2023

Hfx No.
525622

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

In the Matter of the Receivership of Stone Brothers Plumbing & Heating Limited

Between:

Business Development Bank of Canada

Applicant

- and -

Stone Brothers Plumbing & Heating Limited

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT,
Business Development Bank of Canada
Application in Chambers: August 16, 2023 at 9:30 a.m.

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L§3 — Appointment of Receiver and Manager

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

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

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

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

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

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

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

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

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

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

In considering whether to appoint a receiver, the court should consider the effect of such an order on the parties, and, since it is an equitable remedy, the conduct of the parties: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988, 28 O.T.C. 102 (Gen. Div.).

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

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

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

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

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

The court will not permit a collateral attack in some other proceeding to be made on the appointment of a receiver. The only exception to the principle is (a) where the original proceeding in which the receiver was appointed has been resolved in favour of the plaintiff; (b) the original proceeding was commenced without reasonable and probable cause; and was motivated by fraud, malice or bad faith, and (c) the plaintiff has suffered damage as a result of the initiation of the earlier proceeding or as a result of a judgement subsequently set aside as fraudulently obtained: *Nash v. CIBC Trust Corp.* (1996), 7 C.P.C. (4th) 263, 1996 CarswellOnt 1540 (Ont. Gen. Div.).

In the case of a court-appointed receiver, the court has an obligation to decide who is the appropriate person to be appointed. This obligation cannot be delegated to the security holder applying for the appointment; the court will, however, give careful

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

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

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

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

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

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

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

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

the order should be restricted to the assets covered by the debenture and made subject to existing encumbrances.

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

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

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

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

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

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

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

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

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

The defendant debtor moved to set aside an *ex parte* order appointing an interim receiver on the basis of an error in principle and the plaintiff creditor moved to appoint a receiver over the defendant. The Ontario Superior Court of Justice declined to

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

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

Factors to consider in the determination of whether it is appropriate to appoint a receiver include: (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed; (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; (c) the nature of the property; (d) the apprehended or actual waste of the debtor's assets; (e) the preservation and protection of the property pending judicial resolution; (f) the balance of convenience to the parties; (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others; (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; (k) the effect of the order on the parties; (1) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver. The court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. Here, it was just and convenient to grant a receivership order. The receiver would be authorized to engage only in such sales as would occur in the ordinary course of business, and the order appointing the receiver did not authorize the receiver to have conduct of the sale of the business, although the creditor could renew the application for sale in the event of a material change of circumstances: *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 2010 CarswellBC 855, 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]).

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

The Alberta Securities Commission held hearings regarding allegations of misrepresentation and fraud, and found that the principals of the debtor companies were responsible for false or misleading statements in offering materials and had engaged in conduct that amounted to fraud on the shareholders. The Alberta Court of Queen's Bench granted a motion by the investors to appoint a receiver. There was a real risk of irreparable harm in the wasting of the debtor companies' assets. The receiver would be able to preserve assets and investigate the whereabouts of any other assets. There was no evidence of harm to the debtor companies by placement of the receiver: *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.).

The Ontario Superior Court of Justice reviewed the basis for the appointment of a receiver under s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (*CJA*). Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days, referencing *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 1989 CarswellOnt 191, 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 62 D.L.R. (4th) 277 (Ont. C.A.); and *Toronto Dominion Bank v. Pritchard* (1997), 1997 CarswellOnt 4277, 154 D.L.R. (4th) 141 (Ont. Div. Ct.), leave to appeal refused (1998), 1998 CarswellOnt 641 (Ont. C.A.). Under the loan agreements, the credits were on demand, and as well, the creditor

had the right to cancel the credits at any time at its sole discretion and over 70 days had passed since demand for payment was made. Under s. 243 of the *BIA* and s. 101 of the *CJA,* a court may appoint a receiver if it is "just and convenient to do so", having regard to all the circumstances and, in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed. Here, it was preferable to have a court appointed receiver rather than privately appointed receiver. The prospect of more litigation was a consideration: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, 2011 ONSC 1007 (Ont. S.C.J.).

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

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

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

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

The Ontario Superior Court of Justice granted a receivership order under the Ontario *Securities Act*. The debtors, supported by their creditors, took the position that the receivership was not necessary. Certain creditors also contended that there was no jurisdiction to appoint the receiver under the *Securities Act* on constitutional grounds. Section 129 of the Act permits the Ontario Securities Commission (OSC) to apply to the court for an order appointing a receiver. Such an order may be made

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

The Ontario Superior Court of Justice granted a receivership order and dismissed the debtors' cross-application for an initial order under the *CCAA*. There had been ongoing default by the debtors in respect of their obligations to the secured creditors; and at the time of one advance, the debtors were in breach of their representations in a credit facility agreement. Justice Mesbur noted that a forbearance agreement also contained a promise from the debtors not to commence any restructuring or reorganization proceedings under the *BIA* or *CCAA*. Since the forbearance agreement, the debtors' financial position had deteriorated further, and the creditor terminated the forbearance agreement and advised that it would apply to court to have a receiver appointed. In determining whether a receiver should be appointed, the court will consider all the circumstances of the case, particularly, the effect on the parties of appointing the receiver, including potential costs and the likelihood of maximizing return on and preserving the subject property; the parties' conduct; and the nature of the property and the rights and interests of all parties in relation to it. The fact that the creditor has a right to appoint a receiver under its security is an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets. In this case, the credit agreement itself specifically contemplated appointing a receiver. Given the debtors' failure to come up with even a rudimentary restructuring plan, the court found that it was time for a receiver to take control and manage the business to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders: *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

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

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

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

The Alberta Court of Queen's Bench, in the context of an oppression application, reviewed the considerations to be taken into account on an application to appoint an inspector and an interim receiver. Section 231 of the Alberta *Business Corporations Act* ("ABCA") grants the court the authority to appoint an inspector to conduct an investigation of a corporation. Justice Lee held that in order to have an inspector appointed, there must be an appearance of behaviour that is oppressive, unfairly prejudicial, or unfairly disregarding to the applicants' interests, or an appearance of fraud or dishonesty in connection with the formation, business or affairs of the corporation. Oppression and fraud do not have to be proven, but must appear as a distinct possibility, the judge citing *Kowch v. Gibraltar Mortgage Ltd.* (2010), 2010 CarswellAlta 2780, 90 C.B.R. (5th) 84 (Alta. Q.B.). Lee J. held that the standard of proof is one of "appearance, an outward show" of oppressive or fraudulent behaviour, citing *Western Canadian Oil Management Services Inc. v. Arlyn Enterprises Ltd.* (2008), 2008 CarswellAlta 1173, 2008 ABQB 521 (Alta. Q.B.). With respect to the appointment of an inspector, Lee J. noted that it was an extraordinary remedy and the following considerations should be assessed prior to granting such an order: whether the applicants still need access to important information; whether there are better routes, such as litigation, which can be used to acquire that information; and whether an investigation is prohibitively expensive, in light of the corporation's resources. The primary purpose of an investigation is to bring to light facts that otherwise might be inaccessible to shareholders and security holders. Justice Lee also held that the appointment of receiver-manager is an extraordinary remedy, which should be used sparingly, having regard to all of the circumstances. The test for the appointment of a receiver-manager is comparable to that of the test for injunctive relief. The test for injunctive relief consists of: there must be a serious issue to be tried; it must be determined that the applicant would suffer "irreparable harm" if its application was refused; and an assessment must be made to determine which of the parties would suffer greater harm on the granting or the refusal of the appointment of a receiver-manager pending a decision on the merits, the "balance of convenience" test. In this case, while there was a serious issue to be tried, the applicant had not established irreparable harm necessitating the appointment of a receiver-manager to remedy. This case did not involve the need to preserve or protect the property of the companies: *Murphy v. Cahill* (2012), 2012 CarswellAlta 1198, 2012 ABQB 446 (Alta. Q.B.).

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

The Alberta Court of Queen's Bench reviewed the appointment of a receiver, as well as the scope of the general security agreement in terms of whether it was enforceable against oil and gas under the ground, once the oil and gas came out of the ground. Justice Lee noted that the Alberta Court of Appeal in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 2009 ABCA 127, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) stated that a remedial order to appoint a receiver "should not be lightly granted" and the chambers judge should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; carefully balance the rights of both the applicant and the respondent; and consider the effect of granting the receivership

order, and if possible use a remedy short of receivership. Justice Lee found that the security documentation in this case authorized the appointment of a receiver. After applying the factors, Lee J. came to the conclusion that a remedial order to appoint a receiver and manager was just, convenient and appropriate in the circumstances. Justice Lee also concluded that the oil and gas lease, which granted a right or licence to access, drill for and extract the resource or substance from the ground, was a proprietary interest within the purposive contemplation of Alberta's *PPSA*. The receivership order was granted; however, the receiver was to have no power of sale, except as further ordered by the court, until a specified date: *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 CarswellAlta 153, 99 C.B.R. (5th) 178, 2013 ABQB 63 (Alta. Q.B.).

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

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

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

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

In additional reasons in the proceeding of *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]), the Ontario Superior Court of Justice considered cost submissions and fixed costs of the plaintiffs at approximately $250,000. Justice Newbould observed that in dealing with costs on a partial indemnity basis, Rule 57.01(1) provides that a court may consider a number of factors. While the language is “may” rather than “shall”, generally most or all of these factors enter into the equation in any case. Overall, the objective is to fix an amount that is fair and reasonable to the unsuccessful party; it is not a line by line exercise. Newbould J. observed that in this case, no information whatsoever was provided as to how the amounts were arrived at. In addition, Newbould J. observed that none of the defendants had provided any information as to the hours spent by their counsel on any particular task for the billing rates actually charged. Justice Newbould observed that in many commercial cases, it is more difficult for a plaintiff to construct a case than to defend it. The plaintiff is on the outside looking in, whereas the defendant knows what he or she has been about. In this particular case, Newbould J. stated that the problem had been exacerbated by the complete lack of accounting that should have been provided to the plaintiff and by the steps taken to thwart the plaintiff and advisors from reviewing relevant records both before and after this action was commenced. Newbould J. noted that these issues were referred to in his previous endorsement in which he held that the plaintiff had established a strong case in fraud and very serious breaches of agreement. The fact that the hearing of the motion took just under one day did not mean that the matter was simple dispute. After taking into account the factors contained in Rule 57.01(1), including what amounts the unsuccessful defendants in this case could reasonably expect to pay, and considering what was fair and reasonable to the defendants, Newbould J. fixed the fees to be paid to the plaintiff: *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court reviewed the factors to be considered by the court on a motion to appoint a receiver: (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed; (b) the risk to the security holder taking into consideration the size of the debtor’s equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; (c) the nature of the property; (d) the apprehended or actual waste of the debtor’s assets; (e) the preservation and protection of the property pending judicial resolution; (f) the balance of convenience to the parties; (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others; (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; and (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently. Here, Edwards J. concluded that it was just and convenient to appoint a receiver and manager of the undertaking, property and assets: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 2014 NSSC 128 (N.S. S.C.).

The Ontario Superior Court of Justice was faced with competing applications for the appointment of a receiver and the making of an initial order under the *CCAA*. Five of the *CCAA* applicants owned vacant land and operated as land holding companies. They had no employees. Justice Brown described the condo project as involving a partially constructed residential building. The trades had registered six construction liens against the project, with certificates of action registered. Construction had ceased on the project. Justice Brown noted that both an order appointing a receiver and an initial order under the *CCAA* require a court to consider and balance the competing interests of the various economic stakeholders, and the

specific factors to be taken into account are very circumstance-oriented. Justice Brown noted that the evidence established the indebtedness of borrowers on the loan, the maturing of the loan facility, the demands for payment, the failure the borrowers to repay the amount demanded, and the validity of the security held on the properties. Those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. Brown J. found that the evidence established that it was the failure of the borrowers to abide by the terms of the commitment letter, as amended by second supplements and a forbearance letter, which led them to commit acts of default. Justice Brown found no confidence in the borrowers/*CCAA* applicants' ability to complete the construction of the project; found the proposed financing for the *CCAA* proceedings would be wholly inadequate to complete construction; and there was no credible evidence to suggest that the *CCAA* applicants were anywhere close to finding sources to fund the costs to complete construction and to resolve the existing lien claims. In the result, Brown J. dismissed the application for an initial order under the *CCAA* and appointed a receiver and construction lien trustee: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 7939, 19 C.B.R. (6th) 131, 2014 ONSC 3480, [2014] O.J. No. 273 (Ont. S.C.J. [Commercial List]).

A creditor sought appointment of a debtor company whose principals were embroiled in divorce proceedings and the debtor was in default on payments and had ceased to operate. The court granted the motion for appointment of a receiver, finding that it was unlikely the principals would ever be able to address the debts; the applicant creditor had given ample opportunity for them to turn around the business; and the business was insolvent and not in operation for some time. The court endorsed factors cited in a number of judgments, and in this case, made a decision based on the risk to the security holders and the need to safeguard the assets; a reasonable apprehension of depletion or waste of the assets; the fact that the creditor had a right to appoint a receiver; the need for a court appointment of receiver to enable the receiver to carry out its duties more effectively; the conduct of the parties in failing to make any reasonable progress in finding alternative financing to repay the indebtedness and in failing to devise a reasonable business plan; and because it was the most practical and prudent approach to maximizing return to the parties, including the unsecured creditors, to proceed with a sale: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 2014 NSSC 128 (N.S. S.C.).

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

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

The Court of Appeal for Ontario set aside a number of orders in a receivership proceeding. The Court reviewed cases in which a receiver was appointed with powers to investigate (an "investigative receiver"). Blair J.A. stated: "The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course." Justice Blair noted that the primary evidence in support of the application was a three-page affidavit sworn by the respondent and copies of affidavits from Canada Revenue Agency (CRA). The materials did not disclose that the CRA investigation had been terminated four months before the respondent brought the *ex parte* application. Through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities. Justice Blair noted that all of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act* (*CJA*), which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Blair J.A. specifically noted that the appeal did not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor did the appeal concern a class proceeding or other form of representative action. Blair J.A. held that it was apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity and was intended to empower the receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond the respondent. Blair J.A. set aside the receivership orders as they stood on a fundamentally flawed premise and were unjustifiably overreaching in the powers they granted. Blair J.A. noted the procedural concerns arose out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure. Blair J.A. discussed the relatively new notion of an "investigative receiver", so named for the powers the receiver is granted. In addressing the framework of the proceeding, Blair J.A. noted that the initial and subsequent orders were sought and obtained by relying on s. 101 of the *CJA*. The respondent was an unsecured judgment creditor with a judgment based on fraud. Blair J.A. contrasted this situation with the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order, rather than by private appointment. He also noted that this case did not involve the appointment of a receiver under insolvency legislation, such as the *BIA* or under the *Securities Act*. Blair J.A. noted that the idea of appointing a receiver or monitor with investigative powers has emerged in recent years. The Court of Appeal had not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. Blair J.A. acknowledged that the idea of appointing a receiver to investigate into the affairs of a debtor is not in itself unsound. Rather, it is the runaway nature of the use to which the concept had been put in this case that gave rise to the problem. Justice Blair held that whether it is labelled an "investigative" receiver or not, there is much to be said in favour of such a tool, when it is utilized in appropriate circumstances and with appropriate restraints. There are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions, including even, in proper circumstances, the affairs of and transactions concerning related non-parties, would be a proper exercise of the court's "just and convenient" authority under the *CJA*. Justice Blair stated that the principles governing the appointment of any receiver remain in play. Two "bookend" considerations are particular germane. On the one hand, the authority of the court to appoint a receiver where it appears just or convenient to do so is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, the appointment of a receiver is an extraordinary and intrusive remedy, and should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. Blair J.A. stated that it is the tension between these two considerations that defines the parameters of receivership orders in aid of execution. Blair J.A. noted that the authorities have held that: the appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to discovery; the primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations; generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property; and finally, in all cases, the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. Justice Blair cautioned that *ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons. It is otherwise impossible to determine subsequently what was at issue and the basis for the order made. Blair J.A. acknowledged that the application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard was entitled to deference. However, Blair J.A. was of the view

that the failure to disclose that the very investigation on which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure. The initial and subsequent orders were set aside: *Akagi v. Synergy Group (2000) Inc.*, 2015 CarswellOnt 7407, 25 C.B.R. (6th) 260, 2015 ONCA 368 (Ont. C.A.).

A secured creditor applied pursuant to s. 243(1) of the *BIA* for the appointment of a receiver over substantially all the assets of the debtor. The debtor was a "farmer" within the meaning of the Saskatchewan *Farm Security Act*, S.S. 1988-89, c. S-17.1 (*FSA*) and contested the appointment. The *FSA* requires a creditor to submit a notice of intention, wait a 150-day notice period, and engage in mandatory review and mediation. The trial judge found no conflict between the provisions of the *BIA* and the *FSA*; the Court of Appeal overturned that decision and the Supreme Court of Court allowed a further appeal, setting aside the Court of Appeal's finding. The Supreme Court of Canada held that under the doctrine of federal paramountcy, a conflict arises where there is operational conflict or where the operation of provincial law frustrates the purpose of the federal enactment. Paramountcy is to be narrowly construed, favouring harmonious interpretations. Here, there was no operational conflict as it was possible to comply with both statutes. Section 243 of the *BIA* has the simple purpose of establishing a regime for appointment of a national receiver, aimed at avoiding a multiplicity of proceedings and resultant inefficiency. Under the *BIA*, appointment of a national receiver cannot be made before expiry of the 10-day notice period. Part II of the *FSA* affords protection to farmers against loss of farmland by imposing a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. The Court further held that the provisions did not frustrate the purpose of the federal legislation. The words and discretionary nature of s. 243 of the *BIA* do not suggest that it is a comprehensive remedy exclusive of provincial law. The evidence did not support the argument that the 150-day period frustrated the purpose of allowing for appointment of a national receiver. The *FSA* was not constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, 2015 SCC 53 (S.C.C.).

A special receiver of a debtor company that was placed in receivership sued the auditor for negligence, and the trial judge found that the auditor was not negligent in respect of pre-1996 audits; but was negligent in respect of the 1996 audit although the negligence caused no damages; and was negligent for audit work in 1997-1998 and damages were awarded. On appeal, the Ontario Court of Appeal held that the trial judge did not err in concluding that the auditor could not rely on the corporate identification doctrine ("frauds perpetrated by the debtor's principals and senior managers permeated the corporate structure such that the debtor company was itself identified with the impugned conduct") or the *ex turpi causa* doctrine ("from a dishonourable cause an action does not arise") to excuse itself from liability. The Court held that the *ex turpi causa* doctrine applies only where allowing a plaintiff's claim would introduce inconsistency into the fabric of the law; it does not give the court discretion to withhold a civil remedy for damages merely because the plaintiff has engaged in misconduct. The corporate identification doctrine facilitates the application of the rules of law to a corporation where the primary rules of attribution are not available; it was not intended to apply to an action commenced by an aggrieved company against a third party for negligence. The fraud of the principals should not be attributed to the corporation for the purposes of applying the *ex turpi causa* doctrine in these circumstances, as to do so would deprive the innocent participants of a remedy for the auditor's negligence where the services of an auditor are most important, *i.e.* where there is fraud by high level management. The auditor was under an obligation to have proper auditing procedures in place, and where, as here, an audit is of a publicly-traded corporation, there is an added public interest dimension to the auditor's responsibilities and the integrity of the justice system. The appeal and cross-appeal were dismissed: *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 CarswellOnt 122, 128 O.R. (3d) 225, 31 C.B.R. (6th) 205, 2016 ONCA 11 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed the motion of the borrowers who had sought to set aside the consent judgment granted in favour of the bank. The borrowers had provided security to the bank that expressly provided that, in the event of default by the borrowers, the bank was entitled to demand payment of the entire indebtedness owing by the borrowers and to appoint a receiver and/or receiver-manager. The borrowers' financial situation deteriorated, the bank agreed to a moratorium on principal payments to a specified date and the parties later entered into a forbearance agreement following a mediation. The borrowers did not honour that agreement or two further forbearance agreements. The bank obtained a receivership order, and subsequently entered into a consent judgment. Justice Beaudoin agreed that a misrepresentation may be sufficient to set aside an order made on consent, but the evidence of any such misrepresentations must meet a strict test. After reviewing the evidence, Beaudoin J. concluded that there was no evidence of any misrepresentation that would justify the setting aside of the consent termination order. Moreover, Beaudoin J. found that the receiver had fulfilled its obligation to disclose relevant information. In the result, the borrowers' motion was dismissed; there was no genuine issue requiring a trial and summary judgment was granted dismissing the claims against the bank and the receiver in the subsequent action by

application of the doctrine of *res judicata: Bank of Montreal v. Cardinal*, 2016 CarswellOnt 4233, 34 C.B.R. (6th) 196, 2016 ONSC 1980 (Ont. S.C.J.).

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

An appellant was a director, the chief executive officer and majority shareholder of the debtor corporation. When the bank began providing loans and credit facilities to the debtor, the appellant signed a personal guarantee of all of the debtor's obligations to the bank. The parties then signed a second loan agreement that superseded and incorporated the earlier agreement, which linked the credit limit to the debtor's accounts receivable and required a specific level of tangible net worth at all times as well as a requirement to provide the bank certain financial information on a regular basis. The loan agreement was subject to a facility letter that provided that the line of credit would be repayable on demand, and that the bank could accelerate the payment of the loan upon the occurrence of any event of default. The bank subsequently issued a notice advising that the debtor was overdrawn on its line of credit, had been in breach of the tangible net worth and disclosure requirements. After a further period of time, a demand letter was sent, advising that the debtor had ten days to permanently repay the indebtedness. The debtor filed a notice of intention to make a proposal in bankruptcy. The bank sought and received summary judgment against the appellant guarantor. The Court of Appeal for Ontario dismissed the appeal of the guarantor, finding that while a debtor is entitled to a reasonable time to pay, that determination is fact-specific and dependent on the conduct of the parties before and after the demand. Here, the debtor was afforded a reasonable time to pay following the issuance of the demands. The Court of Appeal held that the interpretation of the guarantee is a question of mixed fact and law, and the motion judge's interpretation was, therefore, entitled to deference: *Toronto-Dominion Bank v. Konga*, 2016 CarswellOnt 20377, 44 C.B.R. (6th) 189. 2016 ONCA 976 (Ont. C.A.).

The Ontario Superior Court of Justice determined that a party claiming a possessory lien pursuant to the *Repair & Storage Liens Act* (*RSLA*) over seven trucks had to deliver the trucks to the court-appointed receiver. The receiver was then authorized to sell the trucks and place the proceeds in trust. Such authorization was without prejudice to the claim of the party asserting the lien. Justice Rady referenced the s. 69.3 stay, s. 70 that provides that every bankruptcy order takes precedence over all judicial or other attachments, garnishments, judgments, executions or other process against the property of a bankrupt

and s. 243(1), which provides for the appointment of a receiver in circumstances where it is just or convenient to do so. Section 247 of the *BIA* imposes on a receiver the duty to act honestly and in good faith and to deal with the property of the insolvent in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all interested persons. Justice Rady also noted that ss. 3-6 of the *RSLA* set out the scheme pursuant to which a repairer has a lien against an article that the repairer has repaired. Justice Rady held that once a receiver is appointed, it is the receiver's duty to liquidate the assets, pay all costs and expenses of the receivership, and distribute the net proceeds among the creditors of the company in order of priority. A receiver owes a duty to the court that appointed it and to the creditors generally. Here, the court order prevailed, and the receiver was entitled to take possession of the liened articles, without prejudice to the claimant's possessory lien claim to be determined at another time. Rady J. held that such an interpretation was consistent with the necessity for the receiver to maintain control over the debtor's assets to ensure their advantageous and orderly disposition for the benefit of all creditors: *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 2017 ONSC 368 (Ont. S.C.J.).

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

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

The New Brunswick Court of Queen's Bench dismissed a motion for injunctive relief. The intended plaintiffs sought to enjoin the receiver from selling certain property, alleging that the secured creditor had acted precipitously in appointing a receiver as none of the companies were insolvent. Clendening J. held that the creditor had a valid general security agreement ("GSA") with the intended plaintiffs; that the intended plaintiffs had breached the covenants of that agreement on more than one occasion, including by allowing the government to gain priority by not paying the property taxes. The GSA defined what may occur on a default, including the right to appoint a receiver. In reviewing the evidence and arguments presented by counsel, Clendening J. found no triable issue. The evidence pointed clearly to the fact that the creditor had a good and valid cause in law to demand full payment. There were no facts before the court to establish that the intended plaintiffs would suffer irreparable harm if the injunction was not granted. The balance of convenience fell in the creditor's favour and injunctive relief should not be granted: *Eaglewood Specialty Products et al v. Royal Bank et al*, 2017 CarswellNB 303, 50 C.B.R. (6th) 246, 2017 NBQB 136 (N.B. Q.B.).

The Saskatchewan Court of Queen's Bench considered competing applications, one for the appointment of a receiver under the *BIA* and the *PPSA*, and the other for an initial order and a stay of proceedings under the *CCAA*. The Court granted the receivership application. Since early 2015, the creditor had accommodated financial difficulties being faced by the debtor and had agreed, under various forbearance agreements, to interest only payments in return for various undertakings of the debtor. The creditor took the position that the debtor had breached those undertakings. The creditor gave notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded payment in full of the indebtedness owed to it. The debtor failed to pay. The debtor was in the business of drilling oil wells, and took the position that its financial difficulties were the

direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. It debtor argued that the economic climate in the Western Canadian oil industry is improving, and it expected a substantial improvement in its cash flow. Justice Scherman held that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith, and due diligence; and that an applicant under s. 243 of the *BIA* bears the burden of satisfying the court that it would be just and convenient to appoint a receiver in the circumstances. Justice Scherman found, on the evidence, that there had been elements of bad faith in the debtor's dealings with the creditor. Good faith of the applicant is a baseline consideration for a court in considering *CCAA* applications. In this case, the debtor had provided inaccurate information relating to its accounts payable, and it also made a significant payment to another creditor that was in breach of its agreement with the forbearing creditor. Scherman J. concluded that it was not appropriate to make an initial order pursuant to the *CCAA* application; it was just and convenient that a receiver be appointed. Justice Scherman indicated that the court was fully alive to the consequences that appointing a receiver may have upon employees, unsecured creditors, shareholders, and business associates. However, he was satisfied on the evidence that the creditor had provided significant relief from the contractual terms over a two-year period, and thus had already effectively provided the debtor with much of the remedial opportunity contemplated by the *CCAA*: *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 CarswellSask 399, 50 C.B.R. (6th) 220, 2017 SKQB 228 (Sask. Q.B.).

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

The New Brunswick Court of Queen's Bench declined to expand a receivership order to include an affiliated company of the principals of the debtor and its property and assets. The Court has the power to appoint a receiver or receiver and manager where it is just or convenient to do so, and in deciding, the court will have regard to all the circumstances, but in particular, the nature of the property and the rights and interests of all parties. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so also is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. Here, Justice McNally was not satisfied that it would be just or convenient to expand the initial receivership order to include the affiliated company and its property and assets, because the secured creditor had a prior first charge security on the real estate; the collateral mortgage was not in default; there was no risk that the real property could be removed and no evidence that it might be deteriorating; no appraisals of the affected properties were provided; and there appeared to be no need for a receivership order to secure the real property that the debtor was currently occupying: *LA PHARMACIE DE CAP-PELÉ LTÉE. et al (Receivership)*, 2017 CarswellNB 584, 55 C.B.R. (6th) 177, 2017 NBQB 229 (N.B. Q.B.).

The British Columbia Supreme Court declined to appoint a receiver. Justice Burke held that the applicant creditor had to satisfy the court that it was "just and convenient" to appoint a receiver pursuant to s. 243 of the *BIA*, citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) for a list of factors the court may consider: a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment is authorized by the security documentation; b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; c) the nature of the property; d) the apprehended or actual waste of the debtor's assets; e) the preservation and protection of the property pending judicial resolution; f) the balance of convenience to the parties; g) the fact that the creditor has the right to appoint a receiver under the loan documentation; h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor; i) the principle that appointment of a receiver is

extraordinary relief that should be granted sparingly; j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; k) the effect of the order on the parties; l) the conduct of the parties; m) the length of time that a receiver may be in place; n) the cost to the parties; o) the likelihood of maximizing return to the parties; and p) the goal of facilitating the duties of the receiver. While it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, the court should review the matter holistically and decide whether, in the circumstances, it is just and convenient to appoint a receiver. Burke J. concluded that it would not be just and convenient to appoint a receiver; there were *bona fide* triable issues between the parties, including the existence and amount of debt and whether a debt was extinguished by settlement. In this case, Burke J. was of the view that there was no emergency or risk of dissipation of assets, and found that very few, if any, of the factors in *Maple Trade* were applicable: *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 CarswellBC 3624, 2017 BCSC 2385 (B.C. S.C.).

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2017 NSSC 105
Nova Scotia Supreme Court

Royal Bank of Canada v. 2M Farms Ltd.

2017 CarswellNS 272, 2017 NSSC 105, 278 A.C.W.S. (3d) 474, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151

Royal Bank of Canada (Applicant) v. 2M Farms Ltd. (Respondent)

Moir J.

Heard: February 23; March 2, 2017
Judgment: March 3, 2017
Docket: Hfx. 425907

Counsel: Gavin D.F. MacDonald, Meryn Steves, for Applicant
Tim Peacock, for Intervenor, National Building Group Inc.
Marc Comeau, for Dana Robinson Fisheries Limited

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Applicant receiver B Ltd. sought approval of sale of five-acre lot — Receivership and power of sale were to enforce security for bank debts — Plaintiff encumbrancer N Inc. had builder's lien that was registered after banks' security — In letter dated June 17, 2016, B Ltd.'s counsel advised N Inc.'s counsel of $350,000 agreement purchase and sale and provided copy — About one month later, counsel had to advise that agreement was terminated under due diligence conditions — Inadvertent failure occurred on November 24, 2016 — Agreement of purchase and sale now sought to be approved had been concluded — On that day, receivers' counsel prepared letter to be sent by email to N Inc.'s counsel to advise of $210,000 sale — Copies were sent to B Ltd., but through inadvertence nothing was sent to main addressee — B Ltd. brought motion for approval of sale by receiver — Motion granted — Sale was approved — After approval hearing started, N Inc. produced offer of $230,000 and evidence that another offer for $236,500 could be coming — General obligation under s. 247(b) of Bankruptcy and Insolvency Act is touchstone for approval of sale by receiver when receiver has been appointed under Act, alone or in combination with provincial law — Commercial reasonableness is touchstone for approval and includes fairness, efficacy, integrity, and sufficiency of sale process — Interests of parties have to be borne in mind — Approving sale by receiver is not opportunity to reopen marketing effort — Failure to send email on November 24, 2016 caused no unfairness to N Inc. — On November 24, 2016, there was nothing left for N Inc. to do because receiver was subject to binding agreement of sale subject to approval process that could not be turned into new opportunity for making offers — N Inc. knew receiver had concluded that earlier list prices were too high because in June, 2016 N Inc. was told of $350,000 sale — List prices were public — Lowest list price and actual sale price exceeded debt owed to N Inc. — Reductions in list price would be of practical concern to other parties, but not to N Inc. — Sale process was fairly conducted in interest of various parties Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 247(b).

Table of Authorities

Cases considered by *Moir J.*:

Bank of Montreal v. Maitland Seafoods Ltd. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20, 120 A.P.R. 20, 1983 CarswellNS 43 (N.S. T.D.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

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

s. 242(1)(c) — considered

s. 247(b) — considered

Builders' Lien Act, R.S.N.S. 1989, c. 277
s. 8(3) — considered

Conveyancing Act, 1881 (44 & 45 Vict.), c. 41
Generally — referred to

s. 25(2) — considered

Real Property Act, R.S.N.S. 1989, c. 385
s. 15 — considered

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
R. 35.12 — considered

R. 42.09 — referred to

Authorities considered:

McGhee, Q.C., John, *Snell's Equity, 33rd ed.,* (London: Sweet & Maxwell, 2015)

p. 947 — considered

Words and phrases considered:

commercial reasonableness

Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

motion to approve a sale by the receiver

A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort.

MOTION for approval of sale by receiver.

***Moir J.* (orally):**

Introduction

1 BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: "foreclose out the encumbrances on title to the property." The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

2 The other encumbrancer is National Building Group Inc. It has a builder's lien that was registered after the banks' security. The priority between the banks' security and the builder's lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the Builder's Lien Act.

3 The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

4 In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

Approval of Sale

5 The receiver submits that *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

6 The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

7 As stated by Justice Wood at paragraph 14 of *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.): "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the Bankruptcy and Insolvency Act, a receiver must deal with the receivership property in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

8 As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

9 BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

10 The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

11 To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

12 The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015	$600,000
January, 2016	$550,000
March, 2016	$500,000
June, 2016	$425,000
July, 2016	$350,000
October, 2016	$315,000.

13 The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

14 Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

15 In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

16 National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

17 National Building Group also argues “the reasonableness of the purchase price... is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property.” It proposed that we determine the priorities before considering sale approval or “delay the proposed sale for 30 days to allow for an accounting”, and an opportunity for National Building Group “to explore its’ options”.

18 The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot “delay the proposed sale”. Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

19 This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver’s failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

20 The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by

the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

21 The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

22 The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed about the property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

23 In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

24 Communications between the receiver and National Building Group were through lawyers.

25 In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

26 On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

27 Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

28 There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

29 By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

30 An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building Groups' counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

31 After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

32 A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 57 N.S.R. (2d) 20 (N.S. T.D.).

33 The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for

National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

34 National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

35 National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

36 I find that the sale process was fairly conducted in the interest of the various parties.

Proposed Terms for Foreclosure

37 The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

38 However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

39 Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

Foreclosure-Based Versus Vesting Order-Based Receiverships

40 Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

41 Counsel then argues that s. 15 the Real Property Act incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

42 This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited* 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

43 Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

44 Justice Wood's decision in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel*.

45 Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

46 The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

47 I respectfully adopt Justice Wood's reasons in *Crown Jewel Resort Ranch Inc.* . In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the Bankruptcy and Insolvency Act. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

48 I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

The Need to Join Interested Parties

49 We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

50 I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in this province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

51 *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

52 There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

53 The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty

until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

Dispute about Priorities

54 When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

55 Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

Conclusion

56 I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Motion granted.

HMANALY L§20
Houlden & Morawetz Analysis L§20

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

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

L§20 — Sale of Assets by a Receiver and Manager

L§20 — Sale of Assets by a Receiver and Manager

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

Section 247(b) provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

The duties of the court in reviewing a proposed sale of assets by a receiver that is opposed by other interested parties are as follows:

(i) it should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;

(ii) it should consider the interests of all parties;

(iii) it should consider the efficacy and integrity of the process by which offers have been obtained; and

(iv) it should consider whether there has been unfairness in the working out of the process: Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.); National Bank of Canada v. Global Fasteners & Clamps Ltd. (2001), 24 C.B.R. (4th) 228, 2001 CarswellOnt 945 (Ont. S.C.J. [Commercial List]); Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 475, 11 C.B.R. (4th) 217, 1999 ABQB 425, 245 A.R. 138 (Alta. Q.B.); Canadian Imperial Bank of Commerce v. Tux & Tails Ltd. (2006), 2006 CarswellSask 126, 20 C.B.R. (5th) 316, 2006 SKQB 118 (Sask. Q.B.); Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 CarswellAlta 57, 63 C.B.R. (5th) 26, 2010 ABCA 16 (Alta. C.A.).

For a discussion of the requirements for a sale of assets of a debtor in a commercially reasonable manner, see Sullivan v. Letnik (2002), 2002 CarswellOnt 3454, 38 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]).

The receiver's duty is not to obtain the best price, but to do everything reasonably possible in the circumstances to obtain the best price: Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), affirmed (2000), 2000 CarswellOnt 466, 15 C.B.R. (4th) 298, 47 O.R. (3d) 234 (C.A.).

The Ontario Superior Court of Justice held that, when considering the recommendations of a court-appointed receiver with respect to the sale of assets, a court should be conscious of the need to preserve the integrity of the sales process regime for sales of assets by officers of the court; and follow the principles set out in Royal Bank v. Soundair Corp. (1991), [1991] O.J.

No. 1137, 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.). The court also held that its jurisdiction to vary a court order pursuant to s. 187(5) of the BIA should be exercised sparingly and by analogy to the provincial law regarding variation of orders: Re Hunjan International Inc. (2005), 2005 CarswellOnt 6658, 18 C.B.R. (5th) 89 (Ont. S.C.J.).

The Ontario Superior Court of Justice, on a motion by a court-appointed receiver to approve a sale of assets, held that it will show considerable deference to the receiver and will be disinclined to second-guess the various decisions of the receiver in connection with the sales process and the adequacy of the receiver's efforts; the tests set out in Soundair, supra had been met. The court also held that a receiver's insistence on compliance with a deadline for the submission of offers in accordance with the sales process does not detract from the inherent fairness of the sales process and ensures that all interested parties will be governed by the same ground rules and the same deadlines: Denison Environmental Services v. Cantera Mining Ltd. (2005), 2005 CarswellOnt 1846, 11 C.B.R. (5th) 207 (Ont. S.C.J.), additional reasons at (2005), 2005 CarswellOnt 243 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that a trustee in bankruptcy can sell its right, title and interest in an action commenced by a bankrupt to purchasers who are defendants in the action as part of a tender process commenced by the trustee and authorized by the non-conflicted inspectors of the bankrupt's estate where: (a) the estate of the bankrupt has no material resources to conduct the litigation and no creditors of the estate are interested in taking an assignment of the action pursuant to s. 38 of the BIA; (b) the tender process is conducted in a reasonable and competent manner; (c) the bankrupt did not object to the tender process and participated therein; and (d) the bankrupt had the opportunity to demonstrate to third parties the merits and strengths of the action and seek outside support for a bid. In such circumstances, the court held that it will show deference to the business decision of the trustee and the non-conflicted inspectors of the bankrupt's estate to sell the action to the defendant purchasers: Re Krzysztof Stanislaw Geler (2005), 2005 CarswellOnt 2094, 12 C.B.R. (5th) 15 (Ont. S.C.J.).

Unlike a privately appointed receiver and manager, where a court-appointed receiver and manager is selling assets, a secured creditor loses the power to dictate the terms of the sale; in these circumstances, the court has the discretion and power to determine the terms and conditions of the sale: Royal Bank v. Fracmaster Ltd. (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1993 CarswellAlta 539 (C.A.).

The court must not, however, enter into the marketplace; it must not sit as if it were hearing an appeal from the decision of the receiver, reviewing in detail every element of the process by which the receiver has arrived at its recommendation that the offer should be accepted: Crown Trust Co. v. Rosenberg (1986), 67 C.B.R. (N.S.) 320, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.); Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 1991 CarswellOnt 205 (C.A.); Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd. (1994), 27 C.B.R. (3d) 190, 1994 CarswellNWT 3 (N.W.T. S.C.); Royal Bank v. Fracmaster Ltd. (1999), 11 C.B.R. (4th) 217, 245 A.R. 138, 1999 CarswellAlta 475 (Q.B.), affirmed (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1999 CarswellAlta 539 (C.A.).

The court should not lightly withhold the approval of a sale by a court-appointed receiver. If the receiver acted fairly and reasonably and has made sufficient efforts to obtain the best price, the court will not interfere unless there has been some unfairness or the sale is improvident: Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.); Crown Trust Co. v. Rosenberg (1986), 67 C.B.R. (N.S.) 320, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.); National Trust Co. v. Massey Combines Corp. (1988), 69 C.B.R. (N.S.) 171, 39 B.L.R. 245 (Ont. S.C.); Can. Commercial Bank v. Pilum Invt. Ltd. (1987), 62 C.B.R. (N.S.) 319 (Ont. H.C.); Royal Bank v. Soundair Corp., supra; Integrated Building Corp. v. Bank of N.S. (1989), 75 C.B.R. (N.S.) 158, 71 Alta. L.R. (2d) 320 (C.A.); CCFL Subordinated Debt Fund & Co. v. Med-Chem Health Care Ltd. (1999), 8 C.B.R. (4th) 171, 1991 CarswellOnt 1361 (Ont. Gen. Div.).

In deciding whether to accept an offer recommended by a receiver, the court should consider the interests of all parties: Royal Bank v. Soundair Corp., supra; Alma College v. United Church of Canada (1996), 40 C.B.R. (3d) 78, 1996 CarswellOnt 1176 (Ont. Gen. Div.); further reasons 43 C.B.R. (3d) 8; the decision in 43 C.B.R. (3d) 8 was affirmed 43 C.B.R. (3d) 19 (Ont. C.A.); Re Regal Constellation Hotel Ltd. (2004), 2004 CarswellOnt 2653, 23 R.P.R. (4th) 64, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, (sub nom. HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of)) 242 D.L.R. (4th) 689, (sub nom. Regal Constellation Hotel Ltd. (Receivership), Re) 188 O.A.C. 97 (Ont. C.A.), affirming (2004), 2004 CarswellOnt 428, 37 C.L.R. (3d) 207, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]). Creditors' interests are an important consideration but they are not the only consideration: Royal Bank v. Fracmaster Ltd. (1999), 11 C.B.R. (4th) 217, 245 A.R.

138, 1999 CarswellAlta 475 (Q.B.), affirmed (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1999 CarswellAlta 539 (C.A.).

In Re Hoque (1996), 38 C.B.R. (3d) 133, (sub nom. Hoque (Bankrupt), Re) 148 N.S.R. (2d) 142, 429 A.P.R. 142, 1996 CarswellNS 51, the Nova Scotia Court of Appeal stated the test in these words: was the receiver in selling the assets acting with integrity in a reasonable and competent manner? If the answer is in the affirmative, then the court will not interfere. It is only in exceptional circumstances that the court will intervene and proceed contrary to the recommendation of the receiver: Crown Trust Co. v. Rosenberg, supra; Chimo Structures Ltd. v. Chimo Industries Ltd. (1976), 23 C.B.R. (N.S.) 250 (B.C. S.C.); Skyepharma PLC. v. Hyal Pharmaceutical Corp., supra.

Where the court found that the process adopted by the receiver in selling the assets of the debtor was a reasonable and prudent one, designed to sell the assets in an orderly manner so as to obtain the highest return for creditors, it approved the sale: Re 230 Travel Plaza Inc. (2002), 38 C.B.R. (4th) 291, 2002 CarswellOnt 4454 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that where a court has approved a sale process proposed by a receiver; authorized the receiver to complete a sale transaction; and determined that the receiver has discharged its responsibilities in good faith and in a commercially reasonable manner, then absent a strong prima facie case against the receiver, a court should not grant leave to creditors seeking to sue the receiver for negligence or breach of fiduciary duty in completing the sale transaction, particularly where the court has previously considered and rejected such creditors' allegations: Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]).

On an application for approval of the sale of assets, the receiver-manager has a duty to bring to the attention of the court any reason it perceives might lead the court to conclude that the sale should not be approved. The receiver-manager does not have to recommend approval of the sale: Bank of Montreal v. On-Stream National Gas Ltd. Partnership (1994), 29 C.B.R. (3d) 203, 1994 CarswellBC 633 (B.C.S.C.).

The court will not approve a sale of assets by a receiver-manager where the court is of the opinion that the money being used to purchase the assets is, in fact, the property of the debtor company: Polar Bear Water Distiller Manufacturing. Co. (Receiver of) v. 590863 Alberta Ltd. (2001), 26 C.B.R. (4th) 77, 2001 ABQB 501, 2001 CarswellAlta 781 (Alta. Q.B.).

In deciding whether the receiver has acted providently in accepting an offer for the sale of assets, the court should examine the conduct of the receiver in light of the information that the receiver possessed when it accepted the offer. The court must be very cautious in deciding that the receiver's conduct was improvident on the basis of information that has come to light after the receiver agreed to accept the offer: Royal Bank v. Soundair Corp., supra; Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership (1995), 30 C.B.R. (3d) 285, 1995 CarswellBC 75 (B.C. S.C.); Alma College v. United Church of Canada (1996), 40 C.B.R. (3d) 78, 1996 CarswellOnt 1176 (Ont. Gen. Div.). However, in rare circumstances, on the basis of what has occurred since the acceptance of an offer by a receiver-manager, the court may find that the sale is imprudent and should not be approved: Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership, supra. In the On-Stream case, six years had elapsed since the acceptance of the offer, and by reason of the actions of the creditor in defending the title of the property being sold, the property increased in value to the great potential benefit of the purchaser without additional cost to the purchaser.

Where, after calling for tenders, a better offer is received from a person who did not respond to the public invitation for tenders, the receiver is not obligated to make a new call for tenders: Integrated Building Corp. v. Bank of N.S., supra. If, however, the court has serious concerns whether the receiver has made sufficient efforts to obtain the best offer, the receipt of a significantly larger offer after the close of tenders may indicate that the receiver's conduct has been improvident: Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd. (2002), 34 C.B.R. (4th) 170, 2002 CarswellOnt 1149, 59 O.R. (3d) 376 (Ont. S.C.J. [Commercial List]).

A call for tenders does not constitute an offer the acceptance of which will create a legally binding contract: Arctic Co-operatives Ltd. v. Sigyamiut Ltd. (Receiver of) (1991), 5 C.B.R. (3d) 271, 1991 CarswellNWT 2 (N.W.T. S.C.). If the call for tenders provides that the highest of any tender will not necessarily be accepted, the receiver-manager is not bound to sell to one of the tenderers: Arctic Co-operatives Ltd. v. Sigyamiut Ltd. (Receiver of), supra.

If a sale is made subject to court approval (and this is the usual order), the court is not bound by the contract of sale made by the receiver but must consider if the contract is for the benefit of the creditors as a whole. If there is evidence that there has been confusion about the bidding and that a higher price may be available, the court can refuse to approve the contract of sale

and direct the receiver to call for new tenders: Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (N.S. S.C.).

Where a receiver solicited offers based on a proposed sale agreement, which required the purchaser to assume substantial environmental cleanup costs for a property in a deplorable condition, the requirement of the assumption of cleanup costs was neither unreasonable nor improvident. The court noted that the receiver considered offers that did not contain the cleanup obligation. The court will be loathe to interfere with the business judgment of a receiver and will ordinarily approve a transaction recommended by a receiver acting properly: Morganite Canada Corp. v. Wolfhollow Properties Inc. (2003), 47 C.B.R. (4th) 89, 2003 CarswellOnt 4083 (Ont. S.C.J.).

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another bidder, since technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved by the sale: Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]), affirmed (2000), 47 O.R. (3d) 234, 15 C.B.R. (4th) 298, 130 O.A.C. 273, 2000 CarswellOnt 466 (C.A.); Re 230 Travel Plaza Inc. (2002), 38 C.B.R. (4th) 291, 2002 CarswellOnt 4454 (Ont. S.C.J.).
In limited circumstances, a prospective purchaser may become entitled to participate in an approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not, however, sufficient: Skyepharma PLC v. Hyal Pharmaceutical Corp., supra.

If the court has approved the terms for the sale of assets, and it is desired to amend them, the proper course is to return to court to obtain a variation: Cleansteel Products Ltd. v. Can. Permanent Trust Co. (1978), 26 C.B.R. (N.S.) 253 (B.C. S.C.).

The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer, may decide to recommend to the court the acceptance of an unconditional offer rather than a higher offer that contains conditions. If there are conditions in the offer, the receiver must analyze them to determine whether they are within the receiver's control or if they appear, in the circumstances, to be minor and very likely to be fulfilled. The alternatives should be gridded with a view to maximizing the return and minimizing the risk: Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]), set aside/quashed (2000), 2000 CarswellOnt 466, [2000] O.J. No. 467, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.).

If there are prior and subsequent encumbrancers, they must be made parties to the sale proceedings when the action is commenced so that their right to redeem the debenture is preserved: Roynat Ltd. v. Canawa Holdings Ltd. (1978), 28 C.B.R. (N.S.) 285 (Sask. C.A.).
The receiver should ordinarily obtain an appraisal of the property to be sold: Jeannette B.B.Q. Ltée v. Caisse Populaire de Tracadie Ltée (1989), 77 C.B.R. (N.S.) 319 (N.B. Q.B.). The property should be properly advertised for sale and, if necessary, the receiver should engage trained professionals to assist in the sale: Jeannette B.B.Q. Ltée v. Caisse Populaire de Tracadie Ltée, supra.

If the court is not satisfied with the way in which the receiver has appraised the property and advertised it for sale, it can refuse to approve the sale and extend the time for offers: Toronto Dominion Bank v. Agriborealis Ltd. (1988), 68 C.B.R. (N.S.) 313 (N.W.T. S.C.); Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242 (Alta. C.A.).

The court will not permit a person who has obtained full information about the amount of tenders, at the last moment, to make a slightly higher tender and thus obtain the debtor's property: Bank of Montreal v. Maitland Seafoods Ltd. (1983), 46 C.B.R. (N.S.) 75 (N.S. T.D.).
Where a receiver has made a confidential report to the court analyzing the bids received by the receiver, the report should not be disclosed to the bidders, since if the court decides not to accept any bid but to call for new offers, it could hinder the receiver in future negotiations with bidders: Skyepharma PLC v. Hyal Pharmaceutical Corp., supra.

If it should be apparent to the receiver that a person bidding for the assets is proceeding on an erroneous assumption in making the bid (e.g., what encumbrances are to be paid by the receiver), the court may relieve the bidder of its bid and order the return of its deposit. The receiver is under a duty to proceed in a commercially reasonable manner, and when beset by a misgiving concerning the bidder's real intention with respect to the purchase, the receiver should take steps to confirm the true state of affairs before accepting the bid: Re Kenmark Litho Inc. (1988), 70 C.B.R. (N.S.) 171 (N.S. T.D.).

Where a debtor's directors had spent 15 months trying to market the company and the only purchaser was for an asset sale where the secured creditor would be paid, but little would remain for other creditors and shareholders, the secured creditor sent notice under s. 244 and sought appointment of a receiver under s. 47 of the BIA for the limited purpose of approving and effecting the sale of assets. The court held that it had been necessary to appoint the receiver to effect the sale in order to protect the secured creditor's interests, sufficient effort was made to get the best price, and there was no unfairness in the marketing or sale process. The court held that although it was not technically a receiver's sale, it was appropriate to apply the Soundair principles in determining the reasonableness of the sale: Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 2006 CarswellOnt 2541, 21 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]).

Where sealed bids have been called for by a receiver, the highest bid should be accepted, even if after the close of bidding, a substantially higher bid is received from one of the bidders. The fact that secured creditors may be affected by the refusal to accept the higher bid is not sufficient reason to justify its acceptance. There are well-established rules governing tendering and, save in exceptional circumstances, they should be followed: Gene Drennan Ltd. v. Med Grill Ltd. (2001), 23 C.B.R. (4th) 135, 2001 BCSC 117, 2001 CarswellBC 471 (B.C. S.C. [In Chambers].

While a receiver should not shop against tenders, if a substantially higher offer is received before the receiver applies to the court for approval of an offer, it is proper practice for the court to refuse to approve the offer and to order that interested parties submit sealed bids: Westcoast Savings Credit Union v. Wachal (1988), 71 C.B.R. (N.S.) 270, 32 B.C.L.R. (2d) 390 (C.A.). To justify re-opening the bidding, a new offer must be a firm, unconditional offer; if it contains too many conditions, the court will not re-open the bidding: Babecky v. Macedon Resources Ltd. (Receiver of) (1991), 6 C.B.R. (3d) 94, 1991 CarswellSask 39 (Sask. C.A.). Where the offer was substantially higher and permitted something to be realized for unsecured creditors, the court refused to approve the highest tender and directed the receiver to call for sealed bids: Re Modatech Systems Inc. (1995), 37 C.B.R. (3d) 274, 1995 CarswellBC 1140, 15 B.C.L.R. (3d) 302 (S.C.).

Where a receiver calls for tenders and accepts the highest tender but for some reason the transaction does not close, although the receiver can retender, it is not essential that it does so. In these circumstances, there is nothing unfair or improper in the receiver negotiating with the second highest tenderer to see if an agreement of purchase and sale is possible on the same terms as contained in its original tender or better terms: Engrais Chaleur Ltée-Chaleur Fertilizers Ltd. v. Mega Bleu Inc. / Mega Blue Inc. (Receiver of) (2003), 42 C.B.R. (4th) 194, 2003 CarswellNB 257, 2003 NBQB 227, 34 B.L.R. (3d) 40 (N.B. Q.B.).
Prices in other offers submitted after the receiver has accepted an offer are only relevant if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it: Royal Bank v. Soundair Corp., supra.

If a fixed charge forms part of debenture security, the court, under its equitable jurisdiction, can refuse to permit a sale until the expiry of the normal redemption period of six months, where it is of the opinion that the delay is necessary to protect the mortgagor's equity of redemption: Toronto Dominion Bank v. Agriborealis Ltd. (1988), 68 C.B.R. (N.S.) 313 (N.W.T. S.C.). This situation does not mean that the usual order relating to foreclosure of land applies to all debentures containing a fixed charge; there may be special circumstances that would warrant shortening the period of redemption: Royal Bank v. Astor Hotel Ltd. (1986), 62 C.B.R. (N.S.) 257, 3 B.C.L.R. (2d) 252 (C.A.).

If, under its security documents, a creditor has the right to sell, the court will not grant a court-appointed receiver under such security documents the right to sell. In these circumstances, the creditor should exercise the power of sale conferred by its security documents: Toronto-Dominion Bank v. E. Goldberger Holdings Ltd. (1993), 12 O.R. (3d) 759, 1993 CarswellOnt 599 (Gen. Div.).

In appropriate circumstances, the court may permit the receiver to sell by private sale: Genelcan Realty Ltd. v. Wiseman (1986), 59 C.B.R. (N.S.) 284 (Ont. H.C.).

Where the debtor's assets are sold by a receiver, the proceeds of the realization take the place of the assets that were sold and remain subject to the interests of secured creditors. If there is a dispute about entitlement to the proceeds, this will be decided by the court: Adelaide Capital Corp. v. St. Raphael's Nursing Homes Ltd. (1995), 42 C.B.R. (3d) 17, 1995 CarswellOnt 1379 (Ont. Gen. Div.).

Where a receiver is selling assets, the receiver is not bound by contractual terms regarding the assets entered into between the debtor and the person who supplied the assets to the debtor: Bank of Montreal v. Scaffold Connection Corp. (2002), 36

C.B.R. (4th) 13, 2002 CarswellAlta 932, 2002 ABQB 706 (Alta. Q.B.).

The Ontario Superior Court of Justice held that it was appropriate to re-open a sales process for a very short timeframe to consider further offers for a debtor company's assets under the CCAA where there was at least the potential that a new offer would lead to a much-improved return for the unsecured creditors than an existing firm offer, and where the creditors who will bear the risk of further costs and time delays were prepared to assume such risks: Re 1587930 Ontario Ltd. (2006), 2006 CarswellOnt 6419, 25 C.B.R. (5th) 260 (Ont. S.C.J. [Commercial List]).

Where a receiver is authorized to sell assets, it is reasonable and appropriate for the receiver to refuse to participate in litigation involving an asset of a debtor and to assign the debtor's interest in such litigation where it is likely that there will be little or no benefit to the creditors even if the litigation were successful, particularly where the assignment of the debtor's interest in the litigation does not preclude a contingent benefit that may stand to the credit of the receivership in the event that the litigation is successful. The court held that the issue is be decided by reference to the following considerations: a court-appointed receiver (a) is a court officer and has a general duty to deal with the property of the debtor in accordance with the powers provided by the court in its order; (b) has a fiduciary relationship to the debtor and the creditors, with a duty to exercise such reasonable care, supervision and control of the property as an ordinary person would give to his or her own; and (c) must diligently exercise its power to defend, institute or continue proceedings for the benefit of all creditors and debtors: Astra Credit Union Ltd. v. Protos International Inc. (2006), 2006 CarswellMan 266, 25 C.B.R. (5th) 83, 2006 MBQB 174 (Man. Q.B.).

The Ontario Superior Court of Justice reviewed the factors to be considered on an application to approve a sale of substantial assets on an expedited basis. In this case the proposed sale was opposed by the Union, which objected on the basis that the proposed transaction was a "quick flip" that would greatly reduce the prospect of recovery for the severance and termination claims of its members. The court held that considerable efforts had been made to achieve a resolution on terms acceptable to the union, the purchaser and the secured creditors, whose funds were at risk. The court applied the four-part test in Soundair, finding that its duty was to consider: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; whether the interests of all parties have been considered; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. The court also noted that although the union was given little time to attempt to bring forward other options, it was acknowledged that no concrete proposals had been brought forward. While a going concern sale of the company would undeniably be in the best interests of the employees, a secured creditor is not required to continue to fund a business to satisfy the union's need for an employer and the court placed a great deal of confidence in the receiver's expert business judgment: Textron Financial Canada Ltd. v. Beta Ltée / Beta Brands Ltd. (2007), 2007 CarswellOnt 89, 27 C.B.R. (5th) 1 (Ont. S.C.J.).

The Yukon Territory Supreme Court considered a receiver's report that included a request for authorization to sell certain shares held by the debtor in another company. The sale was contested by a non-arm's-length party who claimed second creditor status. The non-arm's-length party also moved to set aside the receivership order some 2-1/2 years after it was made; however, the court found that it was an unreasonable period to bring an application to set aside a court order, given that it had participated in hearings throughout. The recommendations of the receiver were accepted by the court. In addition, the court granted leave to the Government of Canada to commence an oppression action against the non-arm's-length group, given its status of creditor as a result of environmental mismanagement: Yukon v. B.Y.G. Natural Resources Inc. (2007), 2007 CarswellYukon 1, 2007 YKSC 2, 31 C.B.R. (5th) 100 (Y.T. S.C.).

In an ongoing CCAA proceeding and interim receivership, two parties had been negotiating the terms of an asset purchase. An extension had been previously agreed to by the parties. The memorandum of agreement ("MOA") expired without being formally extended and a third party expressed interest in the assets. The Ontario Superior Court of Justice reviewed the conduct of the parties and the MOA and concluded that no further extension of time had been provided and there was no factual basis on which to apply the principles of promissory estoppel. The debtor could proceed to accept the new offer: Re Hemosol Corp. (2007), 2007 CarswellOnt 487, 27 C.B.R. (5th) 311 (Ont. S.C.J. [Commercial List]), motion for leave to appeal dismissed (2007), 2007 CarswellOnt 1083, 31 C.B.R. (5th) 83 (Ont. C.A.), additional reasons at (2007), 2007 CarswellOnt 6690, 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286 (Ont. S.C.J. [Commercial List]).

Where the wording of a subrogation clause is clear and unambiguous on its face, as well as when read in light of other related documents, the court held that a receiver was entitled to the net sale proceeds of assets being held in trust together with accrued interest: QK Investments Inc. v. Crocus Investment Fund (2006), 2006 CarswellMan 254, [2006] 9 W.W.R. 736, 206

Man. R. (2d) 129, 2006 MBQB 172, 27 C.B.R. (5th) 152 (Man. Q.B.), additional reasons at (2007), 2007 CarswellMan 5, 2007 MBQB 4, [2007] 2 W.W.R. 530 (Man. Q.B.).

The Ontario Superior Court of Justice [Commercial List] considered the issue of when a party should be entitled to a success fee in the context of a sale of assets in a receivership. An accounting firm sought a determination of its entitlement to recovery of a success fee for its services as investment advisor for the marketing process undertaken by the receiver of two corporations. After consultation with and approval from major creditors, the firm was engaged to assist in the marketing process. The engagement letter provided for a success fee based on the consideration paid by a third party on completion of a transaction. The minimum success fee payable under the engagement letter was US$400,000. The engagement letter also had a specific definition of "transaction". A potential plan had been put forward under the CCAA, which contemplated the sale of the assets, and a key asset central to the sale transaction was a license. A creditor purchased the secured indebtedness held by another creditor and after some litigation became the senior secured creditor. In these circumstances, an assignment by way of a vesting order of substantially all of the debtor's assets was sanctioned by the court because of creditor's senior secured debt. The creditor asserted that the success fee was not payable since the assets acquired by its subsidiary represented a purchase of the existing debt position and that the engagement letter contemplated a transaction in which consideration is paid by a third party and that the purchase of pre-existing security held by its subsidiary was not such a third party transaction. After reviewing the documentation and the submissions, Campbell, J. concluded that the success fee was payable on the basis that the marketing process was pursuant to court direction, which included the involvement of the investment advisor. The engagement letter was entered into with the knowledge and support of the creditors that it would be a binding and enforceable contract. The definition of "transaction" is a broad one and the purchaser is properly regarded as a third party since it received information under a confidentiality agreement. The investment advisor did the work that was contemplated to be entitled for the success fee. The vesting order in effect represents a sale of the debtor's assets and closed as contemplated. Both the receiver and the investment advisor had the reasonable expectation that they would be paid. The fact that the term of the transaction involved assumption of debt rather than sale of assets should not defeat those reasonable expectations. The reasonable expectations include the payment of the success fee out of the receiver's administration charge. In the circumstances, the receiver should not be at risk for the success fee: Re Hemosol Corp. (2007), 2007 CarswellOnt 6511, 37 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that a contractual licence confers no interest or property in the thing and thus the presence of an exclusive licence did not preclude the receiver from selling the underlying property. Morawetz J. held that the process by which the property was transferred was conducted in accordance with the provisions of s. 47(1) of the BIA and s. 101 of the Courts of Justice Act and at best, the applicant had an exclusive licence to use the technology. However, even if established, a licence agreement only creates a contractual agreement as between the parties, and even if the grant to market and sell were construed as a traditional licence, it did not acquire a property interest in such a right. The remedy, if any, was contractual in nature and the exercise of that remedy had been impacted by the approval and vesting order, which was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. The objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions. Here, the applicant took no steps after becoming aware of the approval and vesting order to set aside or vary the order and did not appeal the order: Royal Bank v. Body Blue Inc. (2008), 2008 CarswellOnt 2445, 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court held that a receiver was not bound by an agreement of purchase and sale entered into by the debtor in a court approved sales process that was part of a Chapter 11 and CCAA proceeding. Brenner C.J.B.C. was of the view that prior to appointment of the receiver, the contract was not capable of specific performance as the parties continued to exchange drafts of documents and were still trying to reach agreement on the terms of critical documents. No consensus had been reached prior to the appointment of the receiver, and after its appointment, the receiver made its position clear that it was expressly disclaiming or terminating the agreement, and the receiver notified the purchaser that it was not obliged to close the transaction: Re Pope & Talbot Ltd. (2008), 2008 CarswellBC 1726, 46 C.B.R. (5th) 34 (B.C. S.C. [In Chambers]).

In considering whether to approve a receiver's motion to approve a "quick flip" transaction, the Ontario Superior Court of Justice considered the impact on various parties and assessed whether their respective positions and the proposed treatment that they would receive in the transaction would realistically be any different if an extended sales process were followed. Morawetz J. was satisfied that there was no realistic scenario under which the employees and suppliers in one division of the

debtor would have any prospect of recovery. Morawetz J. was also satisfied that the proposed sale transaction was reasonable and that there was a risk to the business if there was a delay in the process. Under the terms of the proposed offer, the purchaser would acquire substantially all of the assets of the debtor; the purchase price consisted of the assumption or notional repayment of the outstanding obligations to the secured lenders; the purchaser would hire all current employees and assume employee liabilities, and would assume the obligations of the debtor company to trade creditors related to the mould business. The receiver was of the view that the transaction would enable the purchaser to carry on the business, with a successful outcome for customers, secured lenders, suppliers, employees, and other stakeholders. The court approved the transaction and issued a vesting order: Re Tool-Plas Systems Inc. (2008), 2008 CarswellOnt 6257 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted the motion of a receiver for the approval of a sale of property together with the settlement of a pre-receivership claim of the debtor against the proposed purchaser notwithstanding the objections of the debtor and the guarantor. The original receivership order specifically provided that the receiver was to investigate and report on the environmental condition of the property and the status of any proceedings relating thereto; however, the receiver was not to interfere with any proceedings or negotiations of the respondent regarding the environmental condition of the property. Brennan J. concluded that the sale process was reasonable and prudent. He noted that he was not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believed he could have won from the environmental issues; and granted leave to the debtor and the guarantor to commence proceedings against the receiver on account of actions arising out of its administration of the receivership property: National Trust Co. v. James (2008), 2008 CarswellOnt 6350, 48 C.B.R. (5th) 95 (Ont. S.C.J.).

The Manitoba Court of Queen's Bench approved a motion brought by the receiver to approve a sale of assets. In so doing, the court concluded that an unsuccessful purchaser did not have standing to challenge a proposed sale. Relying on Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.), the court held that an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order as it has no legal or proprietary right in the property being sold. The fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, namely the creditors. In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion, where it acquired a legal right or interest from the circumstances of a particular sale process and the nature of the right or interest is such that it could be adversely affected by the approval motion. A commercial interest is not sufficient. Although the court considered the unsuccessful prospective purchasers' evidence in assessing the integrity of the sale process, they were not interested parties merely due to their status as unsuccessful purchasers. There are two principles for a court to consider in reviewing a sale of property. The first is that a court should place a great deal of confidence in the actions taken by the receiver-manager and unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is that a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager: Re Shape Foods Inc. (Receiver of) (2009), 2009 CarswellMan 312 (Man. Q.B.).

The Alberta Provincial Court allowed an appeal of the decision of a master who had denied a receiver's motion to approve a sale of assets. The appeal from the master was de novo. The Provincial Court applied the principles enunciated in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) and approved the sale to the bidder recommended by the receiver. The court held that if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing, it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Here, there was no basis for concluding that the receiver's efforts to secure offers were deficient and the evidence supported the opposite conclusion: Lee v. Geolyn Inc. (2009), 2009 CarswellAlta 631, 2009 ABQB 261 (Alta. Prov. Ct.).

See article I. Bert Nadler and Karine De Champlain, "Upholding the Discretion of Receivers — The Sale of Hyal Pharmaceuticals Corporation", 13 Comm. Insol. R. 61.

A receiver moved for approval of an agreement of purchase and sale of real and personal property in the face of opposition from four parties. The receiver was appointed over the assets of the debtor companies, specifically, a banquet hall and related chattels. The receiver concluded that the purchaser's terms and price represented the best offer in the circumstances and that acceptance of the offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. Pepall J. of the Ontario Superior Court of Justice held that the court order empowered the receiver to market

the property; that the receiver was authorized and empowered to take each step it did in the sale process; and that notices under the PPSA and the Mortgages Act were not required. The order also provided that proceedings against the debtor or its property were stayed. The court held that it would be inappropriate to permit redemption by a mortgagee at this stage of the proceedings, as a receiver would spend time and money securing an agreement to purchase and sale, subject to court approval, only for there to be a redemption by a mortgagee at the last minute. The court reaffirmed that an unsuccessful purchaser did not have standing and that the Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) tests should be applied; specifically, whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. In this case, while it would have been preferable to have had the receiver advertise in the Indian and South Indian newspapers, given the parties interested in the banquet hall, Pepall J. was of the view that the receiver had not acted improvidently and had made sufficient effort to get the best price. The property was shown 97 times and the property was sold for more than the appraised value and the listing price. The appraisal used a direct sales approach and a cursory income approach, as the debtors had not provided the necessary financial information. Justice Pepall was satisfied that the receiver considered the interests of all parties. The court held that if the receiver's decision to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Here, there was nothing in the evidence that caused the court to question the efficacy and integrity of the process; and there was no unfairness in the process. The motion of the receiver was granted: Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]).

Where a party submitted a higher bid for assets after the deadline for offers had passed and after the terms of the offer were accepted by the receiver had been made public, the higher bid was not accepted. Justice Cumming of the Ontario Superior Court of Justice was satisfied that the principles applicable to the sale of assets in receivership set forth by the Ontario Court of Appeal in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 were met. The receiver had properly and diligently considered the interests of all stakeholders, including the creditors and prospective purchasers, in recommending approval of the agreement. There was no real evidence of any unfairness or lack of integrity in the working out and approval of the sales process. Cumming J. held that the court should not foster uncertainty in the bid process, which would only discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace. Cumming J. held that it was unfair and objectionable for a party to wait until another bid was made and accepted by the receiver, and then to make a bid that was marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid. The motion of the receiver was granted and the sale approved: Re 1730960 Ontario Ltd. (2009), 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice declined to approve a proposed sale by a receiver on the basis that the bidding procedure had been flawed. The motion was brought by a prospective purchaser who sought to set aside an order approving a sale of a kiln to a party related to the applicant and to approve a sale to a party related to the respondent. The receivership had been acrimonious. The secured creditor applicant was owed more than $1 million with little prospect of recovery. The process for the sale was disputed, including its valuation. The court was unaware of the position taken by the moving party that it believed it had an approved bid accepted by the receiver because it was not given proper notice. Campbell J. held that the flaw in the process was that there was never a precise agreement between the parties as to the bidding terms, nor was there a court order that mandated precise terms. The previous endorsement of another judge was clear that counsel to the applicant was to have input on the terms and for reasons that are unclear, this did not take place. The process was flawed as soon as there was no agreement as contemplated by the previous endorsement. Campbell J. concluded that it was appropriate to set aside the sale order approving the applicant's bid. Had all the facts, including the lack of notice to the moving party, been brought to his attention, Campbell J. would not have made the order without the opportunity for submissions. Campbell J. did not agree that the relief sought in part in the applicant's cross motion be accepted, namely that it be permitted by lifting the stay to realize on its security, on the basis that the applicant did not seek to bid earlier, did not advise the moving party of its position before the earlier hearing, and did not file any opposition to the relief sought by the receiver. In the circumstances, the court ordered that it was appropriate to reopen the bidding process on specified terms: CTJI LLC v. Ship Shape Refinishing Ltd. (2009), 2009 CarswellOnt 4450, 55 C.B.R. (5th) 261 (Ont. S.C.J. [Commercial List]).

The Ontario Court of Appeal held that a licensee under a Master Licence Agreement with the debtor licensor did not have an interest that was sufficiently connected with the sale process so as to warrant standing in the sale proceedings: BDC Venture Capital Inc. v. Natural Convergence Inc. (2009), 2009 CarswellOnt 5535, 57 C.B.R. (5th) 186, 2009 ONCA 665 (Ont. C.A.).

The Ontario Superior Court of Justice permitted a receiver to reopen a sales process. The court held that giving consideration to a new offer submitted after the terms of the agreement recommended by the receiver had become a matter of public record would discourage parties from bidding in the sales process. However, in this situation, the successful bidder in the initial sale process agreed on terms to reopening the sales process and all parties agreed to the reopening on those terms, on the basis that the initial successful bidder's offer would be converted to a "stalking horse" offer, there would be a further week given for new offers, with a break fee being paid to the bidder subject to certain conditions. Cumming J. was of the view that this approach of a short extension to the sales process was a "win-win" situation for all concerned and was met by agreement of all the parties. The court held that the receiver had properly and diligently followed the court-approved sales process; had not acted improvidently; and had considered the interests of all stakeholders, including the creditors and prospective purchasers in recommending approval of the bid in the first instance and of a different bidder through the reconstituted sales process: ICICI Bank Canada v. 1539304 Ontario Ltd. (2009), 2009 CarswellOnt 6114, 57 C.B.R. (5th) 300 (Ont. S.C.J.).

The Ontario Superior Court of Justice granted a receiver's application for an order approving the sale of two properties. The court held that it was clear from the receiver's reports and the information received from the broker who had the listing that the receiver took sufficient steps to obtain the pulse of the market. The approved sales process was followed and while as many offers as were wanted may not have been received, there were offers received. There was no evidence that a further listing would have resulted in any further offers being obtained. The court held that the receiver had made sufficient effort to obtain the best price possible for these properties and had not acted improvidently; had considered the interests of all parties; there was no evidence that the process lacked integrity or efficacy; and there had been no unfairness in the process. The court approved the agreement of purchase and sale and the vesting order as requested. The receiver also requested an order approving its actions and activities as set out in various reports. The actions and activities of the receiver were approved; however, the court pointed out that at least one of the reports contained legal arguments justifying the actions of the receiver and held that a report made by the receiver to the court should not contain legal argument justifying the receiver's actions. Therefore, while approving the actions and activities of the receiver as described in the reports, it did not include approval of the legal argument made by the receiver in the reports: Re 1730960 Ontario Ltd. (2009), 2009 CarswellOnt 6178, 60 C.B.R. (5th) 318 (Ont. S.C.J.).

The Ontario Superior Court of Justice considered whether, in a receivership, a vendor must be registered under the Ontario New Home Warranties Plan Act to sell a new home. A creditor applied for the appointment of a receiver pursuant to s. 47(1) of the BIA, s. 101 of the Courts of Justice Act and s. 68(1) of the Construction Lien Act. Both of the creditor's mortgages had matured and were in default. The creditor made demands, sent s. 244(1) notices, and proceeded with notices of sale under mortgage. When the notices of sale were issued, 17 of the 25 condominium units were subject to agreements of purchase and sale. Most of the purchasers had terminated their agreements and had sought the return of their deposits from the debtor's lawyers who were holding them in trust. After the notices of sale redemption periods had expired, the creditor sought to be registered as a vendor pursuant to the provisions of the Ontario New Home Warranties Plan Act, which creates warranty protection for purchasers of new condominium units in Ontario and requires vendor registration. A vendor is deemed by the statute to give certain warranties against construction defects. The creditor was prepared to finance the completion of the project under a receiver's certificate and have the receiver market and sell the units; and was prepared to undertake to do all the work necessary to obtain registration of the condominium. The court held that it had to examine the role of a court-appointed receiver and the provisions of the New Home Warranties Plan Act to ascertain how they interact. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral. A court-appointed receiver derives its powers from an order of the court. The receiver is an administrator accountable to the court and to all the stakeholders in the receivership. The New Home Warranties Plan Act defines a vendor as "a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under contract with the owner." Section 6 provides that no person shall act as a vendor or a builder unless the person is registered under the Act. In the case of a condominium project, unit owners are the beneficiaries of the statutory warranties with respect to their individual units and the condominium corporation is the deemed beneficiary of the statutory warranties with respect to the common elements. The court held it was bound by the Court of Appeal decision in Bloor Street East, which held that neither a court-appointed receiver nor secured creditor was a vendor within the meaning of the New Home Warranties Plan Act as a receiver is not acting as principal or agent in any ordinary sense. The court concluded that any sale to purchasers of units would be effected by court order and that the definition of vendor contained in the New Home Warranties Plan Act does not extend to such a sale. An order was made granting appointment of a receiver on the basis that it was necessary for protection of the interests of creditors and that it was just and convenient to do so: Romspen v. 6176666 Canada Ltée. (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice reviewed the validity of referential bids in the context of a receivership and held that the receiver was correct in rejecting the referential bid as being invalid in the circumstances. The essence of sealed competitive bidding is the submission of independent, self-contained bids, the fair compliance with which all bidders are entitled. To allow referential bids would frustrate sealed competitive bidding processes, as the process would be unfair because the successful party could introduce into the sealed bid system elements of a public auction without any risk of being outbid by any other party. Here, no one intended or contemplated an auction, which by its nature enables a bid to be adjusted by reference to another bid. Rather, the parties intended a fixed bid process. In the result, the court was satisfied that the receiver's rejection of a referential bid in favour of another bid was commercially fair and reasonable in the circumstances and should be accepted: Fifth Third Bank v. MPI Packaging Inc. (2010), 2010 CarswellOnt 29, 62 C.B.R. (5th) 215 (Ont. S.C.J. [Commercial List]).

The appellant owned property on which contamination had earlier been discovered. The owner of the adjoining land admitted responsibility and the parties entered into a remediation agreement under which the responsible party would pay for the remediation and for other losses that the debtor company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce the obligations under the remediation agreement and for damages. The mortgage fell into arrears and the court ordered the appointment of a receiver, who was given authority to try to resolve the matter directly with the responsible party. They negotiated a settlement whereby the damage claim was settled, the property sold to the responsible party and the debtor company's mortgage debt partially recovered and partially forgiven. The receiver sought and received court approval for the sale and settlement. On appeal of that judgment, the Court of Appeal held that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the property. As an officer of the court, the receiver is obliged to make full and fair disclosure in all of its applications. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown. In this case, where the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances. The receiver must act "with meticulous correctness, but not to a standard of perfection". The Court held that the orders appealed from were more discretionary in nature. The Court of Appeal will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations. The Court held that the same factors identified in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) could be applied in considering the providence of this settlement, where the values of both a property and claim for damages are in issue: (a) whether the receiver has made a sufficient effort to get the best price and has not acted improperly; (b) the interests of all parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the sale process. Here, the receiver's appraisal and actions and the motion judge's review of the receiver's recommendations based on that appraisal were, in the circumstances, perfectly sound. The receiver's primary task was to ensure that the highest value was received for the assets so as to maximize the return to creditors; and its duty of fairness required that it maximize the return to the debtors, but such a return is not always commercially feasible. Without the sale, it would have been impossible for the senior lender to otherwise recover any significant portion of the debt: National Trust Co. v. 1117387 Ontario Inc. (2010), 2010 CarswellOnt 2869, 67 C.B.R. (5th) 204, additional reasons at (2010), 2010 CarswellOnt 4839 (Ont. C.A.).

Where a receiver and manager was appointed and the estate included four pieces of equipment secured by a PMSI and the bank sought to sell the equipment, the court approved the bank's sale of three pieces of the equipment, but not the fourth, which was a skid office that was attached to a building and would result in damage to the value of the rest of the property if removed. The court held that the receiver should have the opportunity to market the property, including the skid office, and the receiver was to devise a process that would ensure that the bank received its fair share of the proceeds of the sale process: Royal Bank v. Ramco Sales Inc. (2010), 2010 CarswellAlta 102, 64 C.B.R. (5th) 48, 2010 ABQB 1, 16 P.P.S.A.C. (3d) 81 (Alta. Q.B.).

In a case relating to the sale of the debtor's assets, the New Brunswick Court of Appeal granted standing to certain parties in an appeal, noting that this case was not one of a "bitter bidder", but rather, a case in which a prospective purchaser had acquired a legal right or interest that could be adversely affected by a court order. The Court of Appeal also granted standing to certain secured note holders, notwithstanding the language in the trust indenture that provided that the trustee could only act on the authorization of a fixed percentage of the secured creditors. The Court of Appeal then denied leave to appeal as the issues on appeal were not of significance to the practice and were not prima facie meritorious: Re Blue Note Caribou Mines Inc. (2010), 2010 CarswellNB 388, 2010 CarswellNB 389, 69 C.B.R. (5th) 298 (N.B. C.A.).

The Ontario Superior Court of Justice authorized a receiver to take steps to sell two properties and to borrow money to expand the premises on a property leased by Canada Post. The order was granted over the objections of the second mortgagee. In a subsequent decision, in the face of an appeal of the first decision, the court ordered that the first decision was subject to provisional execution: Computershare Trust Co. of Canada v. Beachfront Developments Inc. (2010), 2010 ONSC 4615 [Note: August 20, 2010 judgment is not available at this time]; Computershare Trust Co. of Canada v. Beachfront Developments Inc. (2010), 2010 CarswellOnt 6813, 2010 ONSC 4833 (Ont. S.C.J. [Commercial List]). For a discussion of this case, see L§18 "Duties and Powers of the Receiver".

In litigation proceedings where one party entered into receivership, a bidding process to buy the debtor's interest in the litigation was challenged. The court held that the receiver had acted reasonably in conducting the sale and in finding a referential bid to be invalid. The parties had been aware that they were to submit final and best offer bids by a specified date and it was open to the motion judge to find that an auction was not contemplated: Fifth Third Bank v. MPI Packaging Inc. (2010), 2010 CarswellOnt 3884, 68 C.B.R. (5th) 110, 2010 ONCA 431 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed a receiver's motion to approve an asset purchase agreement with two parties under which the purchasers would acquire, by a credit bid, the assets of the respondents. The assets of the debtor were fixed assets, largely comprised of computer technology, intellectual property, proprietary software applications, trademarks, supply contracts and an investment in shares of a wholly-owned subsidiary. Justice Newbould observed this bid was a credit bid, in which no cash was being paid to the receiver. Without an indication of the value of the assets that had been sold, it was not possible to consider whether the payment by way of a reduction of debt was satisfactory. Without this information, there was no basis for the court to conclude that a sale in the circumstances should be approved. Justice Newbould was of the view that the agreement should not be approved. He considered the material to be completely inadequate to enable the court to properly understand the circumstances to consider whether the sale was in the best interests of the stakeholders. Moreover, valuations or opinions as to the value of assets, including the intellectual property of the debtor, had not been obtained by the receiver and the unusual terms regarding the sale of intellectual property appeared to have been inserted in the agreement on the demand of the purchasers without any analysis or consideration as to the effect of the terms. Newbould J. also had considerable concern as to some aspects of the process, including that the time frame provided to sell the assets was too short and concern that there had not been sufficient exposure of the assets to the market place. Justice Newbould observed that a receiver appointed by the court is an officer of the court. The court is entitled to, and expects, a balanced report from the receiver without containing arguments as to why the receiver acted properly. If there is a factual dispute, it is open to a receiver to describe for the court what the factual dispute is, but leave it to the parties to file proper affidavit evidence relating to the dispute. While the receiver is required to take into account the interests of that secured creditor along with the interests of all other creditors, its job is not just to do the bidding of that secured creditor. In this case, the receiver's second report was replete with argument and rationalization of its actions and gave the appearance that the receiver was not a disinterested neutral observer, but rather an advocate. Justice Newbould was of the view that the receiver should retain new counsel, and any further material provided by the receiver should be done in a manner that would give comfort that the receiver has given due consideration to all important aspects of the receivership and is acting as a neutral, non-interested court officer providing balanced reports. The principles set out in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) had not been met: Canrock Ventures LLC v. Ambercore Software Inc. (2011), 2011 CarswellOnt 1069, 76 C.B.R. (5th) 298, 2011 ONSC 1138 (Ont. S.C.J. [Commercial List]).

Section 247 of the BIA specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner. The court observed that a receiver had concluded that more could be realized for the estate by putting the cause of action up for bidding than by pursuing the cause of action itself at the expense of the estate. The court held that there are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern should be whether the process is reliable, transparent, efficient, fair and one that guards the parties' interests: Bank of Montreal v. Calgary West Hospitality Inc. (2011), 2011 CarswellAlta 698, 78 C.B.R. (5th) 287, 2011 ABQB 293 (Alta. Q.B.). For a discussion of this judgment, see C§86(2) "Who May bring an Application?".

The Nova Scotia Supreme Court denied the motion of a purchase money security interest holder to lift the stay in a receivership. The receiver was of the opinion that the best realization of the debtor's assets would come from a sale of the assets en bloc and it was concerned that enforcement proceedings would negatively impact an en bloc sale. In deciding whether a stay contained in a receivership order ought to be lifted, the court will consider the totality of the circumstances

and the relative prejudice to both sides; and while not strictly applicable, guidance may be drawn from s. 69.4 of the BIA where material prejudice has been found to be objective prejudice as opposed to a subjective one. Justice Hood stated that the case law is clear that mere supposition or speculation was not sufficient to warrant lifting of the stay. The receiver's duty is to act in the interests of the general body of creditors, to consider the interests of all creditors, and then act for the benefit of the general body of creditors. The court must weigh the benefits and disadvantages to each against the general good and consider the totality of the circumstances. Here, the court could not conclude that the possible prejudice of the security holder outweighed the benefit to the creditors of an en bloc sale: Re Scanwood Canada Ltd. (2011), 2011 CarswellNS 564, 84 C.B.R. (5th) 57 (N.S.S.C.).

The Ontario Court of Appeal held that a receiver acted prudently and reasonably in its efforts to secure sale of some of the debtor company's assets, and the sale process and proposed sale and technology licence agreements satisfied the criteria for approval. Sale of all the assets en bloc was not realistic in the circumstances; the debtors lacked the cash to fund an extensive round of marketing; the receiver had used sufficient efforts to pursue the sale of assets; and the price was reasonable when measured against the valuations. The appeal was dismissed: Canrock Ventures LLC v. Ambercore Software Inc. (2011), 2011 CarswellOnt 4170, 78 C.B.R. (5th) 97 (Ont. C.A.).

In determining whether a receiver acted properly in conducting a sale, the court will consider whether sufficient effort has been made to obtain the best price; the interests of all parties; the efficacy and integrity of the process by which the receiver obtained offers; and whether there was any unfairness in the process: Bank of Montreal v. Dedicated National Pharmacies Inc. (2011), 2011 CarswellOnt 7972, 83 C.B.R. (5th) 155 (Ont. S.C.J. (Commercial List)).

The Ontario Superior Court of Justice approved a sale of assets by a receiver to a party related to the debtor. In such circumstances, the court emphasized that it is incumbent on the receiver to review and report on the activities of the debtor. The receiver, in conducting a sales process, was expected to follow the Soundair principles and the process should be transparent and should enable the court to make an informed decision as to whether the sale could be considered fair and reasonable in the circumstances. Justice Morawetz was not satisfied that the first report of the receiver provided sufficient detail to allow him to make an informed decision. The circumstances involved a related party as landlord and a directly related party as purchaser; and thus the receiver must provide sufficient detail in order to satisfy the court that the best result was being achieved. It was not sufficient to accept information provided by the debtor, where a related party is purchaser, without taking steps to verify the information. Justice Morawetz observed that a sale approval order, if granted, provides a degree of comfort to a receiver and other parties that the court has considered the issues and has concluded that circumstances are such that the sale can be said to be fair and reasonable. The receiver provided a supplemental report that addressed the above referenced concerns and Morawetz J. was satisfied that the sale was reasonable in the circumstances: Toronto Dominion Bank v. Canadian Starter Drives Inc. (2011), 2011 CarswellOnt 15140, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a sales/auction process and priority of receiver's charges. In approving the priority of receiver's charges, the court reviewed CCAA cases and adopted the principles for receivership cases. Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver. Justice Brown was of the view that the need for certainty about the priority of charges for professional fees or borrowings apply to priority charges sought by a receiver pursuant to s. 243(6) of the BIA. Here, reasonable notice had been provided to affected persons and the requested relief was granted. The court did not regard the presence of a "come-back clause" in the appointment order as leaving the door open for some subsequent challenge to the

priorities granted by this order: CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]).

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

The British Columbia Supreme Court adjourned the application of a secured creditor to provide the receiver manager with the immediate ability to sell real property charged by the security. The secured party could re-apply once the six-month redemption period set by the court expired. In arriving at its decision, the court considered the question of whether the setting of a redemption period where the security is a debenture is different than where the security is a mortgage charging land or where the security is an agreement for sale. Burnyeat J. held that in the interests of commercial certainty and in order that the procedures relating to the enforcement of agreements for sale, mortgages and debentures can be dealt with in a consistent manner, the court will be called on in enforcement proceedings to set a redemption period in accordance with the equities existing relating to the value of the property and to the debt owing under the security that is being enforced. If the position of the party enforcing the security is secured by the value of the property charged, then the usual redemption period of six months will apply. If not, a shorter redemption period will be ordered rather than the "usual" six months: IMOR Capital Corp. v. Bullet Enterprises Ltd. (2012), 2012 CarswellBC 1832, 2012 BCSC 899 (B.C.S.C. [In Chambers]).

The Ontario Superior Court of Justice approved a sale of assets, notwithstanding a late superior offer that materialized after the deadline established in the court approved sales process. The objecting creditor held a beneficial interest in the subordinated secured plan notes and was the fourth largest trade creditor of the debtor. The creditor submitted that it expected to receive less than 6% recovery on its holdings under the notes and no recovery on its trade debt; but if the late offer were accepted, it expected to receive full recovery under the notes, and possibly a distribution with respect to its trade debt. The court held that s. 36 of the CCAA sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction, including (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale or disposition; (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Justice Morawetz held that the list of factors set out in s. 36(3) of the CCAA largely overlaps with the criteria established in Royal Bank v. Soundair Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.), which specifies that when assessing whether to approve a transaction to sell assets, the court should consider: whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. Morawetz J. held that that at the time the offer was accepted, the late offer was higher but was non-binding. The court held that the test is not whether another bidder was aware of the opportunity to participate in a sales process, but rather, whether

the officer has made sufficient effort to get the best price and has not acted improvidently. Justice Morawetz concluded that the efforts to market the assets were reasonable in the circumstances. Although the late offer was higher than the purchaser's offer, Morawetz J. was of the view that the increase was not such that he would consider the accept transaction to be improvident in the circumstances. In all respects, Morawetz J. was satisfied that there had been no unfairness of the working out of the process. In the result, Morawetz J. determined that the approval and vesting order should be granted: Re Terrace Bay Pulp Inc. (2012), 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court reviewed the law relating to the sale of assets in a CCAA proceeding. The court issued an order approving a divestiture process to be followed by the debtor company for the sale of some of its assets. The debtor, with the help of its chief restructuring officer (CRO) and the monitor, followed the procedure provided for in the divestiture process to find qualified bidders for the assignment of the contract. Two qualified bidders were named, and one of those bids was accepted. A creditor that held first ranking security on the assets involved in the contract and on the proceeds supported the debtor. Another party opposed arguing lack of transparency and unfairness. Justice Gouin held that a crucial aspect of the proceedings was that the divestiture process followed by the debtor for the assignment of the contract had already been approved and authorized by the court. Further, participating bidders had reviewed and accepted the full terms and conditions of the divestiture process under the order, thus the process, including all its steps and phases, could not be challenged at this point in time. Justice Gouin observed that the divestiture process was structured so as to maximize the debtor's' chances of getting as much value as possible for its assets; however, the process still had to be implemented transparently, fairly and with integrity. The monitor was of the view that the whole bidding process was reasonable, had been conducted in accordance with the rules, and was fair and transparent. Justice Gouin held that s. 36(3) of the CCAA lists some of the factors that the court considers before authorizing a sale of assets: whether the process leading to the proposed sale or disposition was reasonable in the circumstances; whether the monitor approved the process leading to the proposed sale or disposition; whether the monitor filed with the court a report stating that, in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; the extent to which the creditors were consulted; the effects of the proposed sale or disposition on the creditors and other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Gouin J. held that once a process has been put in place by court order for the sale of assets of a failing business, that process should be honoured, except in extraordinary circumstances. The court will not lightly interfere with the exercise of the commercial and business judgment properly exercised by the applicant and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. Here the court was satisfied that the process was implemented with transparency, integrity, efficacy, and fairness: Re Aveos Fleet Performance Inc./Aveos performance aéronautique inc., 2012 CarswellQue 8620, 2012 QCCS 4074 (Que. S.C.).

The Saskatchewan Court of Queen's Bench reviewed the case law relating to receivership sales after a bid deadline. The court confirmed the bid submitted prior to the deadline. The court observed that if the decision of a receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances, it should not be set aside simply because a later and higher bid is made. To do so would create chaos in the commercial world and purchasers would never be sure they had a binding agreement. The court and the administration of justice have an abiding interest in maintaining commercial probity and reasonableness in any sale directed by the court. Here, Smith J. held that if the higher bid were to prevail, any reasonable observer would not regard the process as fair and reasonable or one characterized by integrity. The bidder through a court application for disclosure placed itself in a situation where it knew precisely the bid it had to better, and to allow it to defeat the successful bidder by reason of a court ordered disclosure process would not yield a principled result: MNP Ltd. v. Mustard Capital Inc., 2012 CarswellSask 593, 97 C.B.R. (5th) 165, 2012 SKQB 325 (Sask. Q.B.).

The Ontario Superior Court of Justice analyzed the basis for approval of a "pre-pack" credit bid sale in a proposed receivership of debtors that operated four retirement residences. Justice Brown noted that "quick flip" or pre-pack transactions are becoming more common in the distress marketplace. In certain circumstances, a quick flip involving the appointment of a receiver and then immediately seeking court approval of a pre-packaged sale transaction may well represent the best, or only, commercial alternative to a liquidation, citing Re Tool-Plas Systems Inc., 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]). The court will still assess the need for a receiver and the reasonableness of the proposed sale and will scrutinize with care the adequacy and the fairness of the sales and marketing process in quick flip transactions. The court will assess the impact on various parties and whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed. Justice Brown noted that the need for such a robust and transparent record is

heightened where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors. On the evidence, Brown J. was satisfied that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thus ensuring a place to live for the residents and maintaining current levels of employment. The record confirmed a professional and prolonged effort to elicit interest in the properties from third party purchasers; but it appeared that market conditions were such that interest could not be generated at a level that would cover the senior secured indebtedness. Brown J. was satisfied that the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances and that the proposed sale agreement gave proper treatment to claims: Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc., 2013 CarswellOnt 15278, 2013 ONSC 6905 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice declined to approve a proposed transaction for the sale of a house. Following an auction approval order, the receiver entered into an auction services agreement. Subsequently, the receiver was presented with an offer for the property; the receiver's report did not explain how the offer had come about. The receiver met with the offerors, as a result of which the receiver was sent an enhanced offer. The receiver recommended approval of the transaction on the basis that (i) the offer price was at the high end of the valuation range; (ii) the offer was unconditional; (iii) a significant deposit accompanied the offer; and (iv) the auction services stated that while a higher price is possible at a "live" auction, it is not a likely outcome. Justice Brown referenced the Court of Appeal decision in Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.), where the court held that while the primary concern of a receiver is the protection of the interests of creditors, a secondary and "very important consideration" is the integrity of the process by which the sale is effected. In this case, the receiver sought and obtained approval to conduct a sales auction process because of the inability to attract adequate offers for the property through a listing process. The auctioneer had put in place the infrastructure necessary to conduct an auction and had conducted 131 tours of the property. The auction was only four business days away. While Brown J. acknowledged that the inclination of the receiver to take the "bird in the hand" was understandable, given the poor marketing history for the property, he concluded that deviating from the court-approved auction process of this stage would damage the integrity of the sales process. Whether the auction resulted in a better bid than that contained in the proposed transaction was a matter for the market to decide. It could be that the successful bid at the auction would fall short of the proposed transaction, but that risk naturally attaches to any auction process. Brown J. also noted that an auction process had been recommended by the receiver to the court not more than two months prior as the most appropriate way by which to sell the property and the court had accepted that recommendation. The integrity of the sales process required that the auction proceed: HSBC Bank Canada v. Lechcier-Kimel, 2013 CarswellOnt 15938, 2013 ONSC 7241 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed a receiver and approved a sale of assets, reviewing the test for approval of a "quick flip" transaction. The receiver and the three related purchaser entities ("purchasers") had negotiated asset purchase agreements ("APA"), under which the aggregate of the purchase prices was less than the amount of the obligations owed by the debtor under credit agreements and related guarantees. The receiver was of the view that the transactions were the best available option as it would stabilize the debtor's Canada's operations, provide for additional working capital, facilitate the employment of substantially all of the employees, continue the occupation of up to three leased premises, provide new business to existing suppliers, allow for uninterrupted service, and preserve the goodwill and overall enterprise value of the companies. Justice Morawetz noted that it is settled law that where a court is asked to approve a sales process and transaction in a receivership context, the court is to consider the "Soundair principles"; specifically, whether the party made a sufficient effort to obtain the best price and to not act improvidently; the interests of all parties; the efficacy and integrity of the process by which the party obtained offers; and whether the working of the process was unfair. Justice Morawetz was satisfied on the evidence that each of the Soundair principles had been satisfied, and that the economic realities of the business vulnerability and financial position of the debtor militated in favour of approval of the issuance of the requested orders. Justice Morawetz held that where court approval is being sought for a so-called "quick flip" or immediate sale, which involves, as in this case, an already negotiated purchase agreement sought to be approved on or immediately after the appointment of a receiver without any further marketing process, the court is still to consider the Soundair principles, but with specific consideration to the economic realities of the business and specific transactions in question. He noted that courts had approved the sales where: (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and (b) delay of the transaction will erode the realization of the security of the creditor having the sole economic interest. Morawetz J. also referenced Re Tool-Plas Systems Inc., 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]) where he stated: "A `quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a `quick flip' transaction, the court should consider the impact on various parties and assess whether their respective

positions and the proposed treatment that they will receive in the `quick flip' transaction would realistically be any different if an extended sales process were followed." In this case, Morawetz J. was satisfied that the APA were the culmination of an exhaustive marketing process and that there was no realistic indication that another sales process would produce a more favourable outcome. Morawetz J. found that the sales process, in this case, was fair and reasonable, and that the transactions were the only means of providing the maximum realization under the current circumstances. Morawetz J. was satisfied that no party was prejudiced by the form of the transaction. Morawetz J. noted that even if the purchasers and the debtor were to be considered, out of an abundance of caution, related parties, it did not in itself preclude approval of the transaction. Where a receiver seeks approval of a sale to a party related to the debtor, the receiver is required to review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. A sale to a party related to the debtor is not precluded, but will subject the proposed sale to greater scrutiny to ensure transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. Morawetz J. accepted the recommendations of the receiver that the market for the assets had been sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APA were fair and reasonable in the current circumstances: Elleway Acquisitions Ltd. v. 4358376 Canada Inc., 2013 CarswellOnt 16849, 7 C.B.R. (6th) 25, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court approved a sale of property by a receiver over the objections of the debtor. The Court reviewed the Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) tests: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. The Court also noted that although it had some concerns with the sale process, no complaints had been received from other bidders or prospective purchasers. Justice Duncan held that when a property is put on the market in a forced sale, it is not unreasonable to expect that the marketplace may see an opportunity to get a bargain and pressure the price down. Justice Duncan also observed that a further factor that impacts on sale price is the value and length of leases already in place. In this case, the primary tenant had a lease for three more years, which a prospective purchaser had to value as part of its overall assessment of the possible return from investment. Potential buyers have to make a business calculation as to the value of the income stream in whether to offer on the property, and if so, at what price. The receiver had to assess whether the resulting offer was commercially reasonable. There remained the question of whether the process of sale that was employed by the receiver fulfilled the duties set out in Soundair. Justice Duncan observed that there was no evidence to suggest that prospective purchasers had come forward to express an interest in the property in the last two months since the offer period closed. Justice Duncan did, however, express concern that the advertisements characterized the offer process as a tender. The effect of the advertisements when read together with the language in the information package would lead potential bidders to believe that there was no opportunity to bid on the property after the closing date. The receiver did not accept the offer submitted by the purchaser; there was a period of negotiation that culminated a month later in the increased offer. No notice had been provided to those potential purchasers who had requested the information package that the offer had not been accepted or that further offers would be considered. Justice Duncan considered the authorities and was satisfied that the process followed did not negatively impact on the assessment of the receiver`s exercise of judgment. The process adopted for sale of the property was akin to a tender, which requires that the receiver, among other duties, fulfill a duty of fairness to bidders. Justice Duncan was satisfied that the receiver had made a sufficient effort to get the best price for the property and had not acted improvidently, observing that the courts place a high degree of reliance on the business judgment of the receiver: Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd., 2013 CarswellNS 1058, 9 C.B.R. (6th) 163, 2013 NSSC 435 (N.S. S.C.).

The Ontario Superior Court of Justice declined a debtor's request for disclosure of commercially sensitive information in a motion to approve a sale of real property. The receiver filed, on a confidential basis, charts summarizing the material terms of the offers received, as well as an un-redacted copy of the agreement of purchase and sale ("APA"). The offer was superior in terms of price, not conditional on financing, environmental site assessments, property conditions reports or other investigations, and provided for a reasonably quick closing date. In order to disclose that information to the debtor, the receiver asked the debtor to sign a confidentiality agreement. A dispute arose between the receiver and the debtor about the terms of that proposed agreement. The receiver took the position that the economic terms of the agreement, including the purchase price, were commercially sensitive. In order to maintain the integrity of the sale process, the receiver was not in a position to disclose the information. The receiver's motion record contained a full copy of the APA, save that the receiver had redacted the references to the purchase price. Justice Brown noted that in Sierra Club of Canada v. Canada (Minister of Finance), 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522, the Supreme Court of Canada sanctioned the making of a sealing order in respect to material filed with a court when: (i) the order was necessary to prevent a serious risk

to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk, and (ii) the salutary effects of the order outweighed its deleterious effects. Justice Brown noted that, as applied in the insolvency context, that principle had led the Ontario Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer — receiver, monitor or trustee — filed in support of a motion to approve a sale of assets that disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought. Justice Brown held that the purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. To achieve that purpose, a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, the need for confidentiality disappears and the materials can become part of the public court file. If the transaction does not close, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lack access to such information. In this case, Brown J. concluded that the receiver had acted in a reasonable fashion in requesting the debtor to sign the confidentiality agreement before disclosing information about the transaction price and the other bids received; and he was satisfied that the provisions of the confidentiality agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale: GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc., 2014 CarswellOnt 2113, 2014 ONSC 1173 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench approved the receiver's application to sell the debtor's assets over the objection of a party who had expressed an interest in the assets. Justice Veit found that the receiver had met its obligations under the Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) tests; the receiver had made sufficient efforts to get the best price and had not acted improvidently; the receiver's proposal considered the interests of all parties; all interested parties supported the proposal; and the offers were obtained by a process that was efficient and had integrity: Royal Bank of Canada v. Wapiti Waste Management Inc., 2014 CarswellAlta 1007, 20 C.B.R. (6th) 24, 2014 ABQB 361 (Alta. Q.B.).

The British Columbia Supreme Court dismissed the receiver's application for a bidding procedures order approving a stalking horse bid. The court cited a lack of evidence to support the application. Justice Weatherill noted that the use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process. The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the efficacy and integrity of the sale process by which offers were obtained; whether there has been unfairness in the working out of the process; and the interests of all parties. Justice Weatherill noted that there were many stakeholders in the matter, including the bond holders and the lien claimants who would likely end up with nothing if significantly better bids were not received. In order for the process to be effective, the sale process must allow sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project required that interested parties must move relatively quickly in order that the value of the project was preserved and not be allowed to deteriorate. Justice Weatherill held that no course of action other than a stalking horse bidding process appeared to have been considered, including the traditional tendering process. There was no evidence that the receiver had attempted to market the development beyond discussions with three developers. There was no evidence from which the court could assess whether the economic incentives behind the agreement were fair and reasonable. While Weatherill J. accepted the concept of the termination fee, the mere fact that the proposed termination fee was within the "range of reasonableness" as determined in other cases did not mean that it was reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. In this case, there was no evidence regarding how the termination fee was arrived at or how the $1.5 million fee compared with the expenses incurred in respect of its due diligence. Weatherill J. was of the view that such evidence was required: Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd., 2014 CarswellBC 2916, 17 C.B.R. (6th) 41, 2014 BCSC 1855 (B.C. S.C.).

The Court of Appeal for Ontario dismissed a receiver's appeal of a partial denial of its requested fees. The receiver brought a motion seeking approval of its fees and its legal expenses, including fees incurred in negotiating the sale that was not

approved by the court and in bringing the unsuccessful motion to abandon the auction process. The motion judge was critical of the receiver for seeking to abort the auction process almost immediately after seeking court approval on the basis that an auction represented the best realization strategy for the property. The motion judge noted that had there been an offer 50 to 60 per cent higher than the reserve price, it would have justified abandoning the auction, but an offer 20 per cent above the reserve price did not justify a change in the sale process. He concluded that the motion should not have been brought, and thus, the fees incurred by the receiver and its counsel should be denied. The Court of Appeal stated that while courts will show deference regarding the business decisions of receivers, the procedure for reviewing a receiver's conduct of a receivership is not the same as that for reviewing the reasonableness of its fees. While the objecting party bears the burden of showing that a receiver's business decisions are unreasonable, the receiver bears the burden of proving that its fees are fair and reasonable. Thus the deference to which the receiver's business decisions are owed does not insulate its accounts from review to determine if they are fair and reasonable. The Court of Appeal also noted that there was nothing in the motion judge's reasons indicating he was not cognizant of, and did not take into account, the factual context in which the receiver was operating. The motion judge had been involved in the receivership from the outset, and receiver reports had been filed detailing the activities of the receiver. Finally, the Court of Appeal rejected the submission that the motion judge overemphasized the integrity of the auction process and failed to give sufficient consideration to the need for flexibility. The Court noted that a number of circumstances led the motion judge to conclude that safeguarding the integrity of the sale process was paramount, including: the receiver's representations that an auction was the best method to sell the property; the receiver's deviation from the approved sale format almost immediately after the court order was issued and undertaking significant work without seeking court approval; the proposed sale price was only 20 per cent above the reserve price; and the receiver's pursuit of a course of action that would likely only benefit the first mortgagee. In the result, the appeal was dismissed with costs payable by the receiver, and not from the estate: HSBC Bank Canada v. Lechier-Kimel, 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.).

The Ontario Superior Court of Justice approved the receiver's motion for approval to sell a residential property. The order was made over the objections of the mortgagor. The court must consider the following questions before it can approve the sale, citing Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 46 O.A.C. 321 (Ont. C.A.): 1. Did the receiver make a sufficient effort to get the best price and did it act providentially? 2. Did it consider the interests of all the parties? 3. Was the process by which the offer was obtained done with efficacy and with integrity? 4. Was there unfairness in the process? Justice Tzimas was of the view that in the face of the evidence and in consideration of the first legal question, there is no evidence before the court to question or doubt the sufficiency of the receiver's efforts to sell the property. Justice Tzimas was also satisfied that the receiver had considered the interests of all the parties, had consulted with the mortgagees on the identification of a particular listing agent, had listed the price above the appraised value to reflect the wishes of the mortgagees, and had given the applicants the opportunity to bring forward their own buyer. Tzimas J. concluded that the receiver's proposal was reasonable and legally sound, that the receiver had acted in a provident manner, that it had considered all of the parties' interests, and that it had done so with integrity and with fairness. The proposed sale was approved: Stanbarr Services Ltd. v. Reichert, 2014 CarswellOnt 15507, 20 C.B.R. (6th) 99, 2014 ONSC 6435 (Ont. S.C.J.).

A receivership order was amended so that proceeds from sale of receivership properties would be applied first to the total amounts secured by the receiver's charges and borrowing charges in respect property sold; second to the total amounts secured by any first mortgage related to the receivership property sold; third to total amounts secured by the receiver's borrowing charges in respect of other receivership properties; fourth to total amounts secured by the mortgage held that was cross-collateralized across all the receivership properties; and last to the monitor in the concurrent CCAA proceeding for application in that proceeding. The court noted the importance of finality of orders; however, new facts may justify varying or setting aside an order where the evidence may have altered the judgment and could not with reasonable diligence been discovered sooner: Romspen Investments Corp. v. Edgeworth Properties, 2014 CarswellOnt 9980, 16 C.B.R. (6th) 81, 2014 ONSC 4340 (Ont. S.C.J.).

The Nova Scotia Supreme Court approved a receiver's sale of assets but declined to grant a vesting order, which would transfer the debtor's interest from the receiver to the purchaser without the necessity of any conveyancing documents, such as deeds or bills of sale. In doing so, the court considered the question of whether it had the jurisdiction to grant such an order; however, this point was not determined as the court did not consider it to be appropriate to grant the order in the circumstances. Justice Wood held that the material filed by the receiver did not satisfy him that a vesting order was necessary. If the purpose was to simplify the transfer of assets and avoid the necessity of obtaining releases from the encumbrancers, he had no evidence that they had been requested to provide releases and refused to do so. The court held that

a more important circumstance justifying refusal was that the tender documents and asset purchase agreement said that the receiver would provide a deed and bill of sale, which is what the purchaser contracted to receive. Wood J. observed that the effect of a vesting order would be that the purchaser would assume no risk with respect to title and the court would discharge all encumbrances; however, the receiver had not explained why the court should provide this assurance and override the terms of the agreement: Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc., 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 2014 NSSC 420 (N.S. S.C.).

See Stuart Brotman and Dylan Chochla, "What's the ``Deference"? Sale of Assets by Receivers 2014 in Review", in Janis Sarra and Barbara Romaine, eds., Annual Review of Insolvency Law 2014 (Toronto: Carswell, 2015) at 447-468.

The Ontario Superior Court of Justice approved an agreement of purchase and sale from a stalking horse bid process that included an auction for all of the assets of the companies save and except certain excluded assets, over the objections of subordinate secured creditors. The stalking horse offer contained no break fee or payment for the purchaser's expenses. Justice Pattillo noted that a stalking horse offer combined with a court-approved bidding procedure is commonly used in insolvency situations to facilitate the sale of businesses and assets. The court relied on Re Brainhunter Inc., 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), applying four factors that the court should consider in exercising its discretion to authorize a stalking horse process, observing that the same considerations applied in a receivership: Is the sale transaction warranted at this time? Will the sale benefit the economic community? Do any of the creditors have a bona fide reason to object to the sale of the business? Is there a better viable alternative? Justice Pattillo found that the receiver's report made it clear that the sale was warranted; the best realization of the assets would be achieved by the sale of an operating business; and the proposed sale would benefit the "economic community", including the preservation of jobs, contracts and business relationships. The court also noted that in reaching its conclusion that the interests of the creditors and stakeholders were best served by accepting the stalking horse offer, the receiver had considered the fact that the allocated purchase price for the properties would likely provide for less value than the charges registered against them by the objecting creditors. Justice Pattillo approved the sales process, the offer and authorized the receiver to enter into the agreement of purchase and sale. The process was transparent and the proposed timeline was fair and reasonable in the circumstances: Re Crate Marine Sales Ltd., 2015 CarswellOnt 2248, 23 C.B.R. (6th) 202, 2015 ONSC 1062 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court dismissed the claim of a former employee of a company that had been placed into receivership and then went bankrupt. The former employee had argued that the entity that purchased the assets of the bankrupt had assumed the obligations relating to a retirement settlement agreement with the former employee. The plaintiff also argued liability under the common/successor employer doctrines. Justice Wright held that the plaintiff's contract of employment ended when she chose to retire from the company, which brought the employment relationship to a close, relying on Kerr v. 2463103 Nova Scotia Ltd., 2015 CarswellNS 71, 2015 NSCA 7, [2015] N.S.J. No. 22 (N.S. C.A.). By agreeing to accept deferred severance payments spread over a three-year period, the plaintiff thereby became an unsecured creditor. Justice Wright further noted that the company was placed in receivership by a private appointment, immediately followed by a bankruptcy, and thereby lost possession and control of its assets and the powers and duties of its directors and officers over its property were suspended. The receiver's duty is to take possession of the charged property for the express purpose of recouping the loan to the security holder, together with the duty to manage the operations of the debtor for the protection of the security. Insofar as existing contracts are concerned, Wright J. noted that the receiver may complete those that are beneficial to the security holder. Overall, the receiver seeks to exercise its power of sale in the security instrument to recoup the secured loan. In this case, the settlement agreement was of no benefit whatsoever to the security holder. Wright J. further held that the purchaser company could not be held to be either a common or successor employer as it was newly incorporated and not created through a merger or acquisition, nor did it assume responsibility for the indebtedness, and it was not a situation where the plaintiff had been terminated; rather, she had accepted a retirement package. The plaintiff's action was dismissed in its entirety: Hibbs v. Murphy, 2015 CarswellNS 112, 24 C.B.R. (6th) 317, 2015 NSSC 48 (N.S. S.C.).

The Ontario Superior Court of Justice granted a receiver's motion to approve the sale of a golf course. The approval motion was opposed by the respondent, the first mortgagee of the property, who wanted to redeem the first mortgage. The order appointing the receiver authorized it to market the property, and the receiver determined that if it marketed the property quickly, it might be able to complete a sale of the assets by early June, allowing a purchaser to operate the course during the busiest summer months. Newbould J. was satisfied that the receiver conducted a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Justice Newbould held that the sales process in the circumstances was reasonable and appropriate and

met the test of the Soundair principles in Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). Newbould J. further held that the sale agreement and appraisals had been filed under seal, as is usual in the Commercial List, in case any approved sale failed to close and the property must be again exposed to the market place. He added that the integrity of any future sales process would be jeopardized if the documents were available to any future bidders. The respondent had no special right to these documents. Justice Newbould also noted that while the primary concern of a receiver is protecting the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. Newbould J. declined to permit the first mortgage to be redeemed, stating that the essential reason was that it would upset the integrity of the sales process undertaken by the receiver: Business Development Bank of Canada v. Marlwood Golf & Country Club Inc., 2015 CarswellOnt 9453, 27 C.B.R. (6th) 166, 2015 ONSC 3909 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench dismissed the application of a receiver and secured creditor, who had sought an order directing a pharmacy to pay to the receiver the fair value of prescriptions conveyed to the pharmacy on the eve of insolvency of another pharmacy (the "debtor"). Justice Romaine held that it was clear that the physical medical records of patients belong to the physician, citing McInerney v. MacDonald, 1992 CarswellNB 63, 1992 CarswellNB 247, [1992] 2 S.C.R. 138 (S.C.C.); and the principles with respect to this issue apply likewise to other health care professionals, including, in this case, pharmacists. She referenced Re Axelrod, 1994 CarswellOnt 319, 20 O.R. (3d) 133, 29 C.B.R. (3d) 74 (Ont. C.A.), which held that a healthcare provider may use records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests. Justice Romaine concluded that the debtor company and its pharmacist/principal held an interest in patient files and records that they were able to pledge as long as a pledge could be accomplished in a manner compatible with the pharmacist/principal's professional responsibilities. The secured creditor's interest in the pledged assets could be no greater than that of the debtor and its principal, and thus must be subject to the same limitations with respect to the professional responsibilities of a pharmacist when the practice closes. The Court held that given the regulatory regime as described by the College, and the interests of patients involved in the transfer of records and prescriptions, the application to transfer patient records and prescriptions to the receiver or the secured creditor was not feasible. The secured creditor submitted that the pharmacy receiving the records and prescriptions should be liable to pay the receiver an amount equal to the fair value of the prescriptions because it was unjustly enriched by the wrongful transfer of the prescriptions. Justice Romaine observed that a cause of action of unjust enrichment has three elements: (1) an enrichment of the respondent; (2) a corresponding deprivation of the applicant; and (3) an absence of juristic reason for the enrichment; and in this case, the most difficult issue was whether there was an absence of juristic reason for the enrichment. Justice Romaine held that the approach to the juristic reason analysis has two parts. The applicant must show that no juristic reason exists in any established category of such reasons that would deny recovery. The established categories include contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If there is no juristic reason that can be identified from an established category, the applicant has made out a prima facie case. This prima facie case is rebuttable, however, where the respondent can show that there is another reason to deny recovery. At this point, the court should have regard to two factors: the reasonable expectations of the parties and public policy considerations. Justice Romaine found that the receiving pharmacy's acceptance of the transfer of patient records and files in order to facilitate compliance with the debtor's statutory and regulatory obligations and to ensure continuity of care for the patients involved fell within one of the established categories of juristic reasons to deny recovery in unjust enrichment. Justice Romaine also rejected arguments with respect to constructive trust and disgorgement. Finally, Romaine J. considered the issue of a fraudulent preference. She found that the undisputed evidence of the pharmacist/principal of the debtor as to why he transferred the records to the receiving pharmacy without any discussion of payment, at a time when he had given up on the prospect of a sale, satisfied the court that there was no intention to defeat, hinder, delay or prejudice his creditors, but merely to ensure the well-being of patients and their continuous care. The application to find this transaction to be a fraudulent transfer failed: Maximum Financial Services Inc. v. 1144517 Alberta Ltd., 2015 CarswellAlta 1934, 31 C.B.R. (6th) 146, 2015 ABQB 646 (Alta. Q.B.).

The Court of Appeal for Ontario upheld the decision of a motion judge who granted summary judgment in favour of the plaintiff on a claim of fraudulent misrepresentation relating to a purchase of property from a court-appointed receiver. Justice LaForme held that there was sufficient evidence to prove the elements to find the appellant personally liable: the record disclosed that the appellant had engaged in actions that amounted to misrepresentations; the appellant had some level of knowledge about the misrepresentations; the representations had caused the receiver to seek court approval and to transfer title, and but for the false representations, the receiver would likely have acted differently and to the detriment of the appellant; and as a result of the misrepresentations, the receiver had lost an opportunity to negotiate a higher price with the appellant or another party. Justice LaForme then considered the interveners' right to be heard. LaForme J.A. noted that the interveners were witnesses in the summary judgment motion. No relief was sought from them, and none was granted. Justice

LaForme stated that non-parties should not be able to lurk in the shadows and then spring up to challenge a decision whenever the outcome or findings of fact may affect them in some manner they do not like. The Court held that the statement of claim in the appellant's action was the only notice to which the interveners were entitled. Once they were served with the claim, they knew about this action and had an option to intervene as a party. LaForme J.A. concluded that the interveners were not denied natural justice: Meridian Credit Union Ltd. v. Baig, 2016 CarswellOnt 2664, 63 R.P.R. (5th) 179, 2016 ONCA 150 (Ont. C.A.), additional reasons 2016 CarswellOnt 5414, 2016 ONCA 265 (Ont. C.A.).

The Ontario Superior Court of Justice approved a sale of assets by the receiver over the objections of the debtor. Justice Shaw addressed the principles set out in Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). In this case, Justice Shaw was satisfied that the receiver had acted reasonably and not improvidently in accepting the only offer it had received after months of marketing. Shaw J. noted that although the receiver owes a duty to all stakeholders, its primary duty in this case was to maximize the return for the secured creditors. Even with the sale, the secured creditors stood to incur a shortfall on their security. Shaw J. was of the view that they were the only parties with a real economic interest in the sale and they supported the sale. The receiver had negotiated in good faith and had acted reasonably, prudently and fairly and not arbitrarily. The Court also held that the principal of a corporation that had submitted a late proposal to purchase the assets had no standing to appear: 2403177 Ontario Inc. v. Bending Lake Iron Group Ltd., 2016 CarswellOnt 2673, 34 C.B.R. (6th) 125, 2016 ONSC 199 (Ont. S.C.J.). On the debtor's motion for leave to appeal this judgment, the Court of Appeal for Ontario denied the debtor's motion for leave to appeal the approval and vesting order. The Court of Appeal reviewed the test for leave to appeal and also reviewed the duty of the Crown to consult with Aboriginal peoples and communities: 2403177 Ontario Inc. v. Bending Lake Iron Group Ltd., 2016 CarswellOnt 9527, 37 C.B.R. (6th) 173, 2016 ONCA 485 (Ont. C.A.). For a discussion of this appellate judgment, see I§62 "Appeals by Leave of a Judge of the Court of Appeal".

In a receivership proceeding, the Alberta Court of Queen's Bench was asked to approve the sale of property at a price far below the price at which the property had been originally listed for sale. The motion was opposed by the largest unsecured creditor who had raised a number of questions. Justice Veit noted that not approving the proposed sale may turn out to be costly to the unsecured creditors. An adjournment could cause the loss of the offer that, at the time of the application, was on the table, the market could continue to deteriorate, and a potentially relevant insurance policy, when it is able to be assessed, may not provide any answer to the need for remediation. However, Veit J. went on to note that when the largest by far of the unsecured creditors indicated that he was willing to take this risk, and when the policy itself had not been studied, the unsecured creditor's position had to be taken seriously. The receiver's application was denied at this time. The receiver could reapply when the queries of the unsecured creditor were answered: Royal Bank of Canada v. Wapiti Waste Management Inc., 2016 CarswellAlta 441, 2016 ABQB 145 (Alta. Q.B.).

The Manitoba Court of Appeal dismissed an appeal from the decision of a judge who had approved the receiver's motion for a sale of assets. With respect to the standard of review, the motion judge owed the decision of the receiver significant deference. While it is the duty of the court to ensure the integrity of the process, the court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather, to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. Justice Steel noted that the decision of the motion judge was an exercise in judicial discretion and was entitled to deference in the Court of Appeal. The Court of Appeal would intervene only if the motion judge erred in law, misapprehended the evidence in a material way or was clearly wrong. Justice Steel noted that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. The interests of all parties should be taken into account, including the interests of the unsecured creditors. However, in this case, the offer to pay unsecured creditors over time out of future profits was not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. As result, the secured creditors were the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: Royal Bank of Canada v. Keller & Sons Farming Ltd., 2016 CarswellMan 147, 39 C.B.R. (6th) 219, 2016 MBCA 46 (Man. C.A.).

The Manitoba Court of Queen's Bench granted authority to the receiver to sell the land, buildings and related equipment of the debtor. In doing so, the court also commented on the appropriate disclosure of confidential reports. Justice Chartier made the decision in light of the decision of Atomic Energy of Canada Ltd. v. Sierra Club of Canada, [2002] 2 S.C.R. 522 (S.C.C.), as well as other authorities. Chartier J. found that the remaining redacted portions contained sensitive commercial information that would put the receiver at a disadvantage should the present sale not close. It followed that such disclosure

could affect the interests of the creditors whose interests were central in these proceedings. Chartier J. further found that the salutary effects of non-disclosure of the redacted material outweighed the deleterious effects on the rights and interests of the applicants to have access to that material. In analyzing the law pertaining to offers, Chartier J. referenced Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.), and held that the receiver had made a sufficient effort to get the best price and had not acted improvidently. Justice Chartier also noted that the court should consider the interests of all parties, and here, concluded that there had been no unfairness in the working out of the process. In the result, Chartier J. was satisfied that the sales process conducted by the receiver and the agreement that had been submitted for court approval satisfied the principles set out in the Soundair decision. Chartier J. found that the receiver had acted reasonably, prudently and fairly; the sale agreement was approved and the requested vesting order was granted: Royal Bank of Canada v. Keller & Sons Farming Ltd., 2016 CarswellMan 346, 39 C.B.R. (6th) 29, 2016 MBQB 77 (Man. Q.B.). In dismissing an appeal from this judgment, the Manitoba Court of Appeal held that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. In this case, however, the offer to pay unsecured creditors over time out of future profits was not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there was inevitably a significant shortfall, and as a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: Royal Bank of Canada v. Keller & Sons Farming Ltd., 2016 CarswellMan 147, 39 C.B.R. (6th) 219, 2016 MBCA 46 (Man. C.A.).

The Saskatchewan Court of Queen's Bench held that a receiver was entitled to sell the assets of the debtor free and clear of any claim of the licensor pursuant to its licence with the debtor. The claim of the licensor, if any, was against the sale proceeds: Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc., 2016 CarswellSask 607, 41 C.B.R. (6th) 141, 2016 SKQB 306 (Sask. Q.B.).

The Court of Appeal for Ontario reversed the decision of the motion judge and held that "gross operating royalties" ("GOR") constituted an interest in land. The Court required additional submissions on whether the motion judge had jurisdiction to vest out the GOR in a sale by a court-appointed receiver: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2018 CarswellOnt 3694, 57 C.B.R. (6th) 171, 2018 ONCA 253 (Ont. C.A.). For a discussion of this judgment, L§21 "Vesting Orders in Receivership with Respect to Real Estate".

The Ontario Superior Court of Justice dismissed a cross-motion brought by a prospective purchaser of land. The prospective purchaser opposed the receiver's motion to disclaim the agreement of purchase and sale. The prospective purchaser wanted to examine certain individuals in aid of its position. The Court denied the motion on the basis that the examinations were not directed to a matter of relevance on the disclaimer motion: Romspen Investment Corp. v. Horseshoe Valley Lands Ltd., 2017 CarswellOnt 2671, 45 C.B.R. (6th) 309, 2017 ONSC 426 (Ont. S.C.J.).

The receiver moved for approval of a sale of a five-acre property and a warehouse. The receivership and power of sale were to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, a builder's lienholder, had been joined as a party. The priority between the bank's security and the builder's lien was in dispute. The proposed order provided for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities. Moir J. noted that an appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law). Given the amount of secured debt and the appraisals, the purchase price was disappointing. However, the property had been exposed to the market for over twenty months while it was the subject of a professional marketing effort. Moir J. found the sale was commercially reasonable. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. However, the draft order specified, in addition to the usual receiver's deed and certificate that would foreclose "all of the right, title and interest" of the debtor, went further to add: "including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the ``claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all

mortgages and charges held by the applicant; and (iii) all recorded interests showing in the parcel register for the property (collectively, the ``Encumbrances").” Justice Moir noted that the Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc., 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 2014 NSSC 420 (N.S. S.C.) decision suggests that the Nova Scotia court may not have broad authority to grant vesting orders on unlimited grounds. Justice Moir adopted the reasons in Crown Jewel, and held that there is no statutory authority in Nova Scotia giving the court unbounded authority to vest property. A power to sell a stranger's interests without notice cannot be found in “take any other action that the Court considers advisable”, the words of para. 242(1)(c) of the BIA. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of those claiming by, through, or under the debtor. A court does not take away rights from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties. There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforces security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. The court commonly orders a sale with the proceeds standing in the place of the property, preserving the value of the property while allowing time for a resolution or determination of the dispute. In the result, an order was granted approving the sale agreed to by the receiver. The court order provided for payment into court and specified that the terms concerning foreclosure had to be amended so that they did not include an order that appeared to end unascertained or unknown rights: Royal Bank of Canada v. 2M Farms Ltd., 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 2017 NSSC 105 (N.S. S.C.).

A single judge of the Court of Appeal for Ontario, in chambers, granted the receiver's motion to defeat an appeal from an order approving an asset sale and thereby securing that sale. Justice Tulloch observed that the notice of appeal relied solely on s. 193(c) of the BIA in support of the Court of Appeal's jurisdiction to hear the appeal. The appellant explicitly disclaimed reliance on s. 193(e), the provision for leave to appeal. Rule 31 of the Bankruptcy and Insolvency General Rules precludes reliance by an appellant on s. 193(e) of the BIA when that appellant's notice of appeal does not include the relevant application for leave to appeal. Therefore, Tulloch J.A. stated that jurisdiction pursuant to s. 193(e) was unavailable in this case. Tulloch J.A. held that the appellant had not demonstrated that there was an arguable case that the receiver could have obtained a better deal. Section 193(c) did not grant a right of appeal because the impugned order did not “result in a loss or gain” in the relevant sense: Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 CarswellOnt 11087, 49 C.B.R. (6th) 173, 2017 ONCA 611 (Ont. C.A.).

The Superior Court of Québec approved the allocation method developed by the monitor to allocate the proceeds of realization from asset sale transactions and the costs of the CCAA proceedings. The net proceeds held by the monitor on behalf of the creditors was more than $160 million, pending further order of the court. One secured creditor opposed the allocation methodology, arguing that the result was inequitable when applied to the assets over which it claimed priority. Hamilton J. noted that it was important to recognize that a general methodology may not work in all circumstances and that the parties have the right to challenge the general methodology if it produces an inequitable result in particular circumstances. Here, Hamilton J. was of the view that the contractual allocation of the purchase price was a reasonable starting point, on the assumption that it is an allocation done by an arm's length third party who had no interest in the allocation of the proceeds. The contractual allocation will not be given the same weight if the creditor can demonstrate that: (1) the purchaser is not at arm's length, (2) the purchaser has an interest in the allocation of the proceeds, either because it or a related party is a creditor or because it made a deal with a creditor, or (3) the CCAA parties negotiated the allocation. Justice Hamilton noted that typically, there are two ways to demonstrate that the purchaser's contractual allocation of the price is not reasonable: the purchaser had a reason to allocate the purchase price in a way that does not reflect its assessment of the relative value of the assets, or the purchaser's assessment of the relative value of the assets is clearly wrong. Hamilton J. stated that creditor will have to demonstrate a significant departure from the relative value of the assets. Here, there was no suggestion that purchaser was not at arm's length or that the purchaser had any interest in the allocation of the proceeds. As a result, the court would presume that the contractual allocation was reasonable and burden was on objecting creditor to prove that it was not. The creditor did not meet the burden here: Arrangement relatif à Bloom Lake, 2017 CarswellQue 6700, EYB 2017-282980, 2017 QCCS 3529 (C.S. Que.); appeal dismissed 2018 CarswellQue 2686, 2018 QCCA 551, EYB 2018-292887 (C.A. Que.). For a discussion of the appellate decision, see N§196 “Court Approval of Sale of Assets”.

The plaintiff bank was granted summary judgment against the guarantor of a corporate debt; the Ontario Superior Court of Justice reviewing the law relating to an improvident sale: The Bank of Nova Scotia v. Scholaert, 2017 CarswellOnt 15516, 52 C.B.R. (6th) 285, 2017 ONSC 5960 (Ont. S.C.J.). For a discussion of this judgment, see F§63(58) “Personal Property Security Act — Rights and Remedies on Default”.

The Supreme Court of Canada overturned a judgment of the Alberta Court of Appeal in Orphan Well Association v. Grant Thornton Ltd., 2019 CarswellAlta 141, 2019 SCC 5, finding that s. 14.06(4) of the BIA is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". Given the procedural nature of the BIA, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the BIA confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the BIA prevails — bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict. The first is operational conflict, which arises where compliance with both a valid federal law and a valid provincial law is impossible. The second is frustration of purpose, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The doctrine of paramountcy is to be applied with restraint. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation that will bring it into conflict with provincial legislation. The BIA is intended to further "two purposes: the equitable distribution of the bankrupt's assets among creditors and the bankrupt's financial rehabilitation". The result of a trustee's disclaimer of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. No operational conflict or frustration of purpose results from the fact that the Regulator requires the trustee, as a "licensee", to expend estate assets on abandoning the renounced assets. Furthermore, no conflict is caused by continuing to include the renounced assets in the calculation of the Liability Management Rating ("LMR"). Given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold the trustee personally liable as a "licensee", no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the Oil and Gas Conservation Act (OGCA), the Environmental Protection and Enhancement Act (EPEA) or the Pipeline Act. The Court held that disclaimer by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the test in Newfoundland and Labrador v. AbitibiBowater Inc., 2012 CarswellQue 12490, [2012] 3 S.C.R. 443, 2012 SCC 67, [2012] S.C.J. No. 67 (S.C.C.) ("Abitibi"). In the instant case, the trustee retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). There is no conflict between the Alberta legislation and s. 14.06 of the BIA that makes the definition of "licensee" in the former inapplicable insofar as it includes the trustee, which continues to have the responsibilities and duties of a licensee to the extent that assets remain in the estate. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The test set out by the Court in Abitibi must be applied to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability or obligation. Only the first and third parts of the test were at issue in the instant case. Abitibi should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. The Court held that on a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues. The Regulator's refusal to approve licence transfers until the LMR requirements have been satisfied does not give it a monetary claim against the debtor. All licences held by the debtor were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. Accordingly, the end-of-life obligations binding on the trustee are not claims provable in the bankruptcy, so they do not conflict with the general priority scheme in the BIA. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the BIA, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the

LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws on which the BIA is built. On a proper application of the Abitibi test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy. The Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted: Orphan Well Association v. Grant Thornton Ltd., 2019 CarswellAlta 141, 2019 SCC 5 (S.C.C.).

The Ontario Superior Court of Justice granted a receivership order and authorized the receiver to sell the property, but did not approve the stalking horse agreement with its break fee and overbid provisions. The applicant had demanded payment and provided each of the companies with notice of intention to enforce its security in accordance with s. 244 of the Bankruptcy and Insolvency Act ("BIA"). The purpose of the application to appoint a receiver is to facilitate a sale to itself of the interests in two properties on which it had security. The stalking horse bid was comprised of cash and credit, and the terms included a "break fee" plus a minimum overbid. The proposed sale process also sought vesting orders that vest the interests in the two properties "free and clear of any claims" in light of separate ongoing litigation. Justice Pattillo noted that the court's authority to issue a vesting order is contained in s. 100 of the Courts of Justice Act (CJA). That authority, however, does not extend to extinguishing third party proprietary rights, the Court citing Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2018 CarswellOnt 3694, 57 C.B.R. (6th) 171, 2018 ONCA 253 (Ont. C.A.). A question for determination was whether the creditor's contingent claim for a constructive trust in the action gave it a proprietary interest in the two properties. Justice Pattillo noted that a constructive trust is an equitable remedial remedy for certain forms of unjust enrichment. In order for a constructive trust to be found, monetary compensation must be inadequate and there must be a link between the plaintiff's contributions and the property in which it claims an interest. Further, the extent of the constructive trust interest is proportionate to the claimant's contributions. Justice Pattillo held that merely claiming a constructive trust does not create a proprietary interest. In his view, given the proposal that the receiver hold the net sale proceeds pending the determination of the creditor's claims coupled with the fact that the defendant continued to own the other one-half interest in the properties, he did not consider an award of monetary compensation to be inadequate. Further, there was no evidence of a link between the monies allegedly stolen and the properties. Justice Pattillo was satisfied that since the receiver would hold the net sale proceeds from the properties, vesting orders could issue on the sale of both properties, and to the extent the creditor had any rights in the properties, those rights were protected. With respect to the stalking horse bid, Pattillo J. considered the amount for the break fee of $500,000 and the minimum overbid amount of $150,000 to be excessive. A break fee, in the context of a receivership sale with a credit bid, is an amount intended to compensate the unsuccessful credit bidder for the costs it has incurred in carrying out the due diligence necessary to enter into the credit bid agreement in the event that another offer to purchase becomes the successful purchaser. Pattillo J. noted that where break fees and overbid fees are reasonable, such that they do not jeopardize the ability of the competing bidder to make a bid, they have been approved, citing Re Parlay Entertainment Inc., 2011 CarswellOnt 5929, 81 C.B.R. (5th) 58, 2011 ONSC 3492 (Ont. S.C.J.) and Re MPH Graphics Inc., 2014 CarswellOnt 18942, 23 C.B.R. (6th) 224, 2014 ONSC 947 (Ont. S.C.J.). Here, the debtor had provided no evidence to justify the break fee apart from a section of the agreement that referenced due diligence and liquidated damages. Justice Pattillo was not satisfied that the proposed break fee and the overbid fee were reasonable based on the material before him. There was no evidence of what costs were in undertaking due diligence in respect of the transaction. Given that the applicant had been a 50% owner of the properties for several years, Pattillo J. suspected that it must be intimately familiar with the debtors. Pattillo J. also held that it was not appropriate to include in the break fee, as the proposed receiver had done, an amount in respect of future negotiations with the purchaser of the properties. There had been no information concerning the overbid fee and why it was reasonable in the context of the proposed sale. Justice Pattillo observed that the purpose of the sale process in a receivership is to obtain the highest and best price for the property. It is important in approving the sale process to ensure that it is open to competing bidders. Any break fees and overbid fees must be reasonable in the circumstances in that they must not jeopardize the ability of a competing bidder to make a bid. Given the property interests to be sold and the proposed credit bid in this case, Pattillo J. was not satisfied that the proposed break fee and the overbid fee, individually and combined, were reasonable: American Iron v 1340923 Ontario, 2018 CarswellOnt 8441, 61 C.B.R. (6th) 135, 2018 ONSC 2810 (Ont. S.C.J. [Commercial List]).

The Newfoundland and Labrador Supreme Court held that a receiver had acted properly and according to the directions provided by the court. Justice Hurley was satisfied that the receiver took the necessary and reasonable steps to obtain the best price for the assets. Where a receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the court is entitled to find that the receiver has acted properly. The court is entitled to rely on the receiver's expertise unless it is clearly shown to be otherwise: Re Canadian Imperial Bank of Commerce, 2018 CarswellNfld 331, 2018 NLSC 175 (N.L. S.C.).

A mortgagee of a property over which a receiver had obtained an approval and vesting order had no right of appeal. The Ontario Court of Appeal held that the receiver had acted properly under the appointment order's terms, had obtained the best price, and had considered all the parties interests in making the sale: B&M Handelman Investments Limited v. Drotos, 2018 CarswellOnt 10201, 61 C.B.R. (6th) 208, 2018 ONCA 581 (Ont. C.A.).

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

The Court of Appeal for Ontario allowed the appeal from the motion judge who had declined to approve a sale by a court-appointed receiver. The debtor was established as a religious, private charitable organization to buy the property and operate a temple, but later became insolvent. The property had been the subject of litigation. On application of the first mortgagee of the property, the motion judge granted an order appointing a receiver, authorizing it to sell the property, subject to court approval. The receiver prepared a report in support of its motion for court approval of the agreement and sale of the property, which detailed the sales process the receiver undertook with respect to the property. The debtor opposed the receiver's motion. The motion judge declined to approve the sale of the property to the appellant and, instead, established a process that would permit the assignment of the first mortgage. Associate Chief Justice Hoy also noted that the motion judge has relied on the four tests in Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.); and while the motion judge found that the receiver took reasonable steps to obtain the best price for the property, he declined to approve the sale, explaining that "except for the conduct of the receiver/plaintiff relative to the defendant" debtor, he would have approved the sale. Associate Chief Justice Hoy noted that the motion judge's order was discretionary in nature and an appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based on irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations. Associate Chief Justice Hoy held that the motion judge erred in performing the second Soundair duty by failing to properly consider and give sufficient weight to the interests of creditors, and by failing to consider the interests of the appellant, qua purchaser. While the primary interest is that of the creditors, the interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. The motion judge did not consider how declining to approve the sale, so that the assignment of the first mortgage may proceed, would affect the creditors' interests. If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. Hoy, A.C.J. then considered whether the court should approve the sale transaction de novo or set aside the order below and order a new hearing. Ultimately, she concluded that it was appropriate to set aside the order below and ordered a new hearing, on notice to all parties with an interest in the property. In arriving at this conclusion, Hoy, A.C.J. noted that this was not a case where the receiver unequivocally recommended that the sale be approved. Rather, the receiver did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. A re-hearing would permit the motion

judge to obtain clarity on the receiver's position: Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization, 2018 CarswellOnt 14182, 63 C.B.R. (6th) 169, 2018 ONCA 713 (Ont. C.A.).

The Ontario Superior Court of Justice considered the effect of an intervening receivership on the contractual rights and obligations of the parties to agreements of purchase and sale. The plaintiffs were successful in obtaining an order for the return of their deposits. The agreements of purchase and sale were entered into and deposits were held in a trust account in compliance with the Condominium Act. There were many delays in the construction and the closing dates were not met. A court-appointed receiver appointed over the assets of debtor company that was the seller in the agreements. The receiver obtained a court order authorizing a sale of the suites, including the units subject to the purchase and sale agreement. The court issued an approval and vesting order wherein the suites were transferred to free and clear of any security interests. Consequently, the claim by the plaintiffs for specific performance in respect of the commercial units was rendered moot. The plaintiffs sought a return of the deposits for the commercial units. Dietrich J. noted that the procedural and transactional history related to the commercial units is relevant when assessing whether the deposits should be returned. Justice Dietrich concluded that in light of the court-appointed receivership and subsequent sale of the commercial units, the agreements of purchase and sale were terminated through no fault of the purchasers, and the deposit monies should be returned to the plaintiffs. A court-appointed receiver may elect to repudiate contracts entered into by the debtor. In this case, the receiver repudiated both agreements of purchase and sale when it sold the commercial units to a third party during the credit bid. This act evinced the receiver's intention not to be bound by the contracts as it rendered the debtor unable to tender the units and close the agreements of purchase and sale. Justice Dietrich noted that once a contract has been repudiated, the innocent party is faced with a right of election to accept or reject to the repudiation. Dietrich J. stated that accordingly, the plaintiffs communicated their acceptance of this repudiation when they moved for a declaration that the agreement was terminated pursuant to s. 19 of the agreements of purchase and sale. Upon the plaintiffs' acceptance of the repudiation, the agreements of purchase and sale were terminated. In light of this termination, Dietrich J. reasoned that the provisions of the agreement of purchase sale govern, which stipulated that deposit monies shall be returned to the purchaser if the agreement is terminated "through no fault of the purchaser." Dietrich J. was satisfied that in this case, the plaintiffs had no control over the appointment of the receiver, or the receiver's decision to sell the commercial units in a credit bid. The purchasers accepted the receiver's repudiation of each agreement only when performance of the contract became impossible. Accordingly, the termination of the agreements was through no fault of the purchasers and Dietrich J. held that they were entitled to the return of the deposit monies: Jung v. Talon International, 2018 CarswellOnt 16464, 64 C.B.R. (6th) 301, 2018 ONSC 4245 (Ont. S.C.J.).

The Saskatchewan Court of Queen's Bench approved the sale of assets by a receiver over the objections of a number of guarantors. The Court applied the principles set out in Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) and in Toronto Dominion Bank v. 101142701 Saskatchewan Ltd., 2012 CarswellSask 507, 96 C.B.R. (5th) 162, 2012 SKQB 289 (Sask. Q.B.), which require the court to consider: 1. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; 2. the interests of all parties; 3. the efficacy and integrity of the process by which offers are obtained; and 4. whether there has been unfairness in the working out of the process. Justice Layh reviewed the evidence and considered each of the parties' positions in light of the applicable principles of receivership law and the facts of this particular receivership and determined that the draft order of sale approval and vesting order should issue in the form filed. Justice Layh recognized that a number of persons erred in the apparent failure to ensure that two of the guarantors received actual notice of an application. However, Layh J. was not persuaded that the failure to participate in the hearing, if, given the non-participation of the other guarantors, they would have participated at all, was not consequential, for a number of reasons. First, Clause 3(k) of the receivership order stated that the receiver was empowered and authorized to market the property including advertising and soliciting offers in respect of the property and negotiating such terms and conditions of sale as the receiver may deem appropriate. Layh J. noted that it appeared that the receiver had no obligation to seek the court's approval respecting the method it chose to market the property so long as the marketing met a standard of commercial reasonableness. Layh J. was of the view that the order did not render null the express meaning and applicability of Clause 3(k) of the receivership order. Second, even though two of the guarantors could raise a prima facie case of ineffective service, they essentially raised identical objections to the approval of the proposed sale as the large group of guarantors who received notice of the application. Third, and most importantly, the Court considered the argument of certain guarantors that the property should be sold as condominium units, and the court gave due consideration to this suggestion. Layh J. stated that if he thought that a guarantor had raised a sound and valid alternative to achieve a higher sale price without undue delay and costs, the court would have considered refusing the requested order and ordering that the property be sold using a different method of sale. However, that was not the case. Justice Layh found that the Soundair test had been satisfied and the guarantor's opposition did not engage any transgressions of the Soundair principles.

Justice Layh noted that if the guarantors' argument were to succeed and essentially reverse the earlier order at this late date, they must show that the receiver had vitiated the sale process by an illegality or non-compliance with the procedures envisioned; the guarantors had not satisfied that burden. The Court found no illegality or non-compliance by the receiver. The Court held that predictability and certainty are hallmarks of the legitimacy of a receiver to deal with assets. To second guess the method of sale at this late stage was not appropriate. Further, the Court recognized that the sale price was above the appraised value of the property and exceeded the only other bid by more than double the amount. In the result, the Court granted the order for sale approval and vesting order as provided by the receiver: Atrium Mortgage Investment Corp. v. King Edward Apartments Inc., 2018 CarswellSask 528, 65 C.B.R. (6th) 15, 2018 SKQB 296 (Sask. Q.B.).

The Ontario Superior Court of Justice granted a sealing order with respect to an amended settlement agreement and portions of the monitor's report. Counsel to the objecting parties had executed a confidentiality agreement and had reviewed the materials. The Court stated that stakeholders could not receive the confidential information if they did not sign the confidentiality agreement: Re Crystallex International Corp., 2019 CarswellOnt 679, 2019 ONSC 408 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see N§59(1) "Jurisdiction of Courts — Sealing Orders".

The British Columbia Supreme Court dismissed the injunction application brought by a minority shareholder of the parent company of entities in CCAA proceedings. The Court did, however, require the monitor to report on allegations of fraudulent conveyance and fraud raised by the applicant: Smithers v. Smithers Enterprises Inc., 2018 CarswellBC 3658, 2018 BCSC 2427 (B.C. S.C.). For a discussion of this judgment, see N§196 "Court Approval of Sale of Assets".

The Alberta Court of Appeal allowed the appeal from the chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. The appeal was brought by the guarantors, who successfully argued on appeal that mutual mistake was not established on the record and that the receiver had not adhered to the Soundair principles. The receiver had commenced a sales process and accepted a conditional offer from a third party, but, after months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed. A primary creditor was financing the receiver's costs and, over time, became concerned with the increasing costs and protecting its investment. The receiver advised the creditor that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end; the creditor arranged for a numbered company it controlled to be the purchaser, and an asset purchase agreement was executed by the numbered company and the receiver. The receiver obtained an approval and vesting order approving the first asset purchase agreement. The guarantors did not oppose this application as they were not facing a deficiency. The Court noted that what happened next was unclear because of the lack of evidence and the receiver's reliance on evidence from legal counsel about legal conclusions instead of the facts underlying those conclusions. The receiver's report stated that the receiver was advised by its legal counsel that a common mistake occurred regarding the purchase price as set out in the first asset purchase agreement and that court approval was required to amend the mistake. The Court of Appeal noted that it appeared from the evidence that the asset purchase agreement was incorrect when it equated the purchase price to the total debt. The total debt was $1.3 million higher than the purchase price, and continued to accrue with interest and costs. The first asset purchase agreement did not close and the same parties entered into a second asset purchase agreement, which reduced the purchase price. The receiver then filed an application to vacate the first approval and vesting order and sought approval of the second asset purchase agreement. The chambers judge granted the second approval and vesting order. On appeal, the Court of Appeal noted that grounds of appeal that challenge facts and inferences are subject to palpable and overriding error and issues that involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law. The Court of Appeal noted that the decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a conclusion that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations. The Court of Appeal agreed with the guarantors that the evidence did not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test had been met. The evidence established that on the day the first asset purchase agreement was signed, the parties may have had different understandings about the purchase price and the receiver's understanding of the purchase price was incorporated into the agreement. The Court of Appeal noted that while the guarantors were successful on this ground of appeal, this did not end the matter. The appeal could not succeed unless the guarantors established a reviewable error in the chambers judge's Soundair analysis. While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, the Court of Appeal was of the view that these considerations did not relieve the receiver from its basic obligations to the parties and the court. Nor did these considerations relieve the receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. The Court of Appeal noted that the receiver's materials on their own did not

provide the evidentiary basis to support the relief it was seeking. The lack of information about what happened and the way the receiver and the numbered company skirted around the issue in its application materials did not help the perception of the receiver's independence. The chambers judge found that the first asset purchase agreement was terminated, but did not explain the reasons why termination was valid. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed, as it remained a court-supervised sales process where the receiver owed fiduciary duties to the parties to act fairly. The Court of Appeal concluded that what was missing was transparency. The process should enable the court and interested parties to make an informed decision as to whether the sale be considered fair and reasonable circumstances. Given the significant questions left unanswered by the receiver, the Court of Appeal had serious concerns about the efficacy, fairness, and integrity of the process the receiver followed; and the Court of Appeal disagreed with the chambers judge that the receiver had met the requirements of Soundair. In the result, the appeal was allowed, the order of the chambers judge was set aside, and the matter was returned to Queen's Bench for a rehearing before a different judge: Jaycap Financial Ltd v. Snowdon Block Inc, 2019 CarswellAlta 160, 68 C.B.R. (6th) 7, 2019 ABCA 47 (Alta. C.A.).

The Alberta Court of Queen's Bench approved a receivership sale of a condominium project to the secured lender, but declined to order the assignment of certain purchase contracts to the purchaser. The Court held that the purchase contracts had been repudiated and voided by the debtor: Centurion Mortgage Capital Corporation v. The Bridges Steps Limited Partnership (Giustini Bridges Inc), 2019 CarswellAlta 736, 2019 ABQB 276 (Alta. Q.B.). For a discussion of this judgment, see F§186 "Assignment of Agreements".

The Nova Scotia Supreme Court found that the court had jurisdiction pursuant to s. 243(1)(c) of the BIA to grant a vesting order in a receivership proceeding, allowing the receiver to sell assets of the companies that are encumbered. In doing so, the Court found that obiter dicta in previous proceedings had been superseded by legislative change: Royal Bank of Canada v. Eastern Infrastructure Inc., 2019 CarswellNS 713, 73 C.B.R. (6th) 104, 2019 NSSC 297 (N.S. S.C.). For a discussion of this judgment, see L§21 "Vesting Orders in Receivership with Respect to Real Estate".

The Saskatchewan Court of Queen's Bench struck the plaintiff shareholder's claim as an abuse of process. The plaintiff had alleged in various actions that the directors and various shareholders used their super majority rights under the unanimous shareholders agreement in an oppressive manner, and their designated directors voted or acted in breach of their fiduciary duties in executing a deliberate course of action to exclude it from the benefits of what it described as a liquidation event, allowing a sale at significantly less than value. Relying on extant authorities, Justice Scherman held that one circumstance in which abuse of process has been applied is where the litigation before the court is found to be, in essence, an attempt to relitigate a claim that the court has already determined. There was no dispute that at the time of the appointment of an interim receiver, and subsequently, the company was insolvent. Justice Scherman further noted that while allegations of oppressive conduct, breach of directors' fiduciary duty, conspiracy, or fraud do not usually arise within receivership applications, such allegations are clearly significant matters to be considered when advanced. It would have been open to the plaintiff to advance its allegations, provide supporting evidence and opposing the application for the appointment of a receiver on the basis of such allegations. It did not do so. Had the allegations been advanced on the approval application, the court could have considered them in deciding whether or not to approve the sale and vesting order. The court had the jurisdiction and the discretion to not approve the sale if it was satisfied that the allegations had merit. The plaintiff had not opposed the sale on the basis of the allegations made at this point in time in the claim. Rather, it opposed the sale only on the grounds that it had a proprietary interest in the assets that the receiver did not have the right to sell, and that ground was dismissed. Justice Scherman held that to delay advancing such claims and to bring them at this point in time constituted a collateral attack on the decisions rendered in the course of the receivership application and to permit the claim to proceed would constitute an abuse of process by allowing litigation to proceed that would violate the principles of finality, consistency, judicial economy, and the integrity of the administration of justice: Yolbolsum Canada Inc. v. Golden Opportunities Fund Inc., 2019 CarswellSask 582, 2019 SKQB 285 (Sask. Q.B.).

The Alberta Court of Appeal dismissed the appeal of a debtor company and its shareholder from the granting of a sale approval and vesting order. Leave to appeal had been granted, with the Court of Appeal making reference to a late flow of material. The appellants did not bring any fresh evidence of better offers: Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd, 2019 CarswellAlta 2418, 2019 ABCA 433 (Alta. C.A.). For a discussion of this judgment, see L§49 "Appeals from Order with Respect to Actions of Receiver".

A single judge of the Court of Appeal for Ontario determined that an appeal of an approval and vesting order granted to a receiver is governed by the BIA and leave to appeal is required under BIA s. 193(e). No leave application was before the

court. In any event, any stay of the vesting order would be cancelled as any appeal would be weak: First National Financial GP Corporation v. Golden Dragon HO 10 Inc., 2019 CarswellOnt 18509, 2019 ONCA 873 (Ont. C.A.). For a discussion of this judgment, see L§21 "Vesting Orders in Receivership with Respect to Real Estate".

The Ontario Superior Court of Justice determined that a trial of an issue was required to determine the entitlement of the first mortgagee to payment of a prepayment penalty provision: First National Financial GP Corporation and Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc., 2019 CarswellOnt 17722, 73 C.B.R. (6th) 237, 2019 ONSC 6127 (Ont. S.C.J.). For a discussion of this judgment, see L§54 "Distribution by Receiver".

The Ontario Superior Court of Justice granted the receiver's motion for an order approving a sale procedure that featured an asset purchase agreement by way of a credit bid. Justice McEwen applied the criteria set out in Royal Bank of Canada v. Soundair Corp., 1991 CarswellOnt 7706 (Ont. Gen. Div.), affirmed 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). Justice McEwen also referenced the decision of D. Brown J. (as he then was) in CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd., 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), where Brown J. stated that the approval of a particular form of sale procedure must keep the Soundair principles in mind and assess: (a) the fairness, transparency and integrity of the proposed process; (b) the commercial efficacy of the proposed process in light of the specified circumstances facing the receiver; and (c) whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets offered for sale. Justice McEwen noted that the sale procedure was being contemplated during the COVID-19 crisis. However, the financial difficulties encountered by the debtor pre-dated the pandemic, and it had been attempting to sell or refinance the property for 16 months; it was in default on its indebtedness; and there were substantial unpaid realty taxes on the property. Justice McEwen also noted that of the 27 tenants of the property, 16 tenants had temporarily suspended operations, with another six tenants offering limited services. The receiver had obtained an estimate on the property from a reputable commercial real estate company, which was comprehensive and expressly factored into the valuation difficulties in collecting rental income due to the COVID-19 crisis. Further, the credit bid contained in the stalking horse agreement would be paid during the sale procedure while the valuation placed upon the property anticipated a marketing process that would culminate in a sale in 12-18 months. With respect to issues arising out of the sale procedure, McEwen J. determined that the receiver should obtain an environmental report, a valid building condition assessment, and tenant estoppel certificates from the seven major tenants. McEwen J. concluded that the sale procedure complies with the principles set out both in Soundair and CCM Master. The stalking horse agreement and sale procedure struck the necessary balance to move quickly and to address the deterioration of the value of the business, while at the same time setting a realistic timetable to support the process. Justice McEwen granted the receiver's motion and authorized the stalking horse agreement and the sale procedure: Choice Properties Limited Partnership v. Penady (Barrie) Ltd., 2020 CarswellOnt 8329, 2020 ONSC 3517 (Ont. S.C.J.).

The British Columbia Supreme Court affirmed that in a foreclosure proceeding involving a failed real estate project, the receiver can disclaim contracts for the purchase of condominium units. Justice Fitzpatrick noted that the relevant law is not in dispute and had been reviewed by her in Forjay Management Ltd. v. 0981478 B.C. Ltd., 2018 CarswellBC 766, 59 C.B.R. (6th) 304, 2018 BCSC 527 (B.C. S.C.), affirmed Forjay Management Ltd. v. Peeverconn Properties Inc., 2018 CarswellBC 1806, 62 C.B.R. (6th) 180, 2018 BCCA 251 (B.C. C.A.). The relevant principles include that: a receiver has a duty to maximize recovery of assets under its administration; one tool of realization is to affirm or disclaim contracts; typically, the court order will empower the receiver to act in respect of contracts and often, a receiver will seek specific directions if circumstances dictate that level of oversight; and any disclaimer of contracts must arise from a receiver's proper exercise of discretion, including a consideration of its duties and all equitable interests involved. Justice Fitzpatrick held that the interests of the pre-sale purchasers under the contracts do not stand in priority to the legal interests and priority of the secured creditors. The pre-sale purchasers have no legal remedy against the receiver to force completion of a sale and Fitzpatrick J. was of the view that this factor alone favours the receiver being in a position to disclaim the contracts in order to maximize recovery for the secured creditors. The receiver concluded that a disclaimer would result in a "significantly higher estimated pay-out to a greater number of secured and other priority creditors" and if the contracts are not disclaimed, it would be more difficult to maximize recovery. Justice Fitzpatrick was satisfied that the receiver had considered all relevant interests, and had, following the issuance of the report, continued to consider its initial conclusions found in the report as the impact of the COVID-19 pandemic evolved. Justice Fitzpatrick found the receiver's decision was reasonable in the circumstances. Justice Fitzpatrick concluded that returning the units to the market after a disclaimer of the contracts will likely enhance recovery of the assets in the development. With respect to the equities, Fitzpatrick J. noted that certain pre-sale purchasers are facing difficult personal circumstances and that a disclaimer will cause them financial hardship. However, Fitzpatrick J. could not conclude that the equities are tipped in favour of the pre-sale purchasers in these circumstances. Justice Fitzpatrick agreed

with the receiver's recommendation that reasonable efforts should be made to attempt to ameliorate the position of the pre-sale purchasers. The receiver suggested that the pre-sale purchasers be allowed to complete a sales transaction at 92.5% of the recommended list price for the residential units: Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd., 2020 CarswellBC 1674, 80 C.B.R. (6th) 118, 2020 BCSC 1013 (B.C. S.C.).

The Ontario Superior Court of Justice granted the receiver's motion for a sale and investor solicitation process for two of three condominium projects in receivership proceedings. The requested relief for the third project was not approved as the debtor was in a position to exercise its right of redemption. Justice Koehnen noted that an owner's right to redeem remains a core principle of real estate law and should be part of the balancing of interests in deciding whether to grant leave under the receivership order to allow the debtor to exercise its equity of redemption: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 CarswellOnt 8665, 2020 ONSC 3659 (Ont. S.C.J.).

A receiver obtained an order approving sale of two lawsuits commenced by the debtor company against its secured creditor to the secured creditor for $200,000. A group of shareholders/guarantors filed a notice of appeal and the application was granted. Jackson J.A. of the Saskatchewan Court of Appeal held that the first issue for the court in s. 193(c) is whether, based on the evidence, there is at least $10,000 at stake, not whether an order is procedural. The court must first ask whether the appeal involves property that exceeds in value $10,000; it is not necessary that recovery of that amount be guaranteed or immediate. Rather, the claim must be sufficiently grounded in the evidence to the satisfaction of the court determining whether there is a right of appeal. Considering two lines of authority, the Court used the approach in the Orpen v. Roberts, 1925 CarswellOnt 89, [1925] S.C.J. No. 14, [1925] S.C.R. 364 (S.C.C.) and Re United Fuel Investments Ltd., 1962 CarswellOnt 54, (sub nom. Fallis v. United Fuel Investments Ltd.) 4 C.B.R. (N.S.) 209, [1962] S.C.R. 771 (S.C.C.) ("Fallis"). Every exercise of statutory interpretation begins with a review of the purposive obligation imposed by the modern principle of statutory interpretation as set out in Re Rizzo & Rizzo Shoes Ltd., 1998 CarswellOnt 1, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27 (S.C.C.) that it is necessary to give every remedial provision such fair, large, and liberal construction as best ensures attainment of its objects. Jackson J.A. held that narrowing the right of access to appellate review is inconsistent with Rizzo and s. 12 of the Interpretation Act. Sections 193(c) and (e) must be interpretated according to their terms and within their context. The property involved in the appeal was the lawsuits, with a claim that exceeded $200,000, but also, the sale, if approved, left the guarantors open to a guarantee lawsuit, with no ability to minimize their liability while at the same time conferring on the creditor the potential for double recovery. The appeal was not only about the procedure to sell the asset. The potential loss to the group brought their appeal within s. 193(c); the appeal was about whether the asset should have been sold for $200,000 in all the circumstances, and the group had an appeal as of right: MNP Ltd. v. Wilkes, 2020 CarswellSask 281, 80 C.B.R. (6th) 1, 2020 SKCA 66 (Sask. C.A.).

The Ontario Superior Court of Justice declined to grant relief to an individual who sought an order directing the receiver to refrain from disclaiming an agreement of purchase and sale. The individual asked the court to find that he had an equitable or proprietary interest in the property in question. Justice Dietrich declined to grant the relief sought. Justice Dietrich made reference to the receivership order, which provided that the receiver is authorized to "disclaim or cease to perform any contracts of the debtors, including, without limitation, agreements of purchase and sale entered into by the debtors with respect to the property." No steps were taken to appeal the receivership order. Here, the entire amount owing under the agreement of purchase and sale was not paid; there was no valid conveyance of the property; and there was no equitable interest in the whole of the property prior to the bankruptcy. Justice Dietrich also noted that, based on the record, there was little doubt that the receiver's marketing and selling of the property would yield a higher recovery for the estate than would be the case if the agreement of purchase and sale was completed. The equities did not justify the subordination of the applicant's legal priority. Justice Dietrich was satisfied that the receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders in the respondents' estate in its decision to disclaim the agreement. In assessing whether a disclaimer of an agreement is appropriate, the priority of a secured interest registered under the Land Titles Act, while not determinative, weighs heavily: C & K Mortgage Services Inc. v. Camilla Court Homes Inc., 2020 CarswellOnt 14000, 2020 ONSC 5071 (Ont. S.C.J.).

Morawetz C. J. of the Ontario Superior Court of Justice approved a sale transaction and assignment order. geothermal assets located at three condominiums developed by entities in the debtor group made up the vast majority of the purchased assets. The tenants own and operate the geothermal system. KTNI (owning adjacent land) entered into a long-term lease ("lease") with the tenants and "VHI" for the lease of the land to allow the tenants to use the geothermal wells, a 50-year term of which 40 years remain. The Court held that the sale process was properly conducted and produced a purchase price that is commercially reasonable in the circumstances. Morawetz CJ held that if the transaction flounders as a result of the inability

to assign the lease, the result would clearly be harmful to creditors. He noted that an alternative route is available to the receiver, specifically, it can seek a bankruptcy order and then assign the lease. The Court adopted a purposive approach to accomplish the objectives of Canadian insolvency law. Section 243(1)(c) of the BIA provides that 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, and take any action that the court considers advisable. In conjunction with s. 100 of the Courts of Justice Act, the provision is broad enough to form the basis of an assignment order. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA inform the analysis for an assignment by the receiver: whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and whether it would be appropriate to assign the rights and obligations to that person. Here, the geothermal system provides heating and air conditioning to hundreds of condominium units and consequently, the proposed tenants have an incentive to maintain the system in proper working condition. The Court approved the transaction and assignment order. Having considered the guidance set out by the Supreme Court of Canada in Sierra Club of Canada v. Canada (Minister of Finance), 2002 CarswellNat 822, [2002] 2 S.C.R. 522, 2002 SCC 41, [2002] S.C.J. No. 42 (S.C.C.), the Court was satisfied that the confidential appendix should be sealed: Urbancorp, 2020 CarswellOnt 18990, 2020 ONSC 7920 (Ont. S.C.J. [Commercial List]).

End of Document

2019 NSSC 297
Nova Scotia Supreme Court

Royal Bank of Canada v. Eastern Infrastructure Inc.

2019 CarswellNS 713, 2019 NSSC 297, 11 P.P.S.A.C. (4th) 121, 311 A.C.W.S. (3d) 21, 73 C.B.R. (6th) 104

Royal Bank of Canada (Plaintiff) v. Eastern Infrastructure Inc. and Allcrete Restoration Limited (Defendant)

Peter P. Rosinski J.

Heard: September 19, 2019
Judgment: October 10, 2019
Docket: 483616

Counsel: Gavin MacDonald, for Royal Bank of Canada
Stephen Kingston, for Receiver

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Plaintiff creditor obtained order appointing receiver over property of defendant debtors pursuant to s. 243 of Bankruptcy and Insolvency Act — Receiver brought motion for approval and vesting order that would allow it to sell defendants' encumbered assets at auction — Motion granted — While previous decisions had suggested there was no jurisdiction to grant such orders in absence of expressly enabling legislation, more recent decisions, focusing on remedial nature of and liberal interpretation to be applied to Act, had found s. 243(1)(c) did, in fact, allow for such orders in appropriate circumstances — Considerations similar to those relevant to determining whether to approve sale by receiver, including sufficiency of effort to obtain best price, interests of all parties, efficacy and integrity of process by which offers were obtained and fairness, applied — As matter of law and in circumstances of this case, it was appropriate to grant approval and vesting order sought .

Table of Authorities

Cases considered by *Peter P. Rosinski J.*:

Bank of Montreal v. Sportsclick Inc. (2009), 2009 NSSC 354, 2009 CarswellNS 649 (N.S. S.C.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — referred to

Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, *(*sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, *(*sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — considered

Royal Bank of Canada v. 2M Farms Ltd. (2017), 2017 NSSC 105, 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151 (N.S. S.C.) — referred to

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — considered

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416 (Ont. C.A.) — considered

Statutes considered:

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

s. 243(1)(c) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

MOTION by receiver for approval and vesting order permitting sale of debtors' assets at auction.

***Peter P. Rosinski J.*:**

Introduction

1 The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

2 Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case[1] .

The authority for vesting orders pursuant to s. 243(1)(c) BIA

3 Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.) and *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105 (N.S. S.C.)), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744 (Ont. C.A.), in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

4 As Justice Blair stated for the court in *Regal*:

[23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed

receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of the parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

. . .

[31] **In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] **The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of *Sarnia Band v. Canada* (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.
>
> (Emphasis added)

> [33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.
>
> [34] I reach this conclusion for the following reasons.
>
> . . .
>
> [45] Vesting orders properly registered on title, then — like other conveyances — are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

5 Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.) per Pepall JA:

> **(e) Section 243 of the BIA**
>
> **43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.
>
> ***The Wording and Purpose of s. 243***
>
> **44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so.** As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.
>
> **45** Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:
>
> > 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.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — 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 — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

. . .

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515**. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

> **74** This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).
>
> **75** Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").
>
> **76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.**
>
> **77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243.** I will explain."

6 Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel*.

7 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* [2015 CarswellSask 680 (S.C.C.)] was released one year after Justice Wood made his comments in *Crown Jewel*. Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

8 Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montreal v. Sportsclick Inc.*, 2009 NSSC 354 (N.S. S.C.) at paras 32-33, which the court will eventually apply to all such sales:

> **Law**
>
> **32** In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:
>
> > 1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
> >
> > 2. It should consider the interests of all parties.
> >
> > 3. It should consider the efficacy and integrity of the process by which offers are obtained.
> >
> > 4. It should consider whether there has been unfairness in the working out of the process.
>
> **33** Certain principles have been enunciated by the courts in consideration of these points:

> The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
>
> the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para. 40;
>
> the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg*, *supra*, at page 124, Anderson J. said:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.
>
> a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co.*, *supra*.

Conclusion

9 As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Motion granted.

Appendix"A"

Supreme Court of Nova Scotia in Bankruptcy and Insolvency
Between:
Royal Bank of Canada
Plaintiff
and
Eastern Infrastructure Inc. and Allcrete Restoration Limited
Defendants
APPROVAL AND VESTING ORDER (AUCTION)
Before the Honourable Justice *Peter P. Rosinski* Chambers:
UPON HEARING Stephen Kingston on behalf of Ernst & Young Inc. (the "Receiver") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "*Debtor*");
AND UPON appearing that appropriate Notice of this Motion has been provided to all interested parties;
AND UPON having read the First Report of the Receiver dated September 11, 2019 (the "*Receiver's First Report*") and all other materials filed in connection with this Motion;
AND UPON the Receiver having negotiated an Auction Agreement (the "*Auction Agreement*") with Mirterra Industrial Appraisers & Auctioneers (the "*Auctioneer*") as more particularly described in the Receiver's First Report;
AND UPON the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "*Alberta Assets*"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.
NOW UPON MOTION:
IT IS ORDERED THAT:

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "*Transactions*") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "*Purchased Assets*").

3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "*Purchaser*") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "*Purchaser Bill of Sale*"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Claims*") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.

4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. Notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this *19* day of September, 2019

Graphic 1

Footnotes

1 Attached hereto as Appendix “A” is the order granted.