



Court of Appeal File No. CA49441

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Mister Justice Masuhara, of the Supreme Court of British Columbia, pronounced October 27, 2023

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

1351486 B.C. LTD.

RESPONDENT
(PETITIONER/APPLICANT)

AND:

MNP LTD., IN ITS CAPACITY AS COURT-APPOINTED RECEIVER AND MANAGER, LIVING BEACHSIDE DEVELOPMENT LIMITED PARTNERSHIP, SUNNY BEACH MOTEL INC., PORT CAPITAL FARMS (BEACH) INC., PORTLIVING FARMS (3624 PARKVIEW) INVESTMENTS INC., PORTLIVING FARMS (3688 PARKVIEW) INVESTMENTS INC., PORTLIVING FARMS (3648 PARKVIEW) INVESTMENTS INC., PORT CAPITAL GROUP INC., PORTLIVING PROPERTIES INC., MACARIO TEODORO REYES, PORT CAPITAL DEVELOPMENT (FARMS) INC., and 1341550 B.C. LTD.

RESPONDENTS
(RESPONDENTS)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT 1351486 B.C. LTD. ON THE RESPONDENT'S APPLICATION TO LIFT STAY OF PROCEEDINGS

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HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

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MEMORANDUM OF ARGUMENT

1. On October 27, 2023, Justice Masuhara made an order (the “**Order**”) granting a reverse vesting order (“**RVO**”) in the proceedings in the court below, which, among other things, approved the transactions detailed below.
2. His Majesty the King in Right of the Province of British Columbia (the “**Appellant**” or the “**Province**”) appealed the Order on the same day.
3. The applicant 1351486 BC Ltd. (the “**Applicant**”), applies to lift the stay of the RVO imposed pursuant to section 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) by virtue of the appeal to allow the transactions to complete.

Background

Receivership

4. The background to these proceedings is set out in the First Report to Court of the Receiver (as defined herein) dated September 29, 2023 (the “**First Report**”).
5. On January 30, 2023, the Supreme Court of British Columbia (the “**Court**”) pronounced an Order (the “**Receivership Order**”) appointing MNP Ltd. as receiver and manager (the “**Receiver**”) of all of the assets, undertakings and businesses of the following Respondents: (a) Living Beachside Development Limited Partnership; (b) Sunny Beach Motel Inc. (“**Sunny Beach**”); (c) Port Capital Farms (Beach) Inc., (d) PortLiving Farms (3624 Parkview) Investments Inc. (“**3624 Farms**”); (e) PortLiving Farms (3688 Parkview) Investments Inc. (“**3688 Farms**”), and (f) PortLiving Farms (3648 Parkview) Investments Inc. (“**3648 Farms**”) (collectively referred to as the “**Companies**”).¹
6. The Companies own certain lands located in Penticton, BC on which they operate three motels (collectively referred to as the “**Properties**”).²
7. The Applicant holds a second-ranking mortgage of the Properties in the approximate amount of \$4.9 million. The first-ranking mortgage is in the approximate amount of \$7.1 million.³

Sales Process

8. In May 2023, the Receiver entered into a listing agreement to market and sell the Properties.

¹ Receivership Order made January 30, 2023 in SCBC Action No. S229506 (the “**Action**”).

² First Report at para. 3.

³ First Report at para. 7.

9. The Applicant submitted an offer under which the purchase price for the Properties was approximately \$12.9 million. Of the five bids received by the Receiver, this was the highest. The second highest bid was for \$8 million.⁴
10. The Receiver and the Applicant then entered into an Agreement of Purchase and Sale dated September 12, 2023 (the “**Sale Agreement**”).⁵
11. The Sale Agreement was subject to the court granting orders: (i) transferring to and vesting in the Applicant the shares and most of the assets of 3624 Farms, 3648 Farms and 3688 Farms (collectively, the “**Nominee Companies**”); and (ii) transferring to and vesting in Sunny Beach the Excluded Assets (as that term is defined in the Sale Agreement).⁶
12. The Nominee Companies are the registered owners of the Properties meaning that the Applicant, by virtue of acquiring the Nominee Companies, will acquire the Properties without title transferring to the Applicant. This means no property transfer tax (“**PTT**”) is payable under the *Property Transfer Tax Act*, RSBC 1996, c 378 (the “**PTTA**”).⁷

Granting of the RVO

13. On October 27, 2023, despite opposition from the Province, the Court granted the RVO.⁸ The closing date for the transactions contemplated by the Sale Agreement (the “**Transaction**”) is 28 days after the date of the RVO, which is **November 24, 2023**.⁹
14. In granting the RVO, the Court held that it was bound to follow the decision in *Peakhill Capital Inc. v Southview Gardens Limited Partnership* (“**Peakhill SC**”),¹⁰ which approved an RVO under similar circumstances.¹¹
15. In *Peakhill SC*, the Court held that there was no weight to the Province’s argument that it would be unlawful for creditors to avoid the *PTTA* through a RVO because in a non-insolvency context, parties can structure a change of ownership as a share sell and produce the same result.¹² The decision has been appealed to this Court but not yet heard.

⁴ First Report at paras. 22 and 23.

⁵ First Report at para. 24.

⁶ First Report at paras. 25 and 30.

⁷ First Report at paras. 30(ii) and 31.

⁸ Order made October, 27, 2023 in the Action.

⁹ First Report, Appendix B “Sale Agreement” at para. 1.1(r).

¹⁰ 2023 BCSC 1476.

¹¹ Reasons for Judgment of Justice Masuhara dated October 27, 2023.

¹² *Peakhill SC* at para. 77(c).

16. On October 27, 2023, the Province appealed the Court's decision to grant the RVO.
17. Pursuant to s. 195 of the *BIA*, the Order is stayed by virtue of this appeal, thereby preventing the Transaction from closing.

Proposal to lift the stay

18. Following the filing of the Notice of Appeal, the Applicant contacted the Province seeking an agreement to lift the stay to allow the Transaction to close.¹³
19. On November 10, 2023, the Province and the Applicant agreed that the Province would not oppose the Applicant's application to lift the stay on the following terms:
 - (a) an amount equal to the PTT that would be owing on a conveyancing of the Properties (the "**Disputed Amount**") would be paid into trust by the Applicant to be held on specific conditions;
 - (b) no party could argue the appeal was moot by virtue of the Transaction completing; and
 - (c) the remedies available on appeal would not include reversing the Transaction.¹⁴

The stay should be lifted

20. The Applicant seeks an order lifting the automatic stay granted under s. 195 of the *BIA* to allow the Transaction to close.
21. It is in the interests of justice that the stay be lifted. If it is not, the Transaction will not close and the Applicant and the Companies will suffer irreparable harm.
22. The application is not opposed by the Province.
23. The test to consider for lifting a stay of proceedings is the three-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*¹⁵:
 - (a) there is some merit to the appeal in the sense that there is a serious question to be determined;
 - (b) the party seeking the stay will suffer irreparable harm if the stay is not granted; and
 - (c) the balance of convenience favours a stay.

¹³ Affidavit #1 of Ricci Cheung made November 10, 2023 at Exhibit C ("**Cheung #1**").

¹⁴ Cheung #1 at Exhibit C.

¹⁵ [1994] 1 S.C.R. 311.

24. Each factor is satisfied here and it is in the interests of justice that a stay should be lifted.
25. There is no doubt that there is a serious question on appeal. The issues in this case are broadly the same as those identified by this Court in *British Columbia v. Peakhill Capital Inc.*¹⁶ ("**Peakhill CA**"), where the respondents to the Province's appeal also sought an order lifting the automatic stay on terms. Justice Saunders was satisfied that there are serious issues to be tried there.¹⁷ That conclusion should be persuasive on this Court given the close similarities of these cases.
26. Further, as in *Peakhill CA*, there will be irreparable harm to the Companies and their creditors if the stay is not lifted.¹⁸ The Transaction would not be able to complete by November 24, 2023 or the outside closing date of November 30, 2023. While there were other offers, none were comparable and a lower priced transaction would erode the equity available for distribution to the Companies' creditors.
27. As in *Peakhill CA*, there is a strong basis to find a significant unrecoverable financial loss if the stay is not lifted. This includes the interest that continues to accrue under the first mortgage at 18% per annum compounded and calculated monthly (over \$100,000 per month).¹⁹ And this includes the \$500,000 deposit made by the Applicant under the Sale Agreement.²⁰
28. There is also urgency to lifting the stay. The closing date for the Transaction is three days from the hearing of this application. It is for this reason that this application needs to be heard and decided with some alacrity.²¹
29. Finally, the balance of convenience favours a stay. Any potential prejudice to the Province has been addressed in the terms noted above that are modeled on the order granted in *Peakhill CA*, with some modifications.
30. In this regard, the Applicant submits that this application is broadly on all fours with the one in *Peakhill CA*. There, the Court lifted a stay to allow an RVO transaction to close. Justice Saunders did so on terms to avoid prejudice to the Province, which were agreed to more or less by consent and nearly identical to the terms proposed by the Applicant.
31. As a result, the Applicant seeks an order lifting the statutory stay of the RVO imposed by s. 195 of the *BIA* on the following terms:

¹⁶ 2023 BCCA 368.

¹⁷ *Peakhill CA* at para. 9.

¹⁸ *Peakhill CA* at para. 10.

¹⁹ Cheung #1, Exhibit A.


²⁰ Cheung #1, Exhibit B.

²¹ *Peakhill CA* at para. 6.

- (a) upon closing of the Transaction, the Applicant will pay the Disputed Amount into trust with Fasken Martineau DuMoulin LLP, to be held and disbursed only pursuant to further order of this Court;
 - (b) no party to this appeal may assert the appeal is moot or assert that the appeal ought not to be allowed as a result of the closing of the Transaction; and
 - (c) if the Transaction closes, the remedies on appeal will be limited to remedies related to the Disputed Amount and costs of the appeal, and the Transaction will stand and will not be reversed.
32. It is submitted that in the absence of any alternative order that would attract PTT, this order adequately balances the convenience between the parties and is in the interests of justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: November-10-23



for: Kibben Jackson
Counsel for the Respondent, 1351486 B.C. Ltd.