the transfer of assets has been reversed or is deemed not to have taken place, substantial assets remain in Odyssey and its subsidiaries and a receiver would be in a position to administer such assets and business or to realize upon them to satisfy the indebtedness owing to Swiss Bank. Accordingly, I do not accept the submission that there is no substantial benefit to Swiss Bank from the appointment of a receiver.

30 Counsel for Odyssey and Weston submit that Swiss Bank acquiesced in the transfer of assets since the Spring of 1994, and that accordingly, it would be inequitable to appoint a receiver at this time. My reading of the material before this court is that, although Swiss Bank was aware of the intended restructuring plan and the motivation for such plan, it was concerned throughout about the effect that such plan would have on its security position and the tax ramifications of such plan, and at no time indicated its acquiescence in, or approval of, the plan.

31 With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business

sold. The situation in this case is no different. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

32 The first submission of counsel for Odyssey and Weston is that the Odyssey Loan was illegal and accordingly the security for such loan is void and unenforceable. The illegality is alleged to have arisen from the fact that Swiss Bank would not have been able to make the original loan to Odyssey itself without being in breach of certain regulations under the *Bank Act* . I am unable to accept this submission for two reasons. The initial loan made in 1985 has been repaid and it is security for the new loan made in 1989 which is now sought to be enforced. There is so far as I am aware no allegations that Swiss Bank was unable to make the new loan in 1989. In any event, Swiss Bank did not make the original 1985 loan; rather, it arranged for the loan to be made by its parent company in Switzerland and an European affiliate of its parent company, neither of whom would have been subject to the regulations under the *Bank Act* . Accordingly, I fail to see how the original loan could be said to be illegal when the loan was not made by an institution subject to the regulations under the *Bank Act* . Moreover, the decision of the Ontario Court of Appeal in *Sidmay Ltd. v. Wehttam Investments*, [1967] 1 O.R. 508 , affirmed [1968] S.C.R. 828 would seem to stand for the proposition that, even if a loan is made in contravention of a statute or regulation governing the lending institution, such loan is still enforceable by the lending institution.

33 Counsel for Odyssey and Weston further submit that Swiss Bank did not come to court with clean hands in view of the fact that it was in breach of the provisions of the commitment letters governing the Odyssey Loan and the Weston Loan by virtue of its failure to allow certain currency conversions, and was also in breach of its fiduciary duty to the borrowers in that it had undertaken to give advice with respect to the structure of the loans and the provision for currency conversion. I can see that the language of the two commitment letters dealing with currency conversions is not abundantly clear and there is little evidence before this court as to whether the requests for currency conversions were properly made on the appropriate dates and with the appropriate notice.

34 There is also very little evidence before this court to establish that this a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in *Hodgkinson v. Simms* , September 30, 1994, (unreported) [now reported at [1994] 9 W.W.R. 609]. At pp. 20-22 [pp. 629-630] of his reasons, LaForestJ. stated:

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith* . I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *LAC Minerals* , however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...
>
> In relation to the advisory context, then, there must be something more than a simple undertaking by one

party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 ; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) , leave to appeal refused, [1982] 1 S.C.R. xi (note) ....

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27 [pp. 632-633]:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest ... No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle.

36 The commercial transactions among the parties to this action do not appear to me to be those rare occasions where the fiduciary principle would be invoked.

37 In any event, in my view, such allegations of breach of contract and breach of fiduciary duty would have to be established by the borrowers in an action in damages against Swiss Bank and such damages may well be offset against the amounts owing under the Odyssey Loan and the Weston Loan. The fact that such allegations are being made at this time does not, however, constitute a reason for refusing to grant the appointment of a receiver at this time or convince me that it would be unjust or inequitable to do so. It has not been suggested that the damages which might be awarded to Odyssey and Weston, should they be successful in any such action, would be sufficient to pay off the Odyssey Loan and the Weston Loan. In fact, the limited evidence before the court as to the damages to which Odyssey and Weston would be entitled would seem to indicate that such damages would fall far short of the amount necessary to pay off the two loans.

38 In summary, although I am not satisfied that at this time there exists any default resulting from a transfer of assets pursuant to the restructuring plan or that the transfer of the deposit receipts to affiliates in the United States constitutes grounds for the appointment of a receiver, the existence of the other defaults with respect to interest payments, principal payments, arrears of taxes and failure to pay principal on demand, in my view, justifies the appointment of a receiver and none of the submissions put forward by counsel for Odyssey and Weston convinces me that it would be unjust or inequitable to grant such appointment.

39 Accordingly, an order will issue, substantially in the form of the order annexed as Sched. "A" to the notice of motion, appointing Coopers & Lybrand Limited as receiver and manager of the property, undertakings and assets of Odyssey and Weston. If counsel are unable to settle the terms of such order, they may attend upon me. Counsel may also make oral or written submissions to me as to the costs of this motion.

Motion allowed.

1998 CarswellOnt 4436
Ontario Court of Justice (General Division) [Commercial List]

Royal Bank v. 605298 Ontario Inc.

1998 CarswellOnt 4436, [1998] O.J. No. 4859, 84 A.C.W.S. (3d) 92

Royal Bank of Canada, Plaintiff and 605298 Ontario Inc.

Greer J.

Heard: November 10, 1998
Heard: November 12, 1998
Judgment: November 20, 1998
Docket: 98-CL-3070

Counsel: *A. Irvin Schein*, for the Plaintiff.
Avrum D. Slodovnick, for the Defendant and the Moks.
M.J. Neirinck, for the Penta Group and the Ugovsek Group.

***Grerr J.*:**

1 The Plaintiff, Royal Bank of Canada, ("the Plaintiff" or "the Bank") moves for an Order appointing Pricewaterhouse Coopers Inc. ("PwC") as Receiver and Manager of the property, assets and undertaking of the Defendant, 605298 Ontario Inc. ("the Defendant"). The Bank is a creditor of the Defendant, being the holder of two debentures in the amounts of $4,200,000 dated November 11, 1987 and $4,900,000 dated December 19, 1990, and the holder of a General Security Agreement dated November 11, 1987, granting a security interest to it over all of the Defendant's assets, property and undertaking, including the real property owned by the Defendant in the Town of Markham ("the property") which houses a small shopping plaza, the largest tenant of which is a bowling alley.

2 Further, in 1995, the Bank provided various credit facilities to the Defendant consisting of a $75,000 demand operating loan, a $118,000 letter of credit, a $2,983,714 match funded base rate loan and a $1,537,137 term loan. As security for all of this money, the Defendant issued the two debentures which are registered against the property owned by the Defendant. Finally, the Bank holds a joint and several personal guarantee dated June 19, 1991 in the amount of $1,245,000 signed by Dr. Simon Mok and his wife, Grace Mok; a joint and several guarantee dated July 4, 1991 in the amount of $725,000 executed by Penta Drugs Limited, S.T.K. & W. Chemists Limited, Sydney Yiu, Keith Mak, Tak Man Lam and George Kam; a guarantee dated June 26, 1991 in the amount of $300,000 executed by Peter Mok; and a joint and several guarantee dated July 8, 1991 in the amount of $580,000 executed by Ugovsek Investments Limited and Stanislav Ugovsek.

3 Under the provisions of its debentures, the Bank, upon default, may appoint any person or persons to be a Receiver of the property. The Defendant has failed to make any payments on the first due debenture for over a year, and interest on the demand operating loan in the amount of $75,000 has been in arrears since March 23, 1997, interest on the $1,537,137 term loan has been unpaid since May 21, 1997 and interest on the $2,983,714 match funded base rate loan which came due on November 1, 1997, has been in arrears since June 4, 1997. Demand letters have been sent by the Bank to the Defendant for all of its security and demand letters have also been sent to all the guarantors by the Bank.

4 The parties agree that the Defendant has been attempting to restructure its loans and that the Defendant has been having on-going negotiations between the Moks, on the one hand, and the Penta Group and the Ugovsek Group on the other hand. There is documentation to this effect in the Motion Record. There is also evidence that the Moks have attempted to list the property and the bowling alley business for sale without consultation with others who have an interest in the Defendant.

5 Prior to the Motion being heard, the Bank filed a further short 7 paragraph supporting affidavit sworn to by Kenneth L. Kallish, a solicitor. The Defendant moved to adjourn the Motion to allow it to cross-examine Mr. Kallish on the affidavit. This Motion was refused by me and the main Motion was heard.

6 The Moks wish to have further time during which to negotiate a possible restructuring, and take the position that the Bank is owed less than the value of the property so that it has adequate security for its loans. Further, the Defendant maintains that it would be prejudiced if the Receiver is appointed as the value of the property would be diminished if sold by a Receiver as opposed to if it was sold by the Defendant itself. The Defendant believes that the appointment of the Receiver is the remedy of last resort.

7 The Penta Group and the Ugovsek Group are co-owners of the land with the company. They do not oppose the appointment of a Receiver. They wish finality brought to the proceedings which has have been long and protracted, and if no forbearance agreement is reached, they would not contest the Receivership.

8 The Bank says it has delayed long enough in exercising its rights under its security. It relies on the principles set down in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* (September 3, 1991), Doc. 91-CQ-72 (Ont. Gen. Div.) where the secured creditor had not received payments on account of interest since its security matured nor had the principal being repaid when it fell due. In that case, at p.5, Farley J. notes:

> I must also note that there appears to be a major distinction between those cases where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute.

At p.6, he notes that the plaintiffs have extended great latitude to the defendants, which is the case before me. I note, as Farley J. did, that the Defendant before me has not shown any irreparable harm that is not compensable in damages, although as Ground J. noted in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), at p.58, the authorities seem to support the proposition that irreparable harm need not be demonstrated.

9 I am satisfied that there is no other acceptable means to protect the interests of the parties other than the appointment of PwC as the Receiver. The appointment of a Receiver is an equitable remedy, and given that the Court must determine if such an appointment is both just and convenient. While such an appointment may be intrusive and should not be granted simply as a matter of course (see: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.)), in the case at bar, the Bank has not caused the default, which the lending institution did in *Royal Bank*, supra. Here there has been default on the debenture, a loan has matured, there is more than a significant amount owing with huge arrears of interest outstanding, and the Bank has exercised great patience to the present date. It does not have to rely on the appraisal which has been presented by the Defendant, which does not reflect the true financial picture of what the bowling alley revenue and expenses are. The three groups which have an interest in the Defendant company are at odds with one another.

10 The Bank has agreed to postpone the effective date of the Order to November 24, 1998, if the order is made, to allow the interest groups to try to work out their differences and put forward a proposal for restructuring. I have concluded that the appointment of a Receiver must be made. Order to go appointing PwC as Receiver and Manager of the property, assets and undertaking of the Defendant company as set out in paragraph 1 of its Notice of Motion, to take effect on November 24, 1998, and in the terms of the Draft Order which is attached as Schedule A to the Notice of Motion.

11 If the parties cannot otherwise agree on Costs, I may be spoken to.

Motion granted

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

***Farley J.*:**

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were

to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment

on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a $20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> **Appointment to Enforce Rights**
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the

project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note*: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

BUSINESS DEVELOPMENT BANK OF CANADA Applicant	- and -	1000088317 ONTARIO INC. Respondent

APPLICATION UNDER s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 and s. 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss. 67(1)(a) and (e) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 and Rules 3 and 14.05(2), (3) (g) and (h) of the *Rules of Civil Procedure*

Court File No. CV-24-00719692-00CL

ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding Commenced at TORONTO

FACTUM OF THE APPLICANT
(Receivership Application)

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