Court File No. CV-20-00649154-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant

- and –

TRIGGER WHOLESALE, INC., THE EN CADRE GROUP INC., MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents

APPLICATION UNDER Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3, Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 40.01 of the *Rules of Civil Procedure*

BOOK OF AUTHORITIES
(Returnable December 6, 2021)

November 26, 2021

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Tab 1

2009 CarswellOnt 4505
Ontario Superior Court of Justice [Commercial List]

Windsor Machine & Stamping Ltd., Re .

2009 CarswellOnt 4505, 179 A.C.W.S. (3d) 513

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED (Applicants)

Morawetz J.

Heard: March 11, 2009
Judgment: March 11, 2009
Docket: CV-08-7672-00CL

Counsel: Tony Reyes, Evan Cobb for Monitor, RSM Richter Inc.
Raong Phalavong for Saginaw Pattern
Andrew Hatnay, Andrea McKinnon, D. Youkaris for U.A.W., Local 251
Joseph Marin for Windsor Machine & Stamping Ltd.
D. Dowdall, J. Dietrich for Bank of Montreal
J. Archibald for Magna
John D. Leslie for Ford Motor Company
P. Shea for Johnson Controls Inc.
Jackie Moher for Ryder Finance Corporation

***Morawetz J.*:**

1 On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

2 RSM Richter Inc., in its capacity as Monitor, brought this motion for:

(a) an Approval and Distribution Order;

(b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;

(c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;

(d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;

(e) an Order approving the fees and disbursements of the Monitor and its counsel.

3 The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

4 I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

5 The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

6 The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

7 With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

8 The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

9 In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

10 It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

11 Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

12 Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

14 As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

Tab 2

2009 QCCS 6461
Quebec Superior Court

AbitibiBowater, (Re)

2009 CarswellQue 14224, 2009 QCCS 6461, 190 A.C.W.S. (3d) 678, EYB 2009-171231

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C", Petitioners and Ernst & Young Inc., Monitor

Gascon J.C.S.

Heard: November 9, 2009
Judgment: November 16, 2009
Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Joseph Reynaud, for Petitioners
Me Robert Thornton, for the Monitor
Me Jason Dolman, for the Monitor
Me Alain Riendeau, for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008
Me Marc Duchesne, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates
Me Jean-Yves Simard, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates
Me Patrice Benoît, for Investissement Québec
Me S. Richard Orzy, for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.
Me Frédéric Desmarais, for Bank of Montreal
Me Anastasia Flouris, for Alcoa

***Gascon J.C.S.*:**

CORRECTED JUDGMENT, NOVEMBER 23 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

Introduction

1 In the context of their *CCAA* [1] restructuring, the Abitibi Petitioners [2] present a Motion [3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("*MPCo*") sale transaction to the Senior Secured Noteholders *("SSNs")*.

2 More particularly, the Abitibi Petitioners seek:

1) Orders authorizing Abitibi Consolidated Inc. ("*ACI*") and Abitibi Consolidated Company of Canada Inc. ("*ACCC*") to enter into a Loan Agreement (the "*ULC DIP Agreement*") with 3239432 Nova Scotia Company ("*ULC*"), as lender, providing for a *CDN$230 million super-priority secured debtor in possession credit facility* (the "*ULC DIP Facility*").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the "*ULC Reserve*"), with terms that will be substantially in the form of the term sheet (the "*ULC DIP Term Sheet*") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs *of up to CDN$200 million* upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "*ACI DIP Charge*") in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "*Term Lenders*") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "*Lien Holders*") arising under paragraph 61.10 of the Second Amended Initial Order.

3 The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

4 Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee *(*the *"Bondholders")* opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

5 In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN $200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

6 Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

The MPCo Sale Transaction

7 The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

8 Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec *("HQ")* agreed to pay ACCC CDN $615 million (the "*Purchase Price*") for ACCC's 60% interest in MPCo.

9 Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the "*HQ Holdback*"); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

10 That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable [4] .

11 Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

12 To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

13 In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;

b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;

c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the *"MPCo Share Proceeds"*);

d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;

e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the *"MPCo Noteholder Charge"*) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;

f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the *"ULC Reserve Charge"*); and

g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

14 The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension from Investissement Quebec *("IQ")* to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

15 Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

The Ulc DIP Facility

16 Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

17 This amount may be used for a limited number of purposes (the "*Permitted Investments*") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

18 Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

19 According to the Monitor [5], the significant terms of the ULC DIP Term Sheet are as follows:

i) *Manner of Borrowing* — Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN $25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.

ii) *Interest Payments* — No interest will be payable on the ULC DIP Facility;

iii) *Fees* — No fees are payable in respect of the ULC DIP Facility;

iv) *Expenses* — The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) *Reporting* — Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

vi) *Use of Proceeds* — The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "*Budget*");

vii) *Events of Default* — The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;

(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) *Rights of Alcoa* — Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) *Rights of Senior Secured Noteholders* — The Senior Secured Noteholders'rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) *Security* — Security is similar to the existing ACI DIP Facilityand ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

20 The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

The Questions at Issue

21 In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN$230 million be approved?

2) Should the proposed distribution of CDN$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

Analysis and Discussion

1) The Approval of the DIP Financing

22 In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

23 In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

24 On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal (*"BMO"*), guaranteed by IQ.

25 The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

26 There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

27 The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

28 At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

29 On the one hand, as highlighted notably by the Monitor [6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners'liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners'best efforts at forecasting, weekly cash flow forecasts have varied by as much as US$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners'cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners'liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

30 In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

31 On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US$200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

32 In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

33 In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

34 Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

35 Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

a) The period during which the company is expected to be subject to *CCAA* proceedings;

b) How the company's business and financial affairs are to be managed during the proceedings;

c) Whether the company's management has the confidence of its major creditors;

d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;

e) The nature and value of the company's property;

f) Whether any creditor would be materially prejudiced as a result of the security or charge; and

g) The Monitor's report.

36 Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

37 The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

38 In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

39 Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

40 Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

41 As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;

b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

42 Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

43 The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

44 Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

45 By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

46 In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

47 Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

48 Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

49 On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) The Distribution to the SSNs

50 The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

51 The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

52 They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

53 Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

54 The Bondholders oppose the CDN$200 million distribution to the SSNs.

55 In their view, given the Abitibi Petitioners'need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

56 The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors'leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

59 In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

60 With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

61 To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the CDN$200 million proposed distribution that is directly linked to the latter.

62 The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

63 The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

64 To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

65 It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

66 The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

68 It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

70 Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada [7].

72 While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

73 In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

74 In *Windsor Machine & Stamping Ltd. (Re)*, [8] Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

76 All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

77 Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

78 This benefits a large community of interests that goes beyond the sole SSNs.

79 From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

80 Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) The Orders Sought

81 In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

82 Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

83 The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

84 Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

85 Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

86 For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ORDERS the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

ULC DIP Financing

1 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement(the "*ULC DIP Agreement*") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("*ULC*"), as lender (the "*ULC DIP Lender*"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as *Exhibit R-1* in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding *$230* million.

2 *ORDERS* that the credit facility provided pursuant to the ULC DIP Agreement (the "*ULC DIP*") will be subject to the following draw conditions:

a) a first draw of $130 million to be advanced at closing;

b) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

c) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

3 *ORDERS* the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "*Draft ULC DIP Agreement*") to the Monitor and to any party listed on the Service List which requests a copy of same (an "*Interested Party*") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

4 *ORDERS* that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

5 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "*ULC DIP Documents*"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

6 *ORDERS* that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

7 *ORDERS* that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

8 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

9 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

10 *ORDERS* that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "*ULC DIP Expenses*") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

11 *ORDERS* that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

12 *ORDERS* that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

13 *ORDERS* that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

14 *ORDERS* that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "*Notice Period*") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second AmendedInitial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

15 *ORDERS* that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

16 *ORDERS* that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

17 *AMENDS* the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

ORDERS further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of *$230* million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November16,2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16,2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor.

ACI DIP Agreement

18 *ORDERS* that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

19 *ORDERS* that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

20 *ORDERS* that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

21 *ORDERS* that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement

Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

22 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

23 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "*Distribution Motion*") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "*Committee*" and "*Trustee*", collectively the "*SSNs*") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "*ULC DIP Motion*") dated November 9, 2009.

3 *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "*ULC DIP Motion*").

4 See Monitor's 19th Report dated October 27, 2009.

5 See Monitor's 19th Report dated October 27, 2009.

6 See Monitor's 19th Report dated October 27, 2009.

7 See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

Tab 3

Court File No. CV-20–00649154–00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MADAM	)	WEDNESDAY, THE 31ST
	)	
JUSTICE DIETRICH	)	DAY OF MARCH, 2021

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant

-and-

TRIGGER WHOLESALE, INC., THE EN CADRE GROUP INC., MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents

APPLICATION UNDER Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3, Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 40.01 of the *Rules of Civil Procedure*

ORDER
(Directions)

THIS MOTION, made by Grant Thornton Limited ("**GTL**") in its capacity as the Court-appointed receiver (the "**Receiver**") of the assets, property and undertaking of Trigger Wholesale, Inc. ("**Trigger**") and The En Cadre Group Inc. (collectively, the "**Debtors**") and certain real property owned by each of Jaimak Real Properties Inc. or Jaimee Lynn Gdak, for an order, *inter alia,* providing advice and directions in connection with the marketing and sale of all of the real property set out in Schedule "A" (collectively, the "**Real Property**") to the Order of

Mr. Justice McEwen dated October 22, 2020 (the "**Receivership Order**"), was heard this day by Zoom videoconference due to the COVID-19 pandemic.

ON READING the second report of the Receiver dated February 12, 2021 (the "**Second Report**"), the supplemental report to the Second Report dated March 16, 2021 (the "**Supplemental Report**"), the affidavit of Jacob Wiebe sworn February 12, 2021 (the "**Wiebe Affidavit**"), the affidavit of Christine Mason sworn February 4, 2021 (the "**Mason Affidavit**") and on hearing the submissions of counsel for the Receiver, counsel for Clearflow Commercial Finance Corp, counsel for the Respondents and such other counsel as listed on the counsel slip, no one appearing for any other person on the service list, although properly served, as appears from the affidavit of Mariela Adriana Gasparini sworn February 12, 2021.

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Second Report.

3. **THIS COURT ORDERS** that the Second Report and the Supplemental Report of the Receiver and the activities of the Receiver, as described in the Second Report and the Supplemental Report, be and are hereby approved; provided, however that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

4. **THIS COURT ORDERS** that the Receiver's statement of receipts and disbursements as at February 11, 2021 be and is hereby approved.

5. **THIS COURT ORDERS** that the Receiver be and is hereby authorized and directed to carry out the marketing and sale of the Real Property, as set out in the Second Report, with the exception of the real property described in Schedule "A" of the Receivership Order as 250 Lions Ct, Waterloo, ON N2L 6M8, registered in the name of Jaimee Gdak ("Lions Court").

6. **THIS COURT ORDERS AND DECLARES** that the Receiver is authorized and directed to market and sell the Real Property, with the exception of Lions Court, free and clear of any prior agreements, if any, to purchase any of the Real Property, with the exception of Lions Court, as well as any prior license agreements or rental agreements, if any, and any such prior agreements, license agreements or rental agreements shall be nullified and of no further force and effect upon closing of any transaction in respect of the Real Property, with the exception of Lions Court.

7. **THIS COURT ORDERS AND DECLARES** that the Trigger Real Property is owned by Trigger free and clear of any interests or claims of the other Respondents. The Respondents, as applicable, are hereby directed to forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that Trigger is the sole and legal beneficial owner of the Trigger Real Property.

8. **THIS COURT ORDERS AND DECLARES** that the Respondents, as applicable, hold the Trigger Real Property as constructive trustee for the benefit of the creditors of Trigger.

9. **THIS COURT ORDERS AND DECLARES** that the Personal Property Assets are owned by Trigger free and clear of any interests or claims of the other Respondents. The Respondents, as applicable, are hereby directed to forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that Trigger is the sole and legal beneficial owner of the Personal Property Assets.

10. **THIS COURT ORDERS** that the Respondents who may be in possession of the Personal Property Assets deliver up the Personal Property Assets forthwith to the Receiver. In the event that the Personal Property Assets have been disposed of, the Respondents are hereby directed to pay to the Receiver the difference between the value of the consideration received by Trigger and the value of the consideration given by Trigger in the use of the Trigger funds to purchase the Personal Property Assets.

11. **THIS COURT ORDERS AND DECLARES** that the Respondents, as applicable, hold the Personal Property Assets as constructive trustee for the benefit of the creditors of Trigger.

12. **THIS COURT ORDERS** that the Receiver be and is hereby authorized and directed to sell the Trigger Real Property and the Personal Property Assets in accordance with the provisions of the Receivership Order.

13. **THIS COURT ORDERS** that the fees and disbursements of the Receiver for the period from November 1, 2020 to January 31, 2021, as described in the Second Report and as set out in the Wiebe Affidavit, be and are hereby approved.

14. **THIS COURT ORDERS** that the fees and disbursements of the Receiver's legal counsel, Borden Ladner Gervais LLP ("**BLG**"), for the period from November 1, 2020 to January 31, 2021, as described in the Second Report and as set out in the Mason Affidavit, be and are hereby approved.

15. **THIS COURT ORDERS** that Confidential Appendices "1", "2", "3", "4", "5", "6" and "7" to the Second Report be and is hereby sealed until further Order of this Court.

16. **THIS COURT ORDERS** that Confidential Appendix "1" to the Supplemental Report be and is hereby sealed until further Order of this Court.

17. **THIS COURT HEREBY 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.

Dietrich J

Court File No. CV-20-00649154-00CL

CLEARFLOW COMMERCIAL FINANCE CORP. -and- **TRIGGER WHOLESALE, INC. et al.**

Applicant | Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(Directions)

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Lawyers for Grant Thornton Limited, in its capacity as Court-appointed Receiver of Trigger Wholesale, Inc. and The En Cadre Group Inc.

Tab 4

1976 CarswellOnt 383
Supreme Court of Canada

United Trust Co. v. Dominion Stores Ltd.

1976 CarswellOnt 383, 1976 CarswellOnt 404, [1976] A.C.S. No. 99, [1976] S.C.J. No. 99, [1977] 2 S.C.R. 915, 11 N.R. 97, 1 R.P.R. 1, 71 D.L.R. (3d) 72

UNITED TRUST CO. v. DOMINION STORES LTD. et al.

Laskin C.J.C., Judson, Ritchie, Spence and Beetz JJ.

Heard: March 31 and April 1, 1976
Judgment: October 5, 1976

Counsel: *D.T. Stockwood* and *Julia Ryan*, for appellant.
P.S.A. Lamek and *D.J.T. Mungovan*, for respondents.

Annotation

From an historical perspective, of the two judgments, the dissent of the Chief Justice is the more reasonable. If one follows the path traced by the Chief Justice from the English Land Transfer Act, 1875 (U.K.), c. 87, to the present Ontario Act, it leads one to the conclusion that the purpose of the Act has always been to make the register the sole "mirror" of title. Certainly, the interpretation that reduces the number of exceptions to the integrity of the register is preferable from a practitioner's point of view.

This appeal to the Supreme Court of Canada raised a question of first instance in that Court in respect to The Land Titles Act, R.S.O. 1970, c. 234. As a result of the majority decision, citing with approval the judgments of Grant J. and the Ontario Court of Appeal, it will require a clear enactment by the Legislature, similar to the express provisions to be found in the Torrens system legislation, to change the law as enunciated in *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935, [1955] 5 D.L.R. at 292 (C.A.) and abolish the doctrine of actual notice in regard to The Land Titles Act.

One would expect that the movement for an amendment to the Act, if any, would come from the profession. In this regard, it may be significant that the Forms Committee of the Canadian Bar Association which has been engaged in a review of The Ontario Land Titles and Registry Acts and which has recommended a number of amendments to both Acts to the Provincial Property Registrar, has made no recommendations, to date, on the question of notice under The Land Titles Act.

P.W. Hand

Laskin C.J.C. **(dissenting):**

1 This appeal raises a question of first instance in this Court in respect of The Land Titles Act, R.S.O. 1970, c. 234, as amended. The question is whether an unregistered interest in land governed by the Act, and not being an overriding interest thereunder, may be asserted against a purchaser for value of the freehold of the land who obtains a transfer from the owner on the land titles register with actual notice of the unregistered interest. Grant J. held that the purchaser's title was subject to the unregistered interest, and this decision was affirmed by the Ontario Court of Appeal. I take a different view. In my opinion, notice, actual or constructive, of unregistered interests cannot qualify the title of a purchaser for value as shown on the register.

2 The unregistered interest in the present case, sought to be asserted against the appellant's freehold title, is a leasehold which had an unexpired term exceeding three years at the time the appellant obtained its land titles transfer. As such it was not a protected or overriding interest under the Act. S. 51(1), para. 4, makes registered land subject to any lease or agreement for a lease for a period yet to run that does not exceed three years where there is actual occupation under it. Hence, where the

unexpired term exceeds three years, even if there is occupation under it, The Land Titles Act would seem to require registration of the leasehold interest if it is to be protected against the preclusive claim to the entire freehold interest by a registered transferee for value from the registered owner.

3 Why the respondent lessee, a large food chain, which had first become lessee of the land in 1935, did not register notice of its leasehold interest is unfathomable. It had access to competent legal advice no less than did the appellant. On the argument of the appeal, its counsel contended that, in the circumstances of the case, the admitted notice and knowledge by the appellant of the respondent's outstanding leasehold interest before purchasing the freehold made its purchase through a land titles transfer fraudulent when it sought, on the strength of the transfer, to dispossess the respondent. The basis of this contention by the respondent, a contention which was not raised in its original application to Grant J. for relief from forfeiture and reinstatement of its lease, lies in the course of negotiations between solicitors for the respective parties when the appellant was seeking to obtain a surrender of possession by the respondent concurrently with the carrying out of its intended purchase of the freehold. I would not be justified, on the record in this case, in coming to a conclusion that there had been a deliberate misleading of the respondent. The latter knew of the agreement for purchase of the freehold by the appellant and had ample opportunity to protect its interest. The respondent cannot improve its position by labelling actual notice as fraud. If its position is maintainable, it must be on the ground that The Land Titles Act does not defeat unregistered interests of which a subsequent purchaser for value has actual notice.

4 I have had the advantage of seeing the reasons prepared by my brother Spence sustaining that proposition and affirming the judgments below. I agree with him on the other aspects of the present appeal which, of course, cease to be material if the appellant can succeed on the issue of notice.

5 We face here another instance of a temptation to construe a statute in the light of the common law, to qualify a statute by an equitable doctrine alien to the purpose (a clear purpose in the circumstances underlying its enactment) which the statute sought to achieve. Because notice of unregistered interests was not expressly excluded as a qualifying consideration, the integrity of the land titles register is shaken by the judgment in appeal, although the scheme and language of The Land Titles Act are, in my opinion, adequate enough to show the irrelevancy of such notice. A system of registration of title is treated, in respect of the effect of notice of unregistered interests, as if it were a system of registration of documents, such as exists under The Registry Act, R.S.O. 1970, c. 409, as amended, an Act now qualified by The Certification of Titles Act, R.S.O. 1970, c. 59, as amended.

6 If fairness from a common law standpoint was the dominant consideration, irrespective of legislative policy, irrespective of the circumstances which brought title registration systems into being, there could be less quarrel with the decision of the Courts below. We are not, however, concerned with the common law, but rather with a complete break from it through a choice of legislative policy reflected in some countries and in some Canadian Provinces by adoption of the Torrens system, and in England and Ontario by the adoption of a related system of title registration.

7 The Ontario Land Titles Act, first enacted by 1885 (Ont.), c. 22 is modelled not on the Torrens system, which got its start in South Australia in 1857, but on the English Land Transfer Act, 1875 (U.K.), c. 87. There had been a Royal Commission on Registration of Title in England which reported in 1857 but this report, although adopted by Parliament, was not carried out in ensuing legislation, the Land Registry Act, 1862 (U.K.), c. 53. Why this Act failed and was supplanted by a new Act in 1875 is briefly told in Curtis and Ruoff, Registered Conveyancing (2nd ed. 1965), at pp. 5-6:

> ... Unfortunately, however, the 1862 Act did not apply the principles elaborated by the Commissioners. The system established by parliament attempted to achieve perfection. The disregard of what was practicable brought about a failure so catastrophic that, only four years after the passing of the Act, a Royal Commission was set up to inquire into the reasons for it. This Commission reported in 1870 that the failure of the registration system could be attributed to three fundamental departures from the principles advocated by the Royal Commission of 1857. They were:
>
> (1) That the title shown to land before it could be registered must be impeccable, with all technical imperfections cured and that the registrar had no discretion to ignore blemishes which were of no practical consequence;

(2) That the boundaries of every piece of land had to be determined to the last inch by notice to adjoining owners and that this caused disputes over trifles and great expense and delay;

(3) That partial interests, such as life interests, must be registered instead of confining the register to the ownership of the entirety and that this prevented the register from simplifying titles.

As a result of this report, a further Act was passed in 1875. This Act practically repealed the 1862 Act and established a new registry, which is in fact the Land Registry of today, with an entirely different system of registration modelled, this time, on the recommendations of the Royal Commission of 1857. Under this new system the registrar was given a wide discretion as to the titles he might accept for registration and power to hear and determine objections instead of having to refer them to the court. It was no longer necessary to fix the boundaries of properties down to the last inch and registration was confined to the ownership of the full legal freehold or leasehold estate in the land.

8 The 1857 Report, an extensive canvass of the considerations supporting a title registration system as opposed to a system of registration of deeds or documents, was one of a series of inquiries into real property problems which had earlier come under examination by the Real Property Commissioners in reports of 1829 and 1830. The Report of 1857 considered, inter alia, the question of notice of unregistered interests and said this about it (in para. 73):

We propose that fraud in obtaining a transfer of the registered ownership shall defeat the title of the person who becomes registered owner by fraud, but that notice of unregistered rights shall not merely as notice have any such effect. We think that though the purchaser in the course of his inquiries, or before he concludes the purchase, has notice of any claims upon the estate, it will not be unjust to deprive the parties interested in such claims of their rights in favour of such purchaser, if their rights are not protected upon the register. We do not agree that any attempt to exclude the application of the doctrine of notice would prove abortive. We are aware that it has been said that the judges would, notwithstanding any law to the contrary, in the course of time contrive some means of neutralizing any enactment which went to exclude the doctrine of notice, just as our Courts of old contrived to prevent the Statute of Uses having the effect intended by the legislature; and that to abolish the doctrine of notice altogether would be contrary to every principle of justice and equity. After full consideration, however, we cannot adopt these views, but, on the contrary, we concur generally in the reasons adduced by the Real Property Commissioners in their Second Report (pp. 37-40), in favour of excluding the interference of Courts of equity on the ground of notice.

9 The reference in this passage to what the Real Property Commissioners had to say in their Second Report, made in 1830, is a reference to the following observations of those Commissioners:

The reasons in favour of excluding the interference of Courts of Equity on the ground of notice, may be thus stated.

If the public good require that a purchaser, to have the protection of the Law, should comply with a form, and that form be made simple and easy, a purchaser omitting the form has no just ground of complaint that the protection is not given. If the omission were not wilful, he should still blame only his own want of care, or that of his agents. It is greatly for the public good, that civil rights should be capable of being ascertained without difficulty, and for this purpose the Law on which they depend should as far as possible be general, and not varying in different circumstances, which would lead to mistakes; they should be supported by evidence, not open to doubt, and as little as possible exposed to falsification. For these reasons, it has been thought necessary in most Countries to require the title of land to be proved by written documents, and thereby prevent attempts to enforce pretended claims by parol testimony or circumstantial evidence. A registered title possesses the advantages of certainty and security in a high degree, but they will be impaired, if preference be given to an unregistered over a registered deed, on the ground of notice. The fact of notice will in every case be possible and in many probable; there will be a temptation therefore to the unregistered claimant to commence a suit, in the hope that the other claimant may confess notice, or circumstances from which it may be implied; and there may also be a temptation to support the suit so commenced by false evidence.

The mischiefs of letting constructive notice have been so strongly felt, that some Equity Judges have held it excluded under the present Registry Acts; but no provision which can be made for denying effect to constructive notice will be effectual, because the distinction between actual and constructive notice cannot be defined, and must therefore often fail to be justly drawn either by a Court or a Jury; and cases of individual hardship might lead to a course of decisions which would encroach of the spirit of the Act, and impair its benefits.

The exclusion of interference on the ground of notice will very rarely prevent the jurisdiction of a Court of Equity, in case of actual fraud. In all cases in which priority may be given to a registered over an unregistered deed by means of fraud, although notice must be one of the ingredients to prove the existence of the fraud, there will usually be other circumstances by which, independently of the notice, a fraudulent intention will be manifested. Any conspiracy or improper conduct, for preventing or impeding the registration of one deed in order to give effect to another, may always be avoided as fraudulent; and in other cases, fraud will be shown by inadequacy of price, or the circumstances under which the subsequent deed was executed. Where a party suffers from his own negligence, or from not requiring a caveat, which would have protected him against any superior activity in another, he will have relied upon confidence in the parties instead of the protection afforded by the Law, and will have no just cause of complaint.

10 The key sections of the Ontario Act of 1885, following the text of similar sections in the English Act of 1875, were ss. 35, 38, 54(1), (2), (3) and 99. These sections (which, in the present Act, are respectively ss. 91, 94, 75, 78(1) (the original 54(3) and 174) read as follows:

35. A transfer for valuable consideration of land registered with an Absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

(1) To the incumbrances, if any, entered on the register; and

(2) To such liabilities, rights, and interests, if any, as are by this Act declared for the purposes of the Act not to be incumbrances (unless the contrary is expressed on the register),

But free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors, which are within the legislative jurisdiction of this Province ...

38. A transfer of land registered under this Act, made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration ...

54. (1) The registered owner alone shall be entitled to transfer or charge registered land by a registered disposition.

(2) But, subject to the maintenance of the estate and right of such owner, any person, whether the registered owner or not of any registered land, having a sufficient estate or interest in the land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered.

(3) And any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered owner, by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned ...

99. Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

11 The purpose disclosed in these provisions to make the register the sole "mirror" of title and to "curtain" off any unregistered interests regardless of notice (the terms in quotation marks come from Ruoff, An Englishman Looks at the Torrens System (1957), at p. 8) was fortified by an amendment in 1893 (Ont.), c. 22, s. 11 enacting what is now s. 79(1) of the Act. The original s. 54(3), now s. 78(1) was also fortified by 1972 (Ont.), c. 132, s. 18 by adding s. 78(2). The importance of ss. 78 and 79(1) in the light of s. 91 makes it desirable that I should set them out in full, and they are as follows:

> 78. — (1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the director of titles.
>
> (2) Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through him, excepting owners of encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein.
>
> 79. — (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry ...

12 Section 51 [am. 1972, c. 132, s. 13] of the present Act lists the overriding interests, as for example, taxes, existing easements, dower, certain leasehold interests as previously mentioned, and rights of expropriation, to which registered land may be subject, and s. 52 expresses the position as to title upon the first registration of ownership. S. 52 reads as follows:

> 52. The first registration of a person as owner of land, in this Act referred to as first registered owner with an absolute title, vests in the person so registered an estate in fee simple in the land, together with all rights, privileges and appurtenances, free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario, but subject to the following:
>
> 1. The encumbrances, if any, entered on the register.
>
> 2. The liabilities, rights and interests that are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register.
>
> 3. Where the first registered owner is not entitled for his own benefit to the land registered, then as between him and any persons claiming under him, any unregistered estates, rights, interest or equities to which such person may be entitled.

13 From its beginning, the Act provided and still provides for the registration of charges (an updated designation of the mortgage) and for protecting claimed interests in registered land by the registration of a caution: see ss. 26 and 58 of the original Act, now ss. 98 [am. 1972, c. 132, s. 23] and 143. The Master of Titles plays, of course, a key role in the administration of the Act, and there is an assurance fund to back up what is in effect a government guarantee of the title as shown on the register. Registration is not automatic, but must pass administrative scrutiny and be in compliance as to required forms and otherwise with the prescriptions of the Act.

14 I do not need to descend into further detail as to the provisions of the Act to support my view that notice of an unregistered interest by a purchaser for value who buys the title as shown on the register cannot qualify that title. This appears to have been the view taken also of the English Land Transfer Act, 1875 by virtue of s. 49 thereof, the equivalent of s. 75 of the Ontario Act (which was originally s. 54(1), (2) and is quoted above): see 24 Halsbury (1st ed. 1912), at p. 320, s. 591. No doubt the Legislature could have added to what it said about the primacy of the register by referring even more expressly to notice than it did in ss. 78 and 79, as was done in England in the revision of its title registration legislation by the Land Registration Act, 1925 (U.K.), c. 87, s. 59(6) and as is the case in Torrens system legislation but that, in my view, would have merely exaggerated an existing sufficiency.

15 To repeat myself, I am unable to appreciate how there can be any escape from the force of ss. 52 and 91 of the present Act which constitute a code as to the title that is acquired upon first registration and upon a transfer on the register. The supporting provisions, especially ss. 75, 78 [am. 1972, c. 132, s. 18] and s. 79(1), show that registration is the method of obtaining protection of claimed interests in registered land and that only fraud is an external qualifying consideration.

16 In one respect, the English Land Registration Act gives protection to unregistered interests which is given in only a limited fashion by The Ontario Land Titles Act, and that is protection for the "rights of every person in actual occupation of the land or in receipt of the rents and profits thereof" unless the rights are not disclosed upon inquiry. As Megarry and Wade, The Law of Real Property (4th ed. 1975), say, at p. 1066, "equitable owners in possession even though they have not lodged cautions or other entries in the register [are safeguarded and protected] even when their occupation is not obvious to a purchaser"; and, again, "a tenant in possession of registered land under a mere agreement for a lease, for example, or who has an option to renew the lease or to purchase the freehold will be in no danger of losing his rights to a later purchaser, if, as will often happen, he fails to protect his rights by entry on the register". Such a provision in the Ontario Act would have protected the respondent in the present case, and it is worth considering its introduction into that Act.

17 A good deal of argument was addressed by counsel for the parties to Torrens system case law. The main value of the cited cases for the present case is the dissociation of notice and fraud, the rejection of the notion that a person with notice of an unregistered interest can be charged with fraud: see, for example, the Australian case of *Friedman v. Barrett*, [1962] Qd. R. 498. The importance of the distinction is underlined in Torrens system legislation by the express exclusion of notice and by making fraud an exception to the integrity of the register. In some jurisdictions, the legislature has gone further by providing that knowledge of an unregistered interest was not itself to be imputed as fraud. Such a provision existed in the New Zealand Land Transfer Act, 1915, which was considered by the Privy Council in *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101, but was not part of the Queensland legislation which came under examination in *Friedman v. Barrett*. Its absence did not, however, dissuade the Courts from distinguishing mere notice from fraud and from protecting the registered owner against an unregistered claim of an interest of which he had notice. Cases on this question go back to the pioneer judgment of the Privy Council in *Assets Ltd. v. Mere Roihi*, [1905] A.C. 176 at p. 210.

18 Fraud is, of course, an exception to the integrity of the register under the Ontario Act (see s. 174), but since this Court is agreed that the respondent has not made out a case of fraud, there is only the question of notice to consider, a question which the respondent contends must be answered in its favour because, despite what the various provisions of the Act referred to in these reasons may indicate, notice has not been expressly excluded under the Ontario Act as it is under Torrens system legislation.

19 The respondent points to such express exclusion in the New Zealand legislation which was before the Privy Council in the *Waimiha Sawmilling* case, supra, a case upon which the appellant relied. The reliance was based on the fact that the Judicial Committee, in its reasons upholding the title of a registered purchaser as being free from an unregistered agreement of which it had notice, appeared to proceed on the strength of that provision of the New Zealand statute which was comparable to s. 91 of the Ontario Act. Its only reference to the New Zealand provision, which was s. 197, excluding notice was to that part of it which stated that knowledge of the existence of an unregistered interest was not itself to be imputed as fraud. However, the whole of s. 197 was quoted, and I agree with the respondent that the appellant cannot draw much comfort from the *Waimiha Sawmilling* case.

20 This does not mean, in my view, that there is necessarily a gap in the Ontario Act. We are dealing with different albeit related systems of title registration, and I do not think that the presence of an express provision in Torrens system legislation is evidence of a gap in the Ontario Act or, indeed, in the comparable English legislation of 1875. Especially is this so when the consequence is said to be the importing of a doctrine which denies the central policy of the Ontario Act. Of course, an express exclusion of notice as a qualifying consideration in respect of title as shown on the register might have obviated this litigation, but so too would registration of notice of its lease by the respondent pursuant to s. 115 [am. 1972, c. 132, s. 24] of The Ontario Land Titles Act.

21 So much for legislative history and for the legislation itself. I wish to deal now with such case law as there is on the question at issue. The reasons of the Ontario Court of Appeal in the present case are the only reported reasons of an Ontario appellate Court holding that previous notice of an unregistered interest may qualify the title of a purchaser for value acquired by a transfer from the owner as shown on the register. Yet those reasons, subject to a matter to be mentioned in a moment, merely rest on *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935, [1955] 5 D.L.R. at 292 where the Ontario Court of Appeal, without written reasons, affirmed a judgment of Duranceau D.C.J. Speaking in the present case for himself and for Brooke J.A., Jessup J.A. was candid enough to say that (and I quote his words) "if I were approaching the problem in the state of the statute as it was when *Re Jung* was decided, I would have doubt whether that case was correctly decided, particularly in view of the terms of what is now s. 91 of the statute". Jessup J.A. felt, however, that the enactment in 1960 of what is now s. 85(5) of The Land Titles Act must be taken as an affirmation for *Re Jung and Montgomery* as holding that notice of an unregistered interest will qualify a title taken by a purchaser for value on the faith of the register. I shall come later in these reasons to s. 85(5), upon which both parties relied; but I address myself now to what was before Duranceau D.C.J. in *Re Jung and Montgomery* and to what he decided in that case.

22 Jung had purchased certain premises under a land titles transfer of 26th June 1953 which was registered on 30th June 1953. At that time Montgomery was a tenant of part of the premises under a five year lease running from 1st April 1950 to 31st March 1955. Notice of the lease was not registered, but Jung himself had been a tenant of another part of the premises before purchasing the freehold and after his purchase Montgomery continued as tenant of Jung, paying rent which Jung accepted. Montgomery's lease contained an option to renew for three years on giving three months' notice and Montgomery gave proper notice of renewal on 8th November 1954. On 9th February 1955 Jung served a notice to quit on Montgomery, and on the latter's refusal to leave he brought proceedings for possession.

23 Duranceau D.C.J. found as a fact that Jung was aware of Montgomery's lease and of the option therein for renewal before he purchased the premises. So far as the remainder of Montgomery's original term was concerned, it was protected as an overriding interest, being an unexpired term not exceeding three years and with actual occupation. The renewal term presented a different situation. It did not exceed three years but there could be no actual occupation under it until it began, and this could not be before 1st April 1955. Duranceau D.C.J. treated the option as creating a separate interest to be considered on its own terms, and hence it could not be an overriding interest within s. 51(1), para. 4. It does not appear that any argument was made for treating the option as a covenant running with the land, in which event no separate registration would be required: cf. Di Castri, Law of Vendor and Purchaser (2nd ed. 1976), p. 427. For present purposes, however, it is unnecessary for me to determine whether a "covenant" view of the option would be correct. Although the reasons of Duranceau D.C.J. are not explicit on the point, I take it that 9th February notice to quit served on Montgomery was a notice to him to quit at the end of his five year term. The issue between the parties was whether Jung could insist on dispossessing Montgomery after 31st March 1955 or whether Montgomery had a valid renewal term of three years from that time.

24 There are indications in the reasons of Duranceau D.C.J. that because Jung recognized Mongomery's lease by accepting rent under it, he was bound to its terms. The reasons do not indicate whether any remonstrance was made by Jung when the notice of renewal was given on 8th November 1954, three months before Jung gave notice to quit. This could have been enough to dispose of the case without introducing notice into The Land Titles Act. In affirming Duranceau D.C.J., the Court of Appeal is reported as having dismissed the appeal without calling on the respondent tenant and to have agreed with the judgment at first instance. Perhaps it also agreed with all the reasons for judgment, which clearly included reliance on notice, and this was certainly the view taken of *Re Jung and Montgomery* by both Grant J. and the Ontario Court of Appeal in the present case.

25 After citing Magee on Land Titles (1940), pp. 43, 93, 104, to the effect that the doctrine of notice is foreign to The Ontario Land Titles Act and noting that no cases are cited in support, Duranceau D.C.J. refers to a line of cases which he says support the contrary view. Some of these cases are clearly inapplicable to the issue of notice as it arises here; and equally unacceptable is his apparent equating of notice with fraud. Two decisions which were relied on by him and which were cited to this Court on the appeal here may, however, be mentioned. They are *Re Skill and Thompson* (1908), 17 O.L.R. 186 (C.A.) and *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.). Neither, in my opinion, is of any assistance on the question of notice in relation to The Land Titles Act.

26 *Re Skill and Thompson* ran the gamut of Ontario's then superior Court system; it was heard first by Riddell J. in Chambers, then on appeal by the Divisional Court and on further appeal by the Ontario Court of Appeal. It arose out of the dismissal by the Master of Titles under The Land Titles Act of an application to remove or vacate a caution registered against certain land by Thompson who claimed the interest therein as against Skill, the owner shown on the title register. Skill had purchased from one Sears in whose name the title had stood before the transfer to Skill, but Thompson claimed under a previous option to purchase given by Sears and of which Skill allegedly had notice. Riddell J.'s view was that the register was controlling and, moreover, since Thompson had begun an action for specific performance against Sears and Skill, there was no justification for maintaining the caution; hence, he vacated it. The Divisional Court restored the order of the Master of Titles, holding that to remove the caution before the action for specific performance was tried anticipated the result of the action in which it would be open to the plaintiff to establish fraud, in that the transfer from Sears to Skill was not intended to be registered. There may be here an equating of notice with fraud, but the Divisional Court judgment is not clear on the issue of notice as such. When the case came before the Ontario Court of Appeal, two of its five members gave reasons dismissing the appeal; the other three members simply agreed in that result. Osler J.A. proceeded on the ground that the Master of Titles had jurisdiction, which was properly exercised, to maintain the caution and it was not for him to try the rights of the parties summarily. Nothing in his reasons touches the question of notice unless it be in his recital of the facts as involving a claim by Thompson that the transfer by Sears to Skill was in fraud of Montgomery's rights under his exercised option.

27 It is on the reasons of Meredith J.A. that Duranceau D.C.J. in *Re Jung and Montgomery* and the respondent in the present appeal rely. Regrettably, Duranceau D.C.J. in quoting those reasons stops short of placing the quotation in context, that being supplied by a following passage which is not quoted in *Re Jung and Montgomery*. The following two passages from the reasons of Meredith J.A. are the ones quoted [17 O.L.R. at pp. 194 and 195]:

> The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.
>
> Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud: see sec. 124.

28 Section 124 of the Act, as it then was (the provision is now s. 174), protects against fraud in the following terms (previously quoted in its original form as s. 99):

> Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration any disposition of land or of a charge on land which, if unregistered, would be fraudulent and void shall, notwithstanding registration, be fraudulent and void in like manner.

29 Having referred to this provision, Meredith J.A. went on to say this [17 O.L.R. at p. 195]:

> In this case the respondent contends — and it is so plainly alleged in the statement of defence of the defendant Sears in the action — that the appellant acquired title to the land in question from the registered owner, not only with notice of, but expressly subject to, a prior right, which the respondent had, to purchase it, and that he is substantially in the same position as if he had himself agreed to sell it to the respondent. If this be so, how can the Act prevent an enforcement of such a right? But for the registered caution, a transfer by the appellant to a subsequent registered owner, would, under the Act, give a good title to such an owner, but why should it, and how can it, cut out the obligation of the appellant whilst the title remains in him? The purpose of the Act is to protect the registered owner, who buys on the faith of the registry. But if fraud were necessary to support a claim against the appellant, having regard to the Act, it is, at the least, a reasonable question whether the registration of a transfer, for the purpose of defeating a legal obligation, would be, against him who commits the act, a fraud under the section which I have mentioned. I do not, of course, intimate that the respondent will

be able to establish his contentions; it is enough to say that such contentions are reasonably made, in good faith, and are the subject of a pending action.

30 What this passage indicates is that there was more than mere notice alleged against Skill; that he was, in effect, party to an arrangement that any title he acquired would be subject to Thompson's prior claim. Of course, this was mere allegation; the issues were still to be tried. I think Magee on Land Titles (1940) at p. 110 was substantially correct in treating *Re Skill and Thompson* as determining how far the jurisdiction of the Master of Titles extended in dealing with a registered caution. I do not, therefore, regard *Re Skill and Thompson* as settling for any inferior Court that notice as opposed to fraud will be effective against a registered title.

31 The *Tew* case, supra, in 1914 is even less relevant to the issue in this appeal. What is relied on is a general statement of Mulock C.J. Ex., sitting as one of four Judges in appeal, as follows (at p. 265 of 32 O.L.R.):

> The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: *National Bank of Australasia v. Morrow* (1887), 13 V.L.R. 2; *Jellett v. Wilkie* (1896), 26 S.C.R. 289.

32 The litigation arose out of a claim by a mortgagee of land for priority against an assignee for the benefit of creditors who obtained the assignment from the mortgagor after the mortgage but who registered his assignment on the land titles register. The mortgage had been made pursuant to The Short Forms of Mortgages Act and it was not as such registrable on the land titles register. By the time the mortgagee obtained a proper land titles transfer, the assignment had been registered. The trial Judge held that the mortgage should have priority, and this was obviously correct since the assignee was not a purchaser for value who could claim the protection of the land titles register. S. 45 of the Act as it then stood (it is now s. 94) provided that "a transfer of registered land, made without valuable consideration, is subject, so far as the transferee is concerned, to any unregistered estates, rights, interests or equities subject to which the transferor held the same ...". The only difference among the four Judges who heard the appeal was as to the form of the judgment to enable the mortgagee to have effective relief.

33 So much for the case law. The logic of The Land Titles Act is perfectly plain. If, as its terms stipulate, it is the register that determines where title resides, then actual notice becomes immaterial unless it is preserved, as fraud is preserved and as certain other interests called overriding interests, are preserved. To say that because notice is not expressly excluded (as it is excluded ex abundanti cautela in Torrens systems legislation) it is deemed to be preserved, is no less a pronouncement of policy than that which I espouse. The question then becomes one of determining which policy is more consistent with the Act, with its spirit as well as its letter. A succinct statement of the policy will be found in the Ontario Law Reform Commission's Report on Land Registration, issued in 1971, in which it summarizes the land titles system as follows (at p. 14):

> The land titles system was established in Ontario in 1885. It is essentially an affirmation by the province of the ownership of interests in land. Local offices have again been established — at present there are 30 — and a separate record is kept in these offices for each parcel governed by the system. The record includes an affirmation of the existence and ownership of interests — the fee simple and charges, and some leases and easements. Interests about which affirmations of existence and ownership are not made may be protected against loss of priority by registration of notices and cautions.
>
> A search is essentially an examination of the record and, usually, of some documents referred to in the record. The system imposes a larger degree of administrative supervision of conveyancing than the registry system does, and forms that must be used are specified for many transactions. If an interest is extinguished as a consequence of the making of an affirmation, the owner of the interest is entitled to compensation from a fund established for this purpose. A claim that does not appear in the record is of no effect against a purchaser unless the purchser has acted fraudulently.

34 When The Land Titles Act was first introduced in Ontario, there was already experience in the province with a system of registration of deeds, and the policy thereunder of priority of registration subject to actual notice was clearly expressed: see The

Registry Act, R.S.O. 1877, c. 111, ss. 74, 78 and 80. To import actual notice in a title registration system without its express preservation is to change the basic character of the system. It is impossible, in my view, to adhere to the principle of the primacy of the register and at the same time to make it yield to a doctrine of notice.

35 I come now to s. 85(5), referred to in the reasons of the Court of Appeal in this case as a governing consideration in its decision. This provision reads as follows:

> (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice, are entitled to priority according to the time of registration.

36 I do not agree with the view expressed in the Court of Appeal that this provision is, in effect, an affirmation of the survival of notice as a qualification of the absolute character of the register (fraud, of course, apart). The Court dwells on the words in s. 85(5) "notwithstanding any express, implied or constructive notice" for its view, but I am unable to appreciate how the express inclusion of these words supports the conclusion that actual notice of an unregistered interest is still effective against title shown on the register.

37 If it is a provision that operates at large, it obviously excludes notice of an unregistered interest as a limitation of the title shown on the register. Treating s. 85(5) as operating at large, I cannot see how it can be construed to exclude the effect of notice where the notice is of a claim to the same interest as that purchased by another for value on the faith of the register, but not to exclude it where the notice is of a claim to a subordinate interest, as is the case here. Arnup J.A. in his concurring reasons in the Court of Appeal conceded the illogicality of a situation where a person would be better off claiming against a registered transferee through notice than by registering his interest, but he concluded that the Legislature must take responsibility for such a result. I think rather that the Courts must take responsibility, since it would be their interpretation, by no means a compelled one, which produces it.

38 In my view, if s. 85(5) be taken in the context of the whole of s. 85 it is capable of explanation without treating it as applicable at large, but yet reinforcing the indefeasibility of the register and of title according to the register, subject only to overriding interests and to fraud.

39 Section 85 deals with the procedure for registration and with the effectuation of registration. It begins with a provision requiring that the day, hour and minute of the receipt of instruments presented for registration must be noted by the attending officer or clerk. Then follow subsections (2) and (3) which I reproduce here in full:

> (2) Subject to the rules, an instrument received for registration shall be registered in the order of time in which it is so received, unless before registration is completed it is withdrawn or the proper master of titles decides that it contains a material error, omission or deficiency or that there is evidence lacking that he considers requisite or declines registration for any other reason, and notifies the parties or their solicitors accordingly within twenty-one days after being so received and allows a period of time not less than seven and not more than thirty days from the date of such notification for correction of the error, omission or deficiency or for furnishing evidence and, when the error, omission or deficiency is corrected or evidence furnished within the time allowed, the instrument has priority as if it had been correct in the first instance, but, if the error, omission or deficiency is not corrected or if evidence is not furnished within the time allowed or if the person desiring registration fails to appeal successfully from the decision, the proper master of titles may proceed with other registrations affecting the land as if the instrument had not been presented for registration, and the proper master of titles shall be deemed not to be affected with notice of the contents of the instrument.

> (3) Registration of an instrument is complete when the entry in the proper register and particulars of registration thereof on the instrument are signed by the proper master of titles, his deputy or a signing officer, and the time of receipt of the instrument shall be deemed to be the time of its registration.

40 What these provisions show is that entry on the register in fact may take place some time after receipt of an instrument tendered for registration but, nonetheless, the registration will be effective as of the time of receipt of the instrument. As s. 85(2) shows, entry may be held up pending correction of errors or deficiencies in the tendered instrument and yet may be accorded priority as against an intervening tender of another competing instrument which appears to be in correct form. When s. 85(5) speaks of priority "in respect of or affecting the same estate or interests in the same parcel of registered land" according to the order of entry in the register, it is dealing with competing instruments in the light of the provisions of s. 85(2) and (3). It appears to me to be an unnecessary punctuation of the obvious, but it could be said to emphasize the import of s. 85(2) that where an error or deficiency is corrected (as contrasted with the case where it is not) the intervening instrument is not entitled to priority merely because there is notice of it before the error or deficiency in the other one is corrected even if the intervening instrument was created first.

41 I do not regard s. 85(5), in the context in which it exists, as modifying the effect of ss. 52 and 91, any more than their effect is modified by the incongruous terms of s. 157(3) of the Act respecting tax sale purchasers. It appears that the reference to actual notice in s. 157(3), introduced in an amendment to the Act by 1914 (Ont.), c. 24, s. 2, was designed to establish a special rule for tax sales in conformity with the situation under The Registry Act, since there is an included reference to the relevant section of that Act in the 1914 amendment. The amendment is discussed by Magee, Notice under The Ontario Land Titles Act (1933), 11 Can. Bar Rev. 245 with reference also to the judgment of Meredith C.J.C.P. in *Re Lord and Ellis* (1914), 30 O.L.R. 582, 19 D.L.R. 809 decided shortly before the 1914 amendment was passed. However, all this apart, I do not see this special situation as governing the operation of the central feature of the Act.

42 In summary, I am satisfied that ss. 78(1), (2), 79(1), 91 and 94 of The Land Titles Act make it abundantly clear that notice of an uregistered interest cannot qualify the registered title of a transferee for value from the registered owner, and that this conclusion is reinforced by s. 85 as a whole and by s. 85(5) in particular. In the result, I would allow the appeal, set aside the judgments below and dismiss the application of the respondent Dominion Stores Limited, with costs to the appellant throughout.

***Spence J. (Judson, Ritchie* and *Beetz JJ.* concurring):**

43 This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on 25th October 1974. By that judgment, the Court of Appeal dismissed an appeal from the judgment of Grant J. pronounced on 15th October 1973. The respondent, Dominion Stores Limited, had applied to the Supreme Court of Ontario for relief from forfeiture and reinstatement of its lease upon certain premises known as 418 Spadina Road, in the City of Toronto, for an extension of its option agreement for a renewal of the said lease and for an injunction to restrain the three respondents from any future interference with the applicant under its lease and extension or option agreement.

44 Grant J. did grant relief from forfeiture and "ordered and determined" that the applicant Dominion Stores Limited was entitled to exercise its option to renew the lease until 30th June 1982.

45 Grant J. further ordered that the respondent United Trust Company be restrained from further excluding Dominion Stores Limited from possession of the said premises so long as Dominion Stores Limited complied with the terms of the said lease.

46 At the opening of the appeal, I pointed out that no leave to appeal had been obtained and that, therefore, the appeal was governed by the provisions of s. 36 [re-en. R.S.C. 1970, c. 44 (1st Supp.), s. 1; repealed 1974-75, c. 18, s. 3] of the Supreme Court Act, R.S.C. 1970, c. S-19 which at the appropriate time gave an appeal as of right on a question that is not a question of fact alone from a final judgment of the highest Court of final resort for a province in judicial proceedings where the amount or value of the matter in controversy in the appeal exceeds $10,000 while the order of Grant J. confirmed by the Court of Appeal contained no reference to any monetary amount and simply granted the injunction and declaration applied for. Counsel for the appellant referred to the affidavit of Grant Edwardh, and appraiser who deposed that the rental upon the premises was $2.18 per square foot and that the firm market or economic rent was $6.25 per square foot, a difference of $4.07 per square foot per year. Even in one year, the difference between the rent reserved in the lease and the economic rent would exceed $10,000, and such affidavit could have been filed with the notice of appeal to bring the appeal within the provisions of the said s. 36 of the

Supreme Court Act as it then existed. Under these circumstances, this Court determined that if leave to appeal were necessary it should be granted.

47 Dominion Stores Limited had been tenants of the said premises under written lease from 5th September 1935 and had carried on a supermarket in the said premises under the terms of the said lease and various renewals thereof. The respondents Geller and Granatstein became the owners of the said premises subject to such lease in 1946. The last renewal of the lease was dated 12th September 1967 and was to have terminated on 30th November 1970. The said renewal contained an option in favour of Dominion Stores to renew such lease for a further period from 1st December 1970 to 30th November 1975, upon the same terms and conditions except that the rental was increased to $475 per month and also subject to the usual clause as to increase to cover real estate taxes. Dominion Stores gave due notice of the exercise of such option. Desiring to make extensive repairs to the premises and to devote them to a specialty shop rather than to a supermarket, Dominion Stores Limited entered into negotiations with the owners for a longer term of leasing. Such negotiations continued from February 1971 until the early months of 1972.

48 On 12th April 1972, Dominion Stores Limited, over the signature of its real estate manager, one J.A. Munro, wrote to the landlords' solicitor confirming the arrangement which it was alleged had been orally arrived at prior thereto. I quote that letter in full:

> Dear Sir:
>
> *Re: 418 Spadina — Option to Lease*
>
> Pursuant to our discussion yesterday please find attached a copy of the letter received from Simpsons Contract Division covering the cost of renovations required to bring this building in line with Health, Building, Fire and Labour Department regulations.
>
> The existing Dominion lease for this location expires November 30th, 1975. It is understood the owners are now prepared to grant an option to Dominion Stores Limited for the period from December 1, 1975 to June 30th, 1982, at the same rental, terms and conditions as contained in the existing lease. As discussed with you it is the intention for Dominion Stores Limited to proceed with a sublease of these premises at the earliest possible date to Quintana Stores Limited.
>
> On receipt of your clients written acceptance of the option to lease and the proposed sublease, we will have our legal department draw the necessary documentation for execution. Your early attention to this matter will be greatly appreciated.

49 On 20th April 1972, the landlords' solicitor replied to that letter as follows:

> *Attention:* Mr. J.A. Munro
>
> Real Estate Manager
>
> Dear Mr. Munro:
>
> *Re: 418 Spadina — Option to Lease*
>
> We acknowledge receipt of your letter dated April 12th, 1972, and wish to advise that our clients would be prepared to enter into an option agreement with your company for the period from December 1st, 1975 to June 30th, 1982, at the same rental, terms and conditions as contained in the existing lease.
>
> It is clearly understood that the option agreement will contain a condition that renovations must be made by your company to the building in the minimum amount of $15,000 or else the agreement would be terminated. It is also understood that the renovations would be commenced and completed within a reasonable period of time after the execution of the option agreement.

We would suggest that you draw the documentation which is required and if the form and substance meet with our approval we shall submit it to our clients for their immediate execution.

50 On 28th April 1972, Dominion Stores Limited, over the signature of J.R. Morrison, a solicitor in its legal department, again wrote to the solicitor for the landlords a letter which read:

Attention: Mr. Lawrence S. Crackower

Dear Sirs:

Re: Your File No. 72-10835
Molly Geller & Bella Granatstein
418 Spadina Road, Toronto

Further to your letter of April 20th last addressed to the attention of our Mr. J.A. Munro, we have prepared and enclose herewith option agreement in accordance with the understanding reached, and if it meets with your approval we shall be obliged if you will have same executed by your clients and return all three copies to us for execution by Dominion Stores Limited, following which we shall return to you one fully executed copy.

As the remainder of the current term and the renewal term total more than ten years we may wish to register a Notice of Lease, and will be much obliged if you could let us have a legal description of the property or if not the lot and plan numbers.

Yours very truly,

J.R. Morrison,

Solicitor,

Legal Department

51 The learned trial Judge, after a careful consideration of the evidence and documents which I have recited and of the appropriate law, came to the conclusion that by the letter of 20th April 1972, there had been concluded an enforceable agreement to extend the lease on the premises until the year 1982. The learned trial Judge then considered the situation if his determination had been in error and that the correspondence properly construed expressed the intention that the agreement between the parties would be subject to the preparation and execution of a new agreement which met the approval of the landlords' solicitors. Again, after an examination of the evidence and the case law, he came to the conclusion that the solicitors for the landlords did not act judiciously in the matter and that they withheld their approval in bad faith. The learned trial Judge, therefore, granted the order which I have recited above determining that Dominion Stores Limited was entitled to exercise its option to renew the lease until 30th June 1982.

52 Jessup J.A. disposed of this issue in the Court of Appeal in the following short paragraph [6 O.R. (2d) at p. 202]:

The appellant also argues that the agreement in question here for the extension of a lease was only an agreement to agree but I do not think that contention is supported by a fair consideration of the entire correspondence between the landlord's solicitor and the tenant.

53 Arnup J.A., in his reasons, said [6 O.R. (2d) at p. 203]:

The other points raised by the appellant and mentioned by Jessup J.A., were in my view correctly disposed of by Grant J.

54 I have come to the conclusion that upon this issue the judgment of the learned trial Judge confirmed by the Court of Appeal was the correct one and I need add little to his carefully considered reasons.

55 There is only one point dealt with in the argument before this Court which requires particular mention and that is that the agreement with Dominion Stores Limited was arrived at by a letter from the solicitors for the landlords and that there is nothing over the signature of the landlords themselves, and further that although the solicitors are and were in this case authorized to negotiate whether the lease should be renewed and the terms of such renewal, they were not authorized to conclude an agreement for the renewal. I am of the opinion that the actual language of the solicitors' letter of 20th April which I have quoted above clearly indicates that they had instructions from the landlords to conclude a renewal on the terms set out in the said letter and that they were simply carrying out their instructions and acting properly as the communicator for their clients.

56 This application was presented to Grant J. upon affidavit evidence. There is no affidavit from either of the respondents Molly Geller or Bella Granatstein and no affidavit from any member of the firm of solicitors who acted for them and who wrote the letter of 20th April. Under such circumstances, I am entitled to conclude, as were the Courts below, that the letter of 20th April was written upon instructions of the clients and bound the clients as if it had been signed by them personally.

57 I turn to a much more difficult question, and in order to deal with it resume the outline of the facts.

58 The respondent United Trust Company had been negotiating with the respondents Geller and Granatstein for the purchase of the premises known municipally as 418 Spadina Road and on 17th May 1972 submitted a written offer to purchase to the said Geller and Granatstein. This offer was accepted by the said Geller and Granaestein on the same day. One term thereof provided:

> This offer is conditional for a period of thirty days from the date of acceptance herein upon the purchaser obtaining a surrender of lease from Dominion Stores Limited which will allow the purchaser vacant possession of the premises herein on the date of closing and should such surrender not be obtained within thirty days from the date of acceptance herein then this offer shall be null and void at the purchaser's option and all deposit monies shall be returned forthwith upon demand without any deductions whatsoever.

59 The United Trust Company then entered into negotiations with Dominion Stores Limited in an attempt to have them surrender their lease and vacate the premises. These negotiations continued until on or about 15th June when two solicitors for United Trust met with an officer and the solicitor for Dominion Stores Limited in what the solicitor for United Trust Company described as being "a bona fide attempt to settle the matter which is now before the court". The said solicitor in his affidavit continued:

> 5. It was agreed that I would discuss with my clients the amount of rent which they would be prepared to accept from Dominion Stores should Dominion Stores lease the premises from them. As an alternative path to settlement, Mr. Shaw agreed that Mr. Morrison would determine the amount of compensation which Dominion Stores would accept to reimburse them for the alleged out-of-pocket expenses incurred and for the loss of the location.

60 The representatives of the two parties parted on that basis and no further negotiations seem to have taken place but on the same 15th June 1972 the United Trust Company, not its solicitor, wrote to Mrs. Geller and Mrs. Granatstein the following letter:

> Dear Mrs. Geller and Mrs. Granatstein:
>
> *Re: 418 Spadina Road, Toronto*
>
> This letter will confirm that we intend to waive our rights with respect to the condition about obtaining vacant possession of the above property from Dominion Stores Limited as set out in the agreement between United Trust Company and yourselves dated May 17th, 1972.
>
> Therefore, we have instructed our solicitors, Goodman & Goodman to proceed to close the transaction.
>
> I would like to take this opportunity to thank you for the courtesy extended to us by reducing the interest rate on the mortgage back to 8%.

61 It was quite apparent therefore that rather than continue to negotiate with Dominion Stores Limited, United Trust Company were ready to waive the condition in the accepted offer to purchase of 17th May 1972 which made the transaction dependent upon its success in obtaining a surrender of the Dominion Stores lease. The final paragraph of that letter is also most noteworthy. The offer to purchase which I have recited above provided for interest at the rate of 9 per cent per annum. On the basis that the United Trust Company was not going to be able to obtain possession of the premises free from lease, it succeeded in reducing the interest on the mortgage back by 1 per cent per year.

62 It was only on 25th May 1972 that the solicitors for the respondents Geller and Granatstein replied to the Dominion Stores' letter of 28th April which I have quoted above, and that reply read:

> *Attention: Mr. J.R. Morrison, Solicitor, Legal Department*
>
> Dear Mr. Morrison:
>
> Further to your letter to us of April 28th, and further to our recent telephone conversation with Mr. Munro, please be advised that our clients have instructed us to advise you that they have no intention of executing the documents which you have forwarded as the said documents do not meet with the approval of the writer nor our clients in their form and substance.
>
> At this time, we are returning your draft Agreements to you.

63 Although the offer to purchase provided for closing "on or before the 31st of July 1972", the transaction was closed between the respondents Geller and Granatstein as vendors and the United Trust Company as purchasers on 21st June 1972, and the following day, without any notice to Dominion Stores Limited, United Trust Company placed a new door with a new lock on the premises at 418 Spadina Road and excluded Dominion Stores Limited from the premises, although Dominion Stores had paid rent for the period up to and including 30th June 1972. On the same 21st June 1972, the solicitors for United Trust Company wrote to the Dominion Stores Limited a letter which read:

> Dear Nat:
>
> ```
> Re: United Trust
>     418 Spadina Road
>     Geller and Granatstein
> -------------------------
> ```
>
> Subsequent to our meeting last Thursday we met with the vendors' solicitors to attempt to obtain an extension of the time for the fulfillment of the condition in the contract, to enable us to further explore the possibility of a settlement with Dominion Stores Limited.
>
> The vendors refused to grant an extension and accordingly our client had no alternative other than to close the transaction which was completed today. Notwithstanding, I am instructing our client to provide us with the information as per our discussion so that we can, without prejudice to the legal rights of either party, attempt to settle this matter.

64 The first paragraph of this letter is rather interesting. It refers to a meeting on "last Thursday". 21st June would appear to have been a Wednesday. If so, the previous Thursday would have been the 15th, but on 15th June, United Trust Company was writing to Mrs. Geller and Mrs. Granatstein waiving the condition which entitled them to a surrender of the Dominion Stores' lease before they could be required to close the transaction and purchase the premises. It is difficult to understand how there could have been any negotiation at the time specified in that letter other than one to reduce the cost to United Trust Company and such negotiation was in fact successful when the rate on the interest was reduced. Such rejection was, of course, on the basis that United Trust would have to take the title to the premises subject to the lease and the solicitors for the respondents Geller and Granatstein accepted this understanding when they wrote to the solicitors for the United Trust Company on 19th June 1972 saying in part:

> Since your clients have now agreed to waive the condition in the said Agreement of Purchase and Sale, it now appears that your clients have agreed *to assume the tenancy obligations with Dominion Stores Limited*.

(The italics are mine.)

65 On 7th July 1972, the solicitors for Dominion Stores Limited delivered to the solicitors for the United Trust Company a letter demanding that possession be returned and on 10th July 1972 the same solicitors for Dominion Stores Limited delivered to the same solicitors for United Trust Company a letter enclosing a cheque dated 7th July 1972. The cheque was returned. The Dominion Stores Limited, therefore, commenced these proceedings.

66 The title to the premises at 418 Spadina Road, Toronto, is under the provisions of The Land Titles Act, R.S.O. 1970, c. 234 as amended.

67 The appellant United Trust Company admits it had full actual notice of the lease which the respondent Dominion Stores Limited held on the premises and indeed it could not say otherwise as its officers had engaged in long negotiations with the officers of Dominion Stores Limited in an attempt to obtain a surrender of that lease and the offer to purchase made by the appellant United Trust Company to the respondents Geller and Granatstein was originally subject to the condition that such surrender of lease could be obtained from the respondent Dominion Stores Limited. It is the contention, however, of the appellant that under the provisions of The Land Titles Act the lease to Dominion Stores Limited never having been registered on the title in accordance with the provisions of that Act the purchaser took free of any encumbrances created by that lease. Put baldly, this contention is that under The Ontario Land Titles Act, apart from fraud, actual notice of a non-registered instrument is ineffective to put the burden of the encumbrance resulting therefrom upon a purchaser for value.

68 It should first be noted that by the express provisions of The Land Titles Act, R.S.O. 1970, c. 234, i.e., s. 51(1), para. 4, any lease for a period with less than three years to run is protected despite lack of registration by providing that the title is subject to such a lease which for the purpose of the Act should be deemed to be not an encumbrance and, therefore, not requiring registration. As pointed out by Grant J., the lease to Dominion Stores Limited, apart from any right of or option of extension, did not expire until 30th November 1975 and the United Trust Company closed the purchase from the respondents Geller and Granatstein on 21st June 1972, more than three years prior to the expiry of the term and, therefore, the lease was not protected by the provisions of s. 51(1), para. 4.

69 The appellant submits, in support of its contention, the provisions of ss. 52, 75, 78 [am. 1972, c. 132, s. 18], 79 [am. 1972, c. 1, s. 43(4); 1972, c. 132, s. 19], 85(5), 91 and 115(5) [repealed 1972, c. 132, s. 24] of The Land Titles Act. S. 52 deals with a first registration and is not applicable upon the present appeal. I set out the other sections cited by the appellant:

> 75. — (1) No person, other than the registered owner, is entitled to transfer or charge registered freehold or leasehold land by a registered disposition.
>
> (2) Subject to the maintenance of the estate and right of the registered owner, a person having a sufficient estate or interest in the land may create estate, rights, interests and equities in the same manner as he might do if the land were not registered ...
>
> 78. — (1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the director of titles.
>
> (2) Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through him, excepting owners and encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein ...

79. — (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel or land or that have been duly entered in the books of the office kept for the entry of instruments received or are in the course of entry.

(2) For the purposes of subsection 1, the Highways register mentioned in clause *c* of section 182 shall be deemed to be a book kept for the entry of instruments.

(3) Subject to the regulations, the Trans-Canada Pipe Line register established under clause *c* of section 182 shall be deemed, for the purposes of this Act, to be a register of the title of land or interests therein, including easements, owned by Trans-Canada Pipe Lines Limited ...

85. — (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice, are entitled to priority according to the time of registration ...

91. A transfer for valuable consideration of land registered with an absolute title, when registered, confers on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances, subject to,

(*a*) the encumbrances, if any, entered or noted on the register; and

(*b*) the liabilities, rights and interests, if any, as are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register,

and to such rights, privileges and appurtenances, subject also to any qualifications, limitation or encumbrance to which the same are expressed to be subject in the register, or where such rights, privileges and appurtenances are not registered, then subject to any qualification, limitation or encumbrance to which the same are subject at the time of the transfer, but free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario ...

115 — (1) A lessee or other person entitled to or interested in a lease or agreement for a lease of registered land may apply to the proper master of titles to register notice of the lease or agreement in the prescribed manner ...

70 I shall deal with these sections hereafter.

71 It is the appellant's argument that the enactment of the Torrens land titles system in the Province of Ontario made applicable in that province the main theory of a Torrens title registration system, to wit, the absolute authority of the register, and that it is the effect of such a principle that actual notice, no matter how clearly proved so long as encumbrances do not appear on the register, does not affect the clear title of the purchaser for value. I am ready to agree that this is a prime principle of the Torrens system and that it had been referred to as such by various text writers which I need not cite in support thereof.

72 The Torrens Registration System was the brainchild of a Mr. Robert Torrens of South Australia and, due to his perseverance, a statute embodying the principles of his land titles system was enacted in South Australia in 1857. Similar statutes based on the same principles and using the same technique were enacted in rapid succession in Queensland in 1861, in Tasmania, Victoria and New South Wales in 1862, in New Zealand in 1870, and in Western Australia in 1874. Use of the system spread to Canada and a like statute was enacted in the Colony of Vancouver Island in 1861, and then in the Province of British Columbia in 1869. The Land Titles Act was enacted in Ontario in 1885. At that time, the Legislature in Ontario had before it as models all these previous enactments which I have listed. In every case, those enactments contained an express provision making actual notice ineffective to encumber the registered title.

73 The subsequent enactment of Land Titles Acts in Alberta, Saskatchewan and Manitoba contained like provision. In Ontario, no such provision appeared. The respondent Dominion Stores Limited submits that this omission is crucial and certainly could not be considered to be an accident.

74 Counsel for the respondent Dominion Stores Limited submits, and I agree with him, that the many cases cited by counsel for the appellant for the proposition that actual notice is ineffective, including some cases which bear an almost exact resemblance to the present, are cases which depend upon the statutory provisions in the various jurisdictions containing such express provision and, therefore, are irrelevant in considering the situation in Ontario which lacks such a provision. I have read the authorities cited by the appellant and I do find that in each of those cases there is express reference to such a section. As an example, may be cited the provisions of s. 203 of The Land Titles Act, R.S.A. 1970, c. 198, which I quote:

> 203. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

75 There is no doubt that when such a term appears in the governing statute, the result is that unregistered encumbrances fail in any way to affect the title of the purchaser for value.

76 Lord Buckmaster said in *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101 at 106 (P.C.):

> The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose; *while s. 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud*.

(The italics are mine.) and adopted the definition of "fraud" given by Lord Lindley in *Assets Co. v. Mere Roihi*, [1905] A.C. 176 (P.C.) at 210:

> ... by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

77 However, in Ontario, only a few years after the enactment of The Land Titles Act, the Courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those Courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms. Such a provision, as I have said, does appear in all the other statutes cited by the appellant.

78 The view of the Ontario Courts was expressed by Meredith J. in *Re Skill and Thompson* (1908), 17 O.L.R. 186 (C.A.). There, a Master of titles had made an order in which he refused to expunge from the register a caution which was registered by a person claiming under an agreement to purchase from the person who had been the owner and who had, despite such agreement to purchase in the hands of the person, conveyed to one who became the registered owner on the title. Riddell J. allowed an appeal from the Master of titles and ordered that the caution be expunged. Thompson appealed to the Divisional Court composed of Meredith C.J.C.P. and Anglin and Mabee JJ. and Mabee J. gave the reasons for the Divisional Court in reversing Riddell J. Skill then appealed to the Court of Appeal composed of Moss C.J.O. and Osler, Garrow, and Maclaren JJ.A.

In the Court of Appeal, Meredith J.A. alone dealt with the point and his statement has been quoted ever since as expressing the Ontario view as to the effect of actual notice. It was [17 O.L.R. at p. 194]:

> The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.
>
> Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud ...

79 Some years later, in 1914, in *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.), Mulock C.J. Ex. said at 265:

> The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: *National Bank of Australasia v. Morrow* (1887), 13 V.L.R. 2; *Jellett v. Wilkie* (1896), 26 S.C.R. 289.

80 Now it is true that in *Macdonald v. Tew*, supra, Mulock C.J. Ex. was dealing, as he said, with a person who as assignee for creditors was not a purchaser for value but his statement as to the effect of The Land Titles Act upon the common law rights of an owner of land to mortgage, or to lease, is indicative of the view held by Ontario Courts.

81 The next decision in Ontario to which I wish to refer is *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935 [1955] 5 D.L.R. at 292 (C.A.). There, Duranceau D.C.J. had considered a landlord's application for possession. The landlord and a tenant had both been the tenants of adjoining parcels of land held under The Land Titles Act. The landlord purchased the parcel which he had previously leased and the parcel leased by Montgomery. Montgomery's lease, including the option to renew, ran for more than three years. Jung, the new registered owner, had full knowledge of Montgomery's tenancy at the time he purchased from the previous owner. After having closed the transaction, Jung continued to accept rental from Montgomery but later made application for possession. This latter fact, in my view, could have determined the case simply on the basis that Jung had accepted Montgomery as his tenant and was saddled with Montgomery's lease. The learned District Court Judge, however, mentioned this point only at the close of his reasons and devoted the main portion thereof to a consideration of the question of whether Jung's actual notice of Montgomery's lease prior to his having closed the transaction of purchase resulted in him having to take title subject to Montgomery's lease and held that it did so relying particularly on *Re Skill and Thompson* and *Macdonald v. Tew* which I have cited above. Jung appealed to the Court of Appeal and the disposition there is set out in the report in these words:

> The Court dismissed the appeal at the conclusion of the appellant's argument and orally expressed its agreement with the judgment appealed from.

82 In [1955] O.W.N. at p. 936, a similar notation appears.

83 Shortly thereafter, in 1960, The Land Titles Act was amended by the addition of s. 54(5). That amendment now appears as s. 85(5) of The Land Titles Act which I have cited above.

84 In *Pitcher v. Shoebottom*, [1971] 1 O.R. 106, 14 D.L.R. (3d) 522, Lieff J. considered a case where the plaintiff had entered into an oral agreement to buy certain lots from the defendant. Prior thereto, the defendant had approached the real estate agent for the purpose of selling his land. As a result of that agent's endeavours, an agreement had been entered into between the defendant and one Block for the sale of part of the lands in November 1960. That transaction was closed in 1960. The plaintiff took action against the defendant for specific performance of the agreement made in 1958 relying on *Re Jung and Montgomery*, supra. The defendant pleaded the provisions of what is now s. 85(5) of The Land Titles Act. Lieff J. said at p. 112:

> At the time the agreements of purchase and sale were entered into there seems to be no doubt that actual notice of an unregistered interest was sufficient to defeat a registered purchaser's claim to priority over the unregistered interest. That this was the situation at the time the agreements were entered into is supported by *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, where the Court of Appeal dismissed an appeal from the judgment of Duranceau D.C.J., for the reasons given by him ...
>
> It is argued by the corporate defendants that the Land Titles Amendment Act [now s. 85(5)] has the effect of eliminating the doctrine of actual notice from the Land Titles Act. If this is so, and the proper law to apply in the present case is the statute as amended, the effective date of which was January 1, 1960, then this would necessarily be an end to the matter with respect to the doctrine of actual notice.

85 Lieff J. found it unnecessary to decide this point as he held, as a matter of fact, that the purchaser had not notice of the unregistered interest.

86 In the present case, both Jessup J.A. and Arnup J.A. considered s. 85(5) in giving the reasons for the Court of Appeal, as had Grant J. upon the hearing of the application. Jessup J.A. was of the opinion that by the enactment of s. 85(5) the Legislature had disclosed the intent of the statute and that it was the intent found in the decision of *Re Jung and Montgomery*, noting [6 O.R. (2d) at p. 201]:

> ... The subsection does not purport to repeal generally the law is laid down in *Re Jung and Montgomery* and therefore was not enacted simply for the purpose of such repeal.

87 As an alternative reason for the conclusion, Jessup J.A. pointed out that s. 85(5) dealt with "... registered intruments in respect of or affecting the same estate or interest in the same parcel of registered land" while the issue considered was a freehold estate in the purchaser United Trust Company and a leasehold estate in Dominion Stores Limited.

88 Arnup J.A., in his reasons, dealt with the argument in this term [6 O.R. (2d) at p. 202]:

> The appeal narrows down to the question whether the enactment of s. 80(5) in R.S.O. 1960, c. 204 (now s. 85(5), R.S.O. 1970, c. 234), changed the law by abolishing the "doctrine of actual notice". If this is what the Legislature intended, the amendment was put in a very peculiar place, having regard to the context of s-ss. (1) to (4) of s. 85.

89 With respect, I am in complete agreement with that comment. It is difficult to understand why the Legislature, faced with a decision approved in the Court of Appeal that actual notice was still in Ontario effective to encumber the registered titleholder's estate, should have attempted to eliminate such a conclusion by the enactment of a subsection in a section dealing with details of registration when an appropriate amendment in plain words of s. 52 as to first registration or s. 91 as to subsequent transfers would have been appropriate. The form was available as it already appeared in many other provincial Land Titles Acts. Again, I agree with Arnup J.A. when he said that the law of real property should not be found to have been altered by the Legislature except where such alteration had been made by clear or appropriate words.

90 Arnup J.A. was of the view that s. 85(5) would have applied between registered instruments even if one were a transfer of the freehold and the other a lease, being of the opinion that the latter affected the former but found it unnecessary to so determine. In view of his opinion, with which, with respect, I agree, s. 85(5) did not affect the law as enunciated in *Re Jung and Montgomery*.

91 I am in accord with the reasons set out by Jessup J.A. and Arnup J.A. in the Court of Appeal to that effect and I, therefore, am not required to consider the issue of whether the circumstances which occurred in this appeal, and which I have outlined with some detail above, could result in a finding of fraud against the appellant.

92 In *Zbryski v. Calgary* (1965), 51 D.L.R. (2d) 54 (Alta.), Farthing J. considered circumstances which, although they do not resemble the present circumstances, had much the same tenor and found that such circumstances did constitute actual fraud

as against the holder of the unregistered interest but he did so after a trial and after witnesses had given viva voce evidence and were cross-examined extensively.

93 The present appeal arose upon an application for relief against forfeiture and for an injunction. The application was considered upon the basis of affidavit evidence and documents with a limited amount of transcript of examination upon the affidavits. The application itself did not contain any allegation of fraud. In my view, the well-established principle that fraud must be strictly alleged and strictly proved would not justify a finding of fraud on this kind of a record and, therefore, I have not come to any conclusion as to whether the respondent Dominion Stores Limited could have established its case upon the basis of actual fraud.

94 For the reasons which I have given, I would dismiss the appeal with costs and affirm the judgment of the Court of Appeal for Ontario.

Appeal dismissed.

Tab 5

2011 ONSC 5857
Ontario Superior Court of Justice

Bell Canada Inc. v. White Admiral Ltd.

2011 CarswellOnt 11003, 2011 ONSC 5857, 12 R.P.R. (5th) 162, 208 A.C.W.S. (3d) 200

Bell Canada Inc. (Applicant) and White Admiral Limited (Respondent)

P.B. Hambly J.

Heard: September 15, 2011
Judgment: October 5, 2011 *
Docket: C-391-11

Proceedings: additional reasons at *Bell Canada Inc. v. White Admiral Ltd.* (2011), 2011 ONSC 6921, 2011 CarswellOnt 12750 (Ont. S.C.J.)

Counsel: Justin Heimpel, for Applicant
Hilary J. Vaughan, for Respondent

***P.B. Hambly J.*:**

1 Bell Canada Inc. ("Bell") purchased an easement on land on which it constructed a box containing electrical instruments. It registered its easement in the Land Registry system. The land is in the Land Titles system. The land has been purchased by White Admiral Limited ("White Admiral"). Bell requests a declaration that the easement is valid and an order directing the land registrar for the land title system where the property is located to rectify the registration.

The Facts

2 In 1997 William and Mary Turvey owned a parcel of land in St. Thomas. The land is registered in the Land Titles system. On June 26, 1997 they granted to Bell Canada an easement over their land. Bell paid the Turveys $5000 for the easement. Bell's lawyer advised Bell that he had registered the easement and that Bell enjoyed a good and valid easement. Bell placed a Concrete Universal Enclosure 50 ("CUE 50") on the easement. It encloses an infrastructure which Bell uses to serve 317 customers in the area.

3 Ward Houghton is a land surveyor. White Admiral was interested in purchasing the land on which the CUE 50 was located. White Admiral hired Houghton to examine the title to the land. Houghton found that no encumbrance was registered in the Land Titles system on the land on which the CUE 50 was located.

4 Lisa Humphries is employed by Bell. On September 26, 2005 Houghton placed a telephone call to her. He advised her of this. She faxed to him on the same day a copy of the easement that Bell had purchased from the Turveys. It showed that it was registered in the Land Registry system as opposed to the Land Titles system. Ownership of the land had passed to Robert and Lisa Hopf. White Admiral purchased the land from them on January 6, 2006.

5 By letter dated December 28, 2010, the lawyer for White Admiral proposed that Bell lease the land on which the CUE 50 is located as an alternative to removing the CUE 50. The terms that she proposed were that White Admiral pay a signing fee of $120,000 on February 1, 2011 and monthly rent payments escalating from $10,000 to $16,000 until $2031. The total payments proposed would be in excess of $3 million. The cost of Bell removing the CUE 50 would be approximately $400,000 and would take about 18 months.

Analysis

6 The following sections of the *Land Titles Act*, R.S.O. 1990, C. L. 5 are relevant:

Protection of unregistered estates

71. — (1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

Effect of unregistered instruments

72. — (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry.

Court may order rectification

159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.

Application to court to rectify

160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

7 In Anger & Honsberger Law of Real Property Anne W. La Forest, the learned author, states the following:

30. Once land is registered under land titles, it is given a description that relates to the numbered plan in which it is registered. All land is described by geographical and municipal delineation and next by plan number. Within the plan each unit of land is given a parcel number and registered in the register, which can be roughly compared to the abstract book under a registry system. Since only present and binding interests show in the register (all prior ended interests are struck off), the searcher has only to check the proper folio of the register (obtained through the description of the property which will include a plan and parcel number) to determine what registered interests affect the land. These registered interests are given a document number and may then be examined.

8 In *Jung v. Montgomery*, [1955] O.W.N. 931 (Ont. Dist. Ct.) the Court of Appeal held the following:

The doctrine of actual notice does exist under the Land Titles Act. J. had actual notice of the lease and of the option for renewal contained therein before he signed the offer to purchase. J., having such actual notice, could take the property only subject to the lease, which gave M. an unregistered estate or interest in the property by which J. was bound. In acquiring the property with notice of the lease and its material contents, J. became saddled with certain obligations so far as M. was concerned. This court cannot protect a registered owner against his own obligations, much less against his own fraud. (Headnote)

9 In *Dominion Stores Ltd. v. United Trust Co.*, [1976] S.C.J. No. 99 (S.C.C.) the property in question was under Land Titles. The issue was whether or not a lease of which the landlord had actual notice was valid notwithstanding that it had not been registered. After *Jung* was decided the Land Titles Act was amended by adding the following:

> 78 (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration. (then s. 85(5))

The Court of Appeal held that this amendment did not abolish the doctrine of actual notice. The Supreme Court of Canada in the majority judgment of Justice Spence agreed. He stated the following:

> However, in Ontario, only a few years after the enactment of The Land Titles Act, the courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms. Such a provision, as I have said, does appear in all the other statutes cited by the appellant. (QL version p. 26-27)

10 Actual notice of an encumbrance on land in the Land Titles system to the owner of the land protects the interest of the owner of the encumbrance against the owner of the land although the encumbrance is not registered.

11 White Admiral argues that Bell's claim is statute barred. The *Limitations* Act, 2002, S.O. 2002, c. 25 Schedule B states the following:

> 1. "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
>
> **Basic limitation period**
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **SECTION 5**
>
> ***Discovery***
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> ***Presumption***

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

12 Bell commenced its application on April 29, 2011. This was almost 6 years after it had actual notice on September 26, 2005 that its easement was not registered in the Land Titles system. The respondent submits that the *Limitations Act* applies and the claim is barred.

13 Bell has suffered no "injury loss or damage" for which it claims relief against White Admiral. Bell has a right to an easement over White Admiral's land because White Admiral had actual notice of it. Bell seeks an order of the court declaring that it has this right. It also seeks an order that this right be registered in the Land Titles system which applies to White Admiral's land. In my view the *Limitations Act* does not apply.

Conclusion

14 Bell's application is granted. There will be an order as asked by Bell in paragraph 52 of its factum. Bell may make submissions on costs within 10 days of receipt of these reasons. White Admiral may have 10 days to reply.

Application granted.

Footnotes

* Additional reasons at *Bell Canada Inc. v. White Admiral Ltd.* (2011), 2011 ONSC 6921, 2011 CarswellOnt 12750 (Ont. S.C.J.).

Tab 6

1994 CarswellOnt 305
Ontario Court of Justice (General Division), In Bankruptcy

Canadian Engineering & Contracting Co., Re

1994 CarswellOnt 305, [1994] O.J. No. 4176, 28 C.B.R. (3d) 136, 50 A.C.W.S. (3d) 1165

Re bankruptcy of CANADIAN ENGINEERING & CONTRACTING CO. LIMITED

Registrar Ferron

Judgment: September 6, 1994
Docket: Doc. 32-064373

Counsel: *Craig J. Hill*, for appellant, 568805 Ontario Limited.
John D. Andrew, for trustee.

***Registrar Ferron*:**

1 The appellant holds a debenture dated October 4, 1984, which is expressed to, inter alia, secure the appellant against any real and immovable property then owned by the bankrupt or acquired by it after date by way of both specific and floating charge.

2 The debenture was filed with the controller of records at the office of the Ministry of Consumer and Commercial Relations for the Province on October 9, 1984.

3 At the date of the debenture the debtor owned property at 121 Shaw St. and 122 Burton St. in the City of Hamilton, and the debenture was registered in the appropriate Land Titles office against the title of these properties. The validity of the security held by the appellant against the aforementioned properties is not in issue.

4 In May, 1988, the debtor purchased 119 Shaw St. in the City of Hamilton. The debenture was not registered against this property in the Land Titles office until after bankruptcy and after registration by the trustee of the notice of the bankruptcy.

5 The debtor on October 14, 1993, made an assignment of its property to the trustee and, by the terms of the debenture, the charge crystallized as against the properties owned by it on Shaw St. and on Burton St.

6 On December 9, 1993, the trustee registered the assignment in bankruptcy on the title to the property at 119 Shaw St.

7 On or about June 28, 1994, the trustee disallowed the appellant's claim with respect to 119 Shaw St. on the ground that the registered assignment gave the trustee priority of interest in the property over the appellant's then unregistered security.

8 It is clear that the appellant cannot rely on the filing of the debenture with the Ministry of Consumer and Commercial Relations in order to establish priority of its secured interest in the property in issue over that of the trustee.

9 The trustee's position is that s.75 of the *Bankruptcy and Insolvency Act* is clear and unambiguous in its meaning that the security unregistered against the collateral when the assignment in bankruptcy was registered on title is "not valid and effectual" against the trustee.

10 The trustee's factum submitted by counsel states in part, "that Section 75 would be without effect if a debenture charging land, whether fixed or floating, could be registered subsequent to the notice of assignment in bankruptcy and still be valid and effectual as against the trustee".

11 That submission is both true and false. A charge in a debenture taken after the date of bankruptcy and registered after the registration of the assignment or notice of receiving order is fraudulent and void as against the trustee, but an instrument taken before the date of bankruptcy and unregistered is valid in accordance with its tenor notwithstanding the registration of the notice of bankruptcy by the trustee.

12 Section 75 of the Act was enacted to protect bona fide purchasers, mortgagees, and other security holders who deal with a bankrupt for value without notice of the bankruptcy and is designed to maintain their priority over that of the trustee notwithstanding that the bankrupt at the time of the transaction had no title to pass or interest to mortgage.

13 The section does this by notionally restoring the title in the property to the bankrupt for purpose of the specific transaction. The protection ends when the trustee registers notice of the bankruptcy on the title of the property in issue.

14 The section has no relevance to pre-bankruptcy transactions. Such transactions, such deeds, mortgages, and charges depend upon Provincial law for their validity. Since such transactions occur prior to bankruptcy they are not in conflict with the *Bankruptcy and Insolvency Act*, and accordingly its provisions are, by the authority of s. 72(1) of the Act not deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights.

15 With respect to deeds, mortgages and charges, there is not the problem of title which occurs once the vendor or mortgagor declares bankruptcy so that transactions valid between the purchaser or mortgagee and the "later" bankrupt are valid as between the former and the trustee. The trustee can have no higher rights than the bankrupt and the subsequent loss by the bankrupt of title cannot affect the validity of such documents. Specifically, the mere registration of the notice of bankruptcy on title cannot give the trustee priority.

16 If one were to substitute for the trustee a purchaser or mortgagee for value, then, the results would be different. But a trustee is not a purchaser for value. His title arises through operation of law and the transfer of registered land made without valuable consideration is, in accordance with both the *Land Titles Act* and the *Registry Act*, subject, so far the transferee is concerned, to any unregistered estates, rights, interest or equities subject to which the transferor held the land. The authority for that proposition is found in *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.) and *Craig v. McKay* (1906), 12 O.L.R. 121 (C.A.).

17 In the former case, the plaintiff loaned money to the registered owner of land on the security of a mortgage. The mortgage was not registered and thereafter the mortgagor made an assignment in bankruptcy. The trustee who had registered the assignment on title claimed priority over the unregistered mortgage.

18 At trial, the Judge gave judgment for the plaintiff and the Court of Appeal sustained that decision. At p. 265 the Court of Appeal said:

> In my opinion, the decision of the learned Judge was substantially correct, and should be modified in one formal respect only. The appellant is not a transferee for value; and, by sec.45 of the Land Titles Act, R.S.O. 1914, ch. 126 (now sec. 90), "a transfer of registered land, made without valuable consideration, shall be subject, so far as the transferee is concerned, to any unregistered estates, rights, interests, or equities subject to which the transferor held the same," etc.

19 In result, the appeal must be allowed, and the declaration requested made with directions to the trustee to do whatever may be necessary to permit the secured creditor to realize on its security.

20 The question of costs may be spoken to.

Appeal allowed.

Tab 7

John Macdonald & Co. v. Tew

Ontario Judgments

Ontario Supreme Court - Appellate Division

Mulock C.J.Ex., Maclaren J.A., Clute and Riddell JJ.

November 30, 1914

[1914] O.J. No. 139 | 32 O.L.R. 262

John Macdonald & Co. Limited v. Tew

Case Summary

Land Titles Act — Mortgage in Form Prescribed by Short Forms Act — Inability to Register — Deed of Assignment for Benefit of Creditors — Registration of — Priorities — R.S.O. 1914, ch. 120, secs. 30(2), 45, 115 — Form of Judgment — Rectification of Records — Declaration of Trust — Costs

In November, 1910, the registered owner of land conveyed it by way of mortgage to the plaintiffs as security for a debt-the mortgage-deed being in the form provided by the Short Forms of Mortgages Act. The land leaving been brought under the Land Titles Act, the mortgage could not be registered, and no registration of a charge was effected; in 1912, the plaintiffs procured the mortgagor to execute an instrument in the proper form under the Act. In the meantime the mortgagor had made an assignment to the defendant for the benefit of creditors, and the defendant had registered the assignment against the land mortgaged to the plaintiffs. In this action, the plaintiffs asked for a declaration that their mortgage was entitled to priority over the assignment; for a direction that the assignment be removed from the register or otherwise postponed to the mortgage; and for costs. At the trial judgment was given in favour of the plaintiffs: (1) declaring; that their mortgage was entitled to priority over the assignment, and directing that it be so recorded, and the register and records in the Land Titles office be rectified accordingly; (2) requiring the plaintiffs to value their security in connection with their claim against the estate of the mortgagor in the hands of the defendant; (3) directing that the plaintiffs be entitled to add the costs of the action to their claim against the estate; and (4) directing that the defendant's costs of the action should be paid out of the estate:

Held, upon appeal, affirming the judgment, that the plaintiffs were entitled to priority, the defendant not being a transferee for value: sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 120.

Per MULOCK C.J.Ex., and CLUTE J., that sec. 115 of the Act was applicable; and that the judgment should be varied by directing that, instead of recording the mortgage-deed in the books of the Land Titles office as a link in the chain of title, it should be deposited with the proper Master of Titles, and he should enter the plaintiffs on the register as owners of a charge, with such particulars to be taken from the mortgage-deed as are required by sub-sec. 2 of sec. 30 of the Act.

Per MACLAREN J.A., and RIDDELL J., that, in view of the many difficulties attending amendment of the records of a Master of Titles, it was not wise to order any change under sec. 115; the judgment should be varied by substituting for the direction to amend the records a declaration that the defendant was a trustee for the plaintiffs to the extent of their mortgage, in priority to the trusts of his assignment.

The members of the Court not being agreed as to the variation to be made, the appeal was dismissed with costs.

1 APPEAL by the defendant from the judgment of WINCHESTER Senior Judge of the County Court of the County of York, in favour of the plaintiffs, in an action in that Court, tried by him without a jury.

2 The plaintiffs by their statement of claim alleged that in 1911 Sarah A. Campbell made an assignment for the benefit of her creditors to the defendant, who thereupon registered the assignment against, land owned by her, which had been brought under the Land Titles Act; that on the 10th November, 1910, the plaintiffs, being creditors, obtained from her a mortgage for $600 on this lot; but, as it was in the form given by. the Short Forms of Mortgages Act, they were unable to record it; that, after some time, they succeeded in getting her to execute a mortgage in the proper form (23rd August, 1912), but could not record this by reason of the assignment to the defendant; that the plaintiffs then endeavoured to induce the defendant to recognise their rights as mortgagees prior to the assignment, but he refused to do so. The plaintiffs claimed: (1) a declaration that their mortgage was entitled to priority over the assignment; (2) a direction that the assignment be removed from the register or be otherwise postponed to the mortgage; (3) costs.

3 The County Court Judge gave judgment declaring that the plaintiffs' mortgage was entitled to priority to the deed of assignment for the benefit of creditors made by Sarah A. Campbell to the defendant; directing that it be so recorded, and the register and records in the Land Titles office rectified accordingly; directing that the plaintiffs should value their security-in connection with their claim against the estate of Sarah A. Campbell; that they should be entitled to add their costs of this action to their claim against the estate; and that the defendant's costs of the action should be paid out of the estate.

4 October 27. The appeal was heard by MULOCK C.J.Ex., MACLAREN J.A., CLUTE and RIDDELL JJ.

5 G. G. S. Lindsey, K.C., for the appellant, argued that, granting that under the statute there is no question as to the priority of a valid charge over a previously registered assignment for the benefit of creditors, the instrument for which the plaintiffs claim priority in this action is not entitled thereto, and has no effect as a charge. It did not conform to the Land Titles Act, the forms used in which are mandatory. The plaintiffs cannot avail themselves of the rights and powers vested in a mortgagee at common law, and incidental to his estate, but only of such as rest directly upon the provisions of the statute itself: Smith v. National Trust Co. (1912), 45 S.C.R. 618, 639, 640. The plaintiffs' position is that of a simple contract creditor: Gilbert v. Reeves & Co. (1911), 4 Sask. L.R. 97, 102. The following authorities were also referred to: Craig v. McKay (1906), 12 O.L.R. 121, 125; Re M. Rumely Co. and Registrar of the Saskatoon L.R. District (1911), 17 W.L.R. 160; In re North- West Telephone Co. Limited (1909), 2 Sask. L.R. 379.

6 A. C. McMaster, for the plaintiffs, respondents, argued that the judgment of the learned trial Judge was right and should be affirmed. The plaintiffs' rights are clear under sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126, and sec. 115[*] indicates the method in which they should be secured.

7 Lindsey, in reply, argued that sec. 115 of the Act did not apply to the present case, and referred to Thom on the Canadian Torrens System, pp. 129, 130.

November 30. MULOCK C.J.Ex.

8 One Sarah A. Campbell was the registered owner of lot No. 88 in the village of Cobalt, in the district of Nipissing, and on the 10th November, 1910, conveyed the same, and other lands, by way of mortgage, in the form provided by the Short Forms of Mortgages Act to the respondent company as security for a debt owing by her.

9 The title to the property being under the Land Titles Act, the mortgagees were advised that they could not register their mortgage, and, on or about the 23rd August, 1912, obtained from the mortgagor a transfer of the property under the Land Titles Act; but, prior to malting this transfer, the mortgagor had made an assignment of her property to the appellant for the benefit of her creditors, and that assignment had already been registered against the property.

10 After some unsuccessful negotiations with the appellant for the purpose of obtaining from her a recognition of the respondent company's claim for priority in respect of the mortgage security, the company brought this action to enforce the same. It was tried by His Honour Judge Winchester, Senior Judge of the County Court of the County of York, who gave judgment declaring that the mortgage ranked prior to the deed of assignment for the benefit of creditors, and directing that it be so recorded, and that the register and records in the Land Titles office be rectified accordingly. From that judgment the defendant appeals.

11 In my opinion, the decision of the learned Judge was substantially correct, and should be modified in one formal respect only. The appellant is not a transferee for value; and, by sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126, "a transfer of registered land, made without valuable consideration, shall be subject, so far as the transferee is concerned, to any unregistered estates, rights, interests, or equities subject to which the transferor held the same," etc.

12 The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: National Bank of Australasia v. Morrow (1887), 13 V.L.R. 2; Jellett v. Wilkie (1896), 26 S.C.R. 289.

13 The mortgage in question purports to convey the legal estate; and, having regard to the fact that, under the Land Titles Act, a security on land is to be created by a charge, the legal estate remaining in the owner, the proper course is, instead of recording the instrument in the books of the office as a link in the chain of title, to deposit it with the proper Master of Titles; and thereupon that officer should enter the respondent company on the register as owners of a charge, with such particulars to be taken from the mortgage as are required by sub-sec. 2 of sec. 30 of the Land Titles Act.

14 Subject to this variation, the appeal is dismissed with costs.

CLUTE J.

15 I am of the same opinion. The defendant admits that the plaintiffs are the mortgagees of the: lands in question. The defendant is assignee for the benefit of creditors under an assignment made subsequent to the plaintiffs' mortgage. The plaintiffs' mortgage, not being in the form required, could not be registered under the Land Titles Act. To cover this defect, a subsequent conveyance was obtained from the mortgagor. Even if this could be registered, it would shew a title in the defendant before registration. The plaintiffs' title to the land is beyond doubt. It is purely a matter of registration. In my opinion, sec. 115 of the Land Titles Act was passed expressly to cover a case like the present. The trial Judge properly held that the plaintiffs were entitled as mortgagees in fee. The register does not shew this, and it should be rectified in the manner suggested in the judgment of the Chief Justice.

16 With this variation, the appeal should be dismissed with costs.

RIDDELL J.

17 The statement of claim alleges that in 1911 Sarah A. Campbell made an assignment for the benefit of her creditors to the defendant, who thereupon registered the assignment against certain lands of here under the "Torrens title;" that on the 10th November, 1910, the plaintiffs, being creditors, obtained from her a mortgage for $600 on this lot; but, as it was in the form under the Short Forms of Mortgages Act, they were unable to record it. After some time, they succeeded in getting her to execute a mortgage in the proper form-the 23rd August, 1912-but could not record this by reason of the assignment to the defendant. They then endeavoured to have the defendant recognise their right as mortgagees prior to his assignment, but he refused. They, therefore, claimed: (1) a declaration that their "said mortgage" is entitled to priority over the assignment; (2) a direction that the said assignment be removed from the register or otherwise postponed to the "said mortgage;" (3) costs.

18 The defendant in his statement of defence admits the assignment to him, and the mortgage of the 10th November, 1910, to the plaintiffs, but says that the assignment covers other lands in respect to which the plaintiffs claim no priority; that such a mortgage the Master of Titles is bound to record, and the plaintiffs should have proceeded to compel him to do so; that "if, as the plaintiffs allege, the said mortgage was given to secure the plaintiffs as creditors, they should have so stated in the proof of claim" against the estate, but that they swore that they had no security, and that they had been paid a dividend on the faith of this affidavit; that the defendant now for the first time learns of the existence of this security, and he calls upon the plaintiffs to value the same; he "admits as a matter of law that an assignee in insolvency does not acquire priority oiler a previous unregistered deed;" he submits that, "on a sale of property under such a deed, a purchaser must so admit as the defendant does in paragraph 7" (the last-mentioned paragraph), and further says that "the proper Master of Titles must so admit as the defendant does in paragraph 7 hereof set out." He submits that the only deed to which his assignment is subject is that of the 10th November, 1910 (he says "that mentioned in paragraph 2," but this is a clerical error for "paragraph 3"); that the charge obtained in August, 1912, is a different contract from that of the 10th November, 1910. He denies that he has ever refused to recognise the right of the plaintiffs; says that the plaintiffs never submitted a proper consent for him to sign; and says that, subject to the mortgage of the 10th November, 1910, he is the owner of the equity of redemption in the land.

19 This tortuous, complicated, and largely irrelevant defence covers about three pages of typewriting. It seems to have been intended to prevent, as no doubt it did prevent, a motion for judgment upon the pleadings, to force a trial, and prevent a great saving of costs; a simple, plain admission of the plaintiffs' rights is avoided, and a general statement of general law substituted.

20 The plaintiffs join issue.

21 After a trial before His Honour Judge Winchester, the following judgment was entered:

> "1. This Court doth declare that the mortgage mentioned in paragraph 3 of the plaintiffs' statement of claim herein, and made on the 10th day of November, 1910, by Sarah A. Campbell to John Macdonald & Company Limited, of the city of Toronto, on the lands described as lot 88 on the east side of Birch avenue, in the town of Cobalt, according to plan number 52, is entitled to priority to the deed of assignment for the benefit of creditors made by the above-named Sarah A. Campbell to Richard Tow, and mentioned in paragraph 2" (this should be "3") "of the plaintiffs' statement of claim, and directs that it be so recorded and the register and records in the Land Titles office be rectified accordingly.
>
> "2. And this Court doth order that the plaintiffs do value their security in connection with their claim against the estate herein on or before the 30th day of September, 1914.
>
> "3. It is further ordered that the plaintiffs be entitled to add the costs of this action to their claim against the estate.
>
> "4. And it is further ordered that the defendant's costs of this action be paid out of the said estate."

22 The defendant now appeals.

23 I had and have the misfortune not to be able to understand precisely what position the defendant desired to take in some respects, but one thing was made perfectly clear, i.e., that he does not now dispute that the unregistered mortgage in question here takes priority over his assignment. What he now claims is that, as he says in the last paragraph of his statement of defence, he is the owner of the equity of redemption subject to the said mortgage. In this the plaintiffs agree, so that the declaration of right in the first part of the judgment contained is unexceptionable; the defendant, indeed, says it is unnecessary, but that is another matter.

24 Again, the defendant contends that the order to record that mortgage is wrong; and in that the plaintiffs concur.

25 There are only two matters that are open: (1) what order, if any, should be made under sec. 115 of the Land Titles Act, R.S.O. 1914, ch. 126, or otherwise; (2) costs.

26 In view of the many difficulties attending amendment of the records of a Master of Titles, I think it not wise to order any change under sec. 115, when all the advantage derivable from that course can be easily and simply obtained by declaring the defendant trustee for the plaintiffs to the extent of their mortgage of November, 1910, in priority to the trusts of his assignment.

27 Then as to costs. On the 24th February, 1914, the plaintiffs' solicitors wrote to the defendant saying that they had already pointed out to him that the plaintiffs had in 1910 obtained a mortgage from Sarah A. Campbell which they were unable to register, but that recently they had procured a mortgage in proper form, and "we did not consider that your assignment could avail against this." The solicitors go on to say that the plaintiffs had sold the property and wanted to get rid of the assignment, and ask an answer whether the defendant will release the property. The very same day, the defendant answered: "On statement of facts made by you, we cannot see our way to allow you to have priority over assignment." After waiting some twenty days, the plaintiffs issued their writ. That the plaintiffs were justified in asking a declaration of their right, is clear. That the defendant in denying the right now admitted was wrong, is equally clear.

28 Then, when it came to the pleadings, the defendant filed a long, involved, and argumentative statement of defence, instead of plainly and unequivocally admitting the plaintiffs' claim, so that a motion for judgment could be made. I think the County Court Judge was not at all too severe on the defendant in ordering that the plaintiffs should have their costs; but rather fault might be found that they add these costs to their claim, and thereby obtain only a dividend on them.

29 As to the costs of the appeal, the plaintiffs were substantially right; the form of the judgment was wrong. This Court has recently decided, in Watson v. Jackson (1914), 31 O.L.R. 481, a similar case, that the respondent should have his costs. That, I think, should be directed in this case also.

30 Some argument took place before us on the effect of the plaintiffs receiving a dividend on the hypothesis that they had no security; but there is no evidence of that fact, if it is a fact; and the principle of Clark v. Phinney (1896), 25 S.C.R. 633, and Steen v. Steen (1907), 9 O.W.R. 65, 110 O.W.R. 720, cannot be made to apply here.

31 MACLAREN J.A., agreed with RIDDELL J.

[In the result, the Court being divided as to the variation, the appeal was dismissed with costs.]

G. G. S. Lindsey, K.C., for the appellant.

A. C. McMaster, for the plaintiffs, respondents.

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* 115. Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land of charge, and as a consequence of such decision the Court is of opinion that a rectification of the register is required, the Court may make an order directing the register to be rectified in such manner its may be deemed just.

Tab 8

2006 CarswellOnt 5597
Ontario Court of Appeal

Elias Markets Ltd., Re

2006 CarswellOnt 5597, [2006] O.J. No. 3689, 10 P.P.S.A.C. (3d) 255, 151 A.C.W.S. (3d) 294, 216 O.A.C. 49, 25 C.B.R. (5th) 50, 274 D.L.R. (4th) 166, 47 R.P.R. (4th) 32

IN THE MATTER OF ELIAS MARKETS LTD., ELIAS GROUP LTD. AND ELIAS PROPERTIES LTD. CARRYING ON BUSINESS IN THE CITY OF WINDSOR, COUNTY OF ESSEX AND PROVINCE OF ONTARIO

And IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, SECTION 47(1), AS AMENDED

D. O'Connor A.C.J.O., Doherty, J. MacFarland JJ.A.

Heard: May 10, 2006
Judgment: September 19, 2006
Docket: CA C44161

Proceedings: affirming *Elias Markets Ltd., Re* (2005), 2005 CarswellOnt 3865, 14 C.B.R. (5th) 20, 77 O.R. (3d) 461, 34 R.P.R. (4th) 127, 8 P.P.S.A.C. (3d) 228 (Ont. S.C.J.)

Counsel: A. Duncan Grace for Bank of Montreal
Milton A. Davis, Brett D. Moldaver for Royal Bank of Canada, Royal Trust Corporation of Canada
Fred Myers for RSM Richter Inc.

***J. MacFarland J.A.*:**

1 The appellant, Bank of Montreal ("BMO") appeals from the order of Rady J. dated August 19, 2005. It asks this court to set aside that part of her order which entitles Royal Bank of Canada and Royal Trust Corporation of Canada (collectively "RBC") to the remedy of subrogation and to recover from the proceeds realized by the interim receiver, RSM Richter Inc. ("Interim Receiver") from the sale of the property municipally known as 655 and 755 Crawford Avenue, Windsor, Ontario. BMO seeks an order that RBC is not entitled to the remedy of subrogation or to recover any amount from the proceeds realized from the sale of the property and that BMO is entitled to recover under its security the proceeds.

2 BMO also seeks to set aside that part of the order declaring that an assignment of rents to RBC is in priority to the security held by BMO. In its place, BMO seeks an order declaring the BMO security to be in priority to the RBC assignment of rents and directing the Interim Receiver to pay to BMO the rents collected in respect of the property.

3 RBC cross-appeals and asks that this court set aside that portion of the order denying RBC an equitable mortgage on the subject lands. In its place, RBC seeks an order directing that RBC is entitled to the sale proceeds of the subject property in priority to any claim by BMO or any other creditor.

4 By the terms of her order, the motion judge ordered that the Interim Receiver was authorized and directed to distribute on a final basis the proceeds of sale and rental of the property at 655/755 Crawford Avenue, Windsor, Ontario as follows:

(a) to Royal Bank of Canada, the net rental proceeds;

(b) to Royal Bank of Canada, the sum of $854,158.11 from the net sale proceeds;

(c) to Bank of Montreal, the balance of the net proceeds.

5 BMO takes the position that because the mortgage held by RBC violated the provisions of the *Planning Act*, R.S.O. 1990, c. P.13 it is invalid as is the Assignment of Rents, which was taken at the same time and is, by its terms, "additional security" and therefore collateral to the mortgage. If BMO is correct, it would move into a first priority position ahead of RBC and be entitled to the entire net proceeds, both from the sale of the property and the rents collected.

The Facts

6 The facts which give rise to this appeal are complex but must be set out in detail for a proper understanding of the issues.

7 This proceeding arises out of the insolvency of Elias Markets Ltd. ("Markets"), Elias Properties Ltd. ("Properties") and Elias Group Ltd. ("Group") (collectively "the companies"). The companies carried on a retail grocery business in Windsor and surrounding area. Markets operated the grocery stores and Properties owned the real estate, including 655/755 Crawford Avenue. Group was a holding company and did not carry on any active business.

8 The proceeding before Rady J. was an application by the Interim Receiver for directions as to the manner of distribution of the proceeds of the sale of the Crawford Avenue properties ($1,670,000) and rents collected therefrom.

9 On January 6, 1996, one of the Elias companies, 1156712 Ontario Ltd. (hereinafter "1156712") and a predecessor to Properties, bought property at 655 Crawford Avenue, Windsor ("Parcel One").

10 In so doing, 1156712 assumed: an existing mortgage in favour of Royal Trust with a principal balance of $657,700.18 outstanding on closing; and an existing mortgage in favour of Larcon Holdings Inc. ("Larcon") with a principal balance of $340,279.40 outstanding on closing.

11 On June 10, 1997, another Elias Company, 882876 Ontario Ltd. ("882876"), also a predecessor to Properties, purchased four additional parcels of land adjacent to the north boundary of Parcel One. ("Parcels Two, Three, Four and Five").

12 Markets operated a grocery store on Parcel One. In 1998, as part of a plan to develop the entire property, 1156712 and 882876 signed a site Plan Agreement with the City of Windsor. Parcels Four and Five were conveyed to the City. Parcels One, Two and Three remained in the hands of the numbered companies (Parcel One in 1156712 and Parcels Two and Three in 882876). The development proposed a new grocery store building at the south end of Parcel One. The existing building (where Markets was then operating a grocery store) at the north end of Parcel One was to be leased to a bingo hall operator. Parking was to be on Parcel One between the two buildings and on Parcels 2 and 3.

13 On March 15, 1999, RBC issued a commitment letter agreeing to lend $2,300,000 to 1156712, secured by a first mortgage on Parcel One ("the mortgage commitment agreement" or "MCA"). The MCA required that the existing first mortgage against Parcel One in favour of RBC be discharged from the loan proceeds. As the terms of the MCA required that the security for the loan be a first mortgage on the subject property, any other encumbrances which would otherwise rank in priority to this new mortgage would necessarily have to be discharged.

14 At this point in time, 1156712 did not own any abutting parcels of land; it owned only Parcel One.

15 On March 26, 1999, Joseph Elias, on behalf of 1156712, signed the MCA and accepted its terms.

16 Six days later, by Articles of Amalgamation dated April 1, 1999, 1156712 and 882876 and a third Elias company amalgamated to form Properties ("Properties"). The articles of amalgamation were registered only against title to Parcel One.

17 At this time, Joseph Elias asked RBC to draw on the $2,300,000 of available financing in order to start the construction on Parcel One. As security for the construction financing, Properties granted to RBC a $1,400,000 construction mortgage, registered against Parcel One on May 26,1999.

18 On November 26, 1999, the $2,300,000 mortgage was registered in favour of RBC against Parcel One. $1,400,000 of this money went to discharge the construction mortgage. Another $854,184.11 was paid to satisfy prior encumbrances, which included:

1. Royal Bank of Canada mortgage payout — $574,172.55

2. National Bank of Canada Mortgage payment — $161,000.00

3. City of Windsor taxes — $36,685.20

4. Larcon Holdings Inc. mortgage payout — $82,326.36

19 At the time of the registrations, as a result of the amalgamation, Properties was now the owner of Parcels One, Two and Three. The RBC mortgages — registered May 26, 1999 and November 26, 1999 — were registered only against Parcel One, and thus were void under s. 50(3) of the *Planning Act.* RBC and Properties were unaware at the time that the mortgages were void. All parties to the mortgages had been represented throughout these transactions by the same solicitor, Jeffrey Slopen.

20 On June 26, 2001, BMO granted Markets a revolving line of credit. As security, Properties gave a guarantee and executed a General Security Agreement (GSA) in favour of BMO. By spring of 2002, the companies were in financial difficulty.

21 On May 6, 2002, almost one year later, BMO registered a Notice of Agreement Charging Lands against Parcel's One and Six. On August 18, 2002, it registered a caution against Parcels One and Three. The registrations coincided with BMO's realization that RBC's mortgage was defective, a fact still unknown to RBC. On August 23, 2002, the Interim Receiver was appointed. It was only after the appointment of the Interim Receiver that questions were raised about the validity of the RBC mortgage.

22 BMO admits it was aware of the mortgage financing in place before it granted the line of credit and obtained the GSA. It was also aware there were prior registrations in favour of RBC. BMO admits it granted the demand loan facility to Markets on the assumption the $2,300,000 RBC mortgage was validly registered and would have priority over its security interest.

The Rectification Application

23 On learning of the breach of the *Planning Act*, Jeffrey Slopen's law firm brought an application to rectify the mortgages, so that they would charge Parcels Two and Three in addition to Parcel One. RBC, BMO, Properties and the Interim Receiver were named as respondents to that application, which proceeded before Abbey J.

24 In that application, both Slopen and the principal of the mortgagor filed evidence to the effect that it was their common intention to mortgage all three parcels of land.

25 Abbey J. dismissed the application and, as a result, RBC's mortgage against Parcel One remained void under the *Planning Act*. In his reasons, Abbey J. noted that in March 1999, at the time RBC agreed to advance the $2,300,000, there was no *Planning Act* violation. The pre-amalgamation corporation, 1156712, owned only Parcel One and did not own abutting land at the time. The amalgamation that ultimately affected the validity of the mortgage was effected after the MCA was entered into but before the $2,300,000 RBC mortgage was registered. But for the amalgamation and the effect that triggered under the *Planning Act*, the registered mortgage would be valid.

Issues

26 The appeal and the cross-appeal raise the following issues:

1. Did the motion judge err in failing to find that the principles of *res judicata* and abuse of process precluded RBC from asserting a priority claim to the net sale proceeds of the subject property?

2. If *res judicata* and abuse of process do not apply, should RBC be granted the equitable remedy of either equitable mortgage or subrogation?

3. Does the RBC Assignment of Rents have priority over BMO's security in respect of the net rents collected by the Interim Receiver from the subject property?

27 For the reasons that follow, I am of the opinion that the motion judge did not err when she concluded that neither the principles of *res judicata* nor abuse of process precluded RBC from asserting its priority claim on the basis of equitable mortgage or subrogation; that RBC does not have a valid $2,300,000 equitable mortgage on Parcel One, but is entitled to priority over BMO to the extent of $854,184.11 on the basis of subrogation; and that the RBC Assignment of Rents has priority over BMO's security.

I. Res Judicata and Abuse of Process

28 BMO argues that, on the motion before Rady J., RBC was in substance seeking the same remedy as was sought in the rectification application — priority over the net sale proceeds of the Crawford Avenue property — on the basis of different legal theories. On the basis of the doctrines of *res judicata* and abuse of process, BMO submits that those legal theories ought to have been advanced as part of the rectification application.

29 The motion judge, in her careful reasons, concluded:

> [28] The unsuccessful application for rectification of the mortgage brought by Mr. Slopen's law firm was in the nature of a "salvage" action to rectify the mortgage to reflect what was argued to be the parties' intention. If rectification had been granted, RBC would have enjoyed a priority position and presumably the solicitor's malpractice suit would be avoided. There was no need to raise any argument with respect to equitable principles or the doctrine of subrogation.
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> [29] The present proceeding is brought by the Interim Receiver, seeking the Court's direction on the issue of priorities, the RBC mortgage having been found to be illegal. Essentially the court is being asked to deal with the consequences of the illegal mortgage. No legal or factual issues are being relitigated and this is not an attempt to impeach, in any way, the findings made by Abbey J.

30 I agree. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), at 329, Laskin J.A. writing on behalf of this court noted:

> *Res judicata* itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding.

31 In this appeal, BMO relies on cause of action estoppel.

32 BMO submits that the evidence in support of the equitable mortgage and subrogation remedies sought before Rady J. was before the court on the rectification application. Having sought to advance RBC's claim to priority in the rectification application solely on the basis of rectification, BMO submits that RBC cannot now in this proceeding advance a claim to priority on the basis of different legal theories. Those legal theories were properly part of and ought to have been advanced in the rectification application.

33 The rectification application was concerned with the mortgage itself, where it was argued that it was always the intention of the parties — both RBC and Properties — that the mortgage was intended to apply to Parcels One, Two and Three. That application was brought by the solicitors who acted for both parties to the mortgage. Had the application been successful, the mortgage would no longer be in breach of the *Planning Act* and an action against the solicitors would have been avoided. When the application failed, the adversity of interest between the solicitors and RBC crystallized. An action against the solicitors in negligence and breach of contract has been instituted and remains outstanding.

34 Had RBC sought to have the issue of priorities as between it and BMO adjudicated in the proceedings before Abbey J., it would have been obliged to bring a separate application — an application to which the solicitors would not be a party and to obtain an order to have its application heard immediately following the rectification application. The issue of priorities was, in my view, irrelevant to the issue raised in the rectification proceeding. Only when the application for rectification was dismissed did it become necessary to determine the competing priority claims.

35 The proceeding before Rady J. was brought by the Interim Receiver and sought the direction of the court as to whom the monies it had collected from the sale of the property and the collection of rents should be paid. This was a very different issue than the one determined by Abbey J.

36 While some of the evidence before Abbey J. was necessarily led before Rady J. to provide context and background, the evidence that specifically related to the priorities issue was new. Clearly relevant to the priorities claim was evidence about what BMO knew about prior encumbrances, specifically the RBC mortgage, when it made its decision to loan money and take a GSA as security. Such was not evidence before Abbey J., nor could it be.

37 In *McQuillan v. Native Inter-Tribal Housing Co-operative Inc.* (1998), 42 O.R. (3d) 46 (Ont. C.A.), Charron J.A. writing for this court, wrote at p. 50:

> The respondent does not contend that the cause of action is the same in both applications. Indeed, it is not. The respondent relies rather on a wider principle, often treated as covered by the plea of *res judicata*. The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at pp. 358-9 ... (citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.C.)):
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>> ... where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

38 In *McQuillan*, the appellant was seeking a prescriptive easement over a two-foot strip of land on the respondent's property. In earlier proceedings, the appellant had sought a declaration of possessory title to the same two-foot strip of land based on much the same evidence. In the circumstances, the court had no difficulty concluding that the second application was precluded by the doctrine of *res judicata*. The court noted, at p. 51:

> Upon careful review of the material filed in support of each application in this case, I am persuaded that the respondent's position should be adopted. Although, in a strict legal sense, a different cause of action is advanced on this application, the appellant is in effect seeking an analogous remedy based on virtually identical facts. In each application, the appellant asserted a right to continue to use the two-foot strip of land on the respondent's property as part of her driveway. It does not appear that it would make any practical difference to the appellant whether this right was asserted by way of possessory title or by way of prescriptive easement. On the facts as presented on the earlier application, it would have been open to advance not only the claim for possessory title but also, in the alternative, the claim to a prescriptive easement. In my view, the appellant's second application falls clearly within the scope of the doctrine of *res judicata* in its wider application.

39 In my view, that is not this case. Very different relief was sought and different evidence heard in each of the two proceedings.

40 Clearly, the Interim Receiver had to have the priorities issue resolved before it could disburse funds, and the rectification application did not and could not deal with that issue. The doctrine of *res judicata* simply does not arise nor is there any abuse of process by bringing the second application.

II. A) Subrogation

41 BMO argues that when it acquired its security interest (some two years after the RBC mortgage had been granted) in the Crawford property, there were no other valid encumbrances affecting the Crawford property. It says that the RBC mortgage, although registered, was void and of no effect and as a result, BMO acquired a first priority position in the Crawford property. As a purchaser for value, the only equities enforceable against BMO are those of which it had notice at the time it acquired its interest in the Crawford Property. And BMO submits that it had no notice of RBC's equity of subrogation.

42 The fallacy in BMO's argument is that at the time it advanced funds and obtained the GSA which secured those funds, it was aware of the RBC $2,300,000 mortgage, believed that that mortgage had priority over its GSA and was not aware that there was any problem with the RBC mortgage. It advanced funds believing that its GSA ranked behind the RBC $2,300,000 mortgage. It was only after the companies fell into financial difficulty and the receiver appointed that a question was raised (by the Interim Receiver and not BMO) about the validity of RBC's security in view of the apparent breach of the provisions of the *Planning Act*. Only after it became aware of the Elias financial difficulties. Thus, BMO was not in the position of a *bona fide* purchaser for value without notice as it did not give value for taking first place. It got what it paid for, and that did not include ranking as first mortgagee on the property.

43 In *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1997), 34 O.R. (3d) 583 (Ont. C.A.), this court considered the equitable remedy of subrogation. The facts in that case are as follows. The subject property was a family home purchased by IS and BS as joint tenants in December, 1988. As part of the purchase, IS and BS granted a first mortgage to Scotia Mortgage for $220,000. On April 23, 1990, IS and BS gave a further mortgage to the Bank of Nova Scotia in the sum of $15,000.

44 In June 1991, RS, the son of IS and BS, was a commercial tenant of Creditview. On June 7, 1991, Creditview commenced an action against RS claiming damages for breach of lease. IS was also named a defendant in that action as the indemnifier of RS with respect to his obligations under the lease. IS transferred his interest in the home property to BS on March 12, 1991.

45 On February 28, 1992, Creditview commenced an action against IS and BS for a declaration that the transfer from IS to BS was a fraudulent conveyance and void as against Creditview.

46 On March 2, 1992, Creditview obtained a certificate of pending litigation (CPL) and registered it against the title to the home property.

47 On September 3, 1992, Mutual Trust agreed to provide $230,000 to refinance the home property to be secured by a first charge. A solicitor retained by Mutual Trust to act on its behalf did not report the existence of the CPL to Mutual Trust.

48 The Mutual Trust refinancing charge was registered September 16th, 1992, which secured the principal sum of $229,500. Discharges of the Scotia Mortgage and Bank charges were also registered. No request was made to Creditview to subordinate its CPL to the Mutual Trust charge.

49 A total of $228,863.37 was advanced under the Mutual Trust charge. Of that sum, $227,967.14 was paid to Scotia Mortgage and the Bank for discharges of their charges.

50 Following its discovery of the CPL on title, Mutual Trust brought an application for an order declaring that the CPL was subordinate to the Mutual Trust charge. The application succeeded on the ground that the Mutual Trust charge was subrogated to the Scotia Mortgage and the Bank charges that it replaced and, accordingly, it ranked ahead of the CPL. This court noted, at pp. 586-587:

In granting Mutual Trust's application, Adams J. held that the doctrine of subrogation applied, that it was not proscribed by the *Registry Act*, R.S.O. 1990, c. R.20, that the fundamental principle underlying the doctrine was one of fairness in light of all the circumstances, that it applied to certificates of pending litigation, that the negligence of the party claiming subrogation was not determinative of the issue, that subrogation is not precluded by the fact that the lands in question are in the land titles system, and the fact that IS was only a guarantor of Mutual Trust's charge presented no obstacle to granting the declaration sought. I agree entirely with his reasoning and his conclusions of these points [citation omitted].

51 The court went on to quote with approval the following reasoning of Adams J:

The fundamental principle underlying the equitable doctrine of subrogation is one of fairness in light of all the circumstances. Within this principle is an understanding that no injustice is done by the appropriate subrogation of a party to the rights of original mortgages. Thus Street J. in *Brown v. McLean* (1889), 18 O.R. 533 (H.C.) at p. 536, stated:

I think, however, that the plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the Defendant's *fi fa.* He would either have refused to make the advance altogether, or he would have had the mortgages assigned to him instead of discharging them.

It is equally clear that the defendant has not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position.

. . . . .

This is because the equity of subrogation affixes to the land in relation to which the third party advanced the mortgage funds. Further, it is not determinative that the entire situation arises because of the negligence of the party claiming subrogation. ... In fact, the doctrine is usually called into play because of a mistake or inadvertence. Accordingly, it is not enough to point to negligent conduct to defeat the doctrine's application. The issue remains one of fairness between the affected parties having regard to all the circumstances.

52 The motion judge in this case concluded that RBC was entitled to rely on the doctrine of subrogation to recover monies advanced to pay municipal taxes and to discharge prior mortgages on Parcel One, all of which totalled $854,184.11. She concluded there was ample authority for the proposition that a mortgagee who pays off earlier encumbrances is entitled to the priority position of those earlier charges. She quoted from *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866 (Eng. Ch. Div.), as follows:

[W]here a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in a default of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee.

53 The motion judge reasoned:

[47] ... In my view, it would be simply unfair in the circumstances of this case to deny RBC its subrogation rights. BMO did not rely on the abstract of title to its detriment. Indeed, BMO was aware of the prior advances made by RBC and it assumed that RBC's security was validly registered. This is made evident by the candid testimony of James Graham, a representative of BMO, during the course of his cross-examination. The transcript reveals the following questions and answers.

58Q. And you were aware of the mortgage financing that had been put in place before Bank of Montreal got involved?

A. That's right, yes.

125Q. And so Bank of Montreal knew that there were prior registrations including registrations in favour of Royal Bank, right?

A. That's right.

127Q. Now can we agree, Mr. Graham, that when the Bank of Montreal first lent its money to or granted demand loan facility to Elias it assumed that Royal Trust mortgage of 2.3 million dollars was validly registered?

A. Yes, that's right.

[48] As a result, BMO made its lending decision knowing of RBCs prior registered interest. Presumably, it was content to rank behind the RBC mortgage of $2.3 million. That was a business decision that it was entitled to make after weighing the relative risks and benefits.

[49] BMO may suffer a loss but it seems to me that this was a risk undertaken by BMO in making the loan in question. Its loss is not, strictly speaking, caused by RBC's right of subrogation, but rather by reason of the deficiency in the value of the security and the underlying covenant. Moreover, to deny subrogation would give BMO an unanticipated windfall. BMO would be unjustly enriched ... In other words, BMO would receive the value of RBC's advances totalling $854,184 which increased the equity in the property and it would be unjustly enriched as a result. This windfall is made more unfair because BMO only discovered that there might be a defect in RBC's security in the spring of 2002, more than a year after its registrations under the PPSA. It was at that time that BMO took steps to register its GSA against Parcels 1 and 3. BMO also registered its Notices of Agreement Charging Land and Caution in May, August and October 2002, all after it became aware of the potential defect in the RBC mortgage.

[50] I pause here to note that RBC is entitled to subrogation not only for the mortgages that it retired but also for the City taxes it paid on behalf of the mortgagor. Authority for this is found in *Traders Realty Ltd. v. Huron Heights Shopping Plaza Ltd*., [1967] 64 D.L.R. (2d) 278 (H.C.J.) and the rationale is consistent with the reasoning expressed in the *Creditview* trilogy reviewed above.

[51] Before leaving the subject, I should deal with BMO's submissions on the issue. It asserts that the doctrine does not appear to have been applied to give a claimant priority over a creditor whose claim did not exist at the time of the payment or advance in question. I can see no reason, in principle, why subrogation should not apply in such a case, particularly where the subsequent creditor has not been misled or has not relied on an abstract of title to its detriment.

[52] BMO asserts that subrogation cannot arise because the RBC mortgage was void. I disagree. Subrogation does not depend on the validity of the underlying registration but arises by virtue of the advance of funds to pay out prior encumbrances.

54 I agree with her reasoning. On the facts, there is no question that BMO assumed that RBC's security had priority to the extent of $2,300,000 over its GSA. It made its loan to the companies on that basis and, at the time, had no basis to question the validity of the RBC mortgage. It advanced its funds on the assumption that the RBC mortgage was valid and had priority over the GSA.

55 In such circumstances, there can be no unfairness to BMO if the doctrine of subrogation is invoked to give priority to RBC over BMO to the extent of the earlier mortgages and municipal taxes paid out from the funds advanced by RBC.

B) Equitable Mortgage

56 On cross-appeal, RBC argues that it has a valid equitable mortgage for $2,300,000 on Parcel One, which was created on March 26, 1999 when 1156712 accepted the terms of the RBC MCA dated March 15, 1999. When that equitable mortgage was created, title to Parcel One was in the name of 1156712, which owned no abutting land. Thus, RBC submits, there was no violation of the *Planning Act*.

57 The motion judge rejected this argument. In reaching this conclusion, the motion judge relied on the decision of this court in *Tessis v. Scherer* (1982), 39 O.R. (2d) 149 (Ont. C.A.), leave to appeal to S.C.C. refused, [1982] 2 S.C.R. xi (S.C.C.).

In that case, a mortgagee sought to enforce a mortgage that had been made in violation of the *Planning Act*; the mortgagor owned abutting parcels of land at the time of the mortgage. This court concluded that the mortgage conveyed no interest as a result of this breach. It does not appear that an argument was made about whether the loan agreement between the parties created an equitable mortgage.

58 That issue was raised specifically in the related matter before Sutherland J. in *Scherer v. Price Waterhouse*, [1985] O.J. No. 881 (Ont. H.C.). In his decision, Sutherland J. carefully reviewed the law on equitable mortgages and concluded that an equitable mortgage had not arisen on the facts of that case. At para. 22, he wrote:

> The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of a want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

59 Because the loan agreement was entered into at a time when the mortgagor owned abutting parcels of land and consent had not been obtained under the *Planning Act*, there was no equitable mortgage because to recognize one would have been in contravention of the statute.

60 In the instant case, after reviewing the law on equitable mortgages, the motion judge concluded:

> This is not a case involving a want of formalities, an inadvertent omission or misdescription or a refusal on the part of the mortgagor to provide a mortgage. In fact, a mortgage was duly prepared, executed and registered as the parties had agreed. The wrinkle was that no planning consent was obtained and the mortgage was void as a result. I agree ... that an equitable mortgage cannot arise upon acceptance of the commitment letter unless a consent is obtained because to hold otherwise would permit a contravention of the statute.
>
> [40] Moreover, if an equitable mortgage confers the same rights as a legal mortgage, it follows that the mortgagee could foreclose or sell the property. This would result in a change in ownership, the very thing the *Planning Act* seeks to prevent or at least, regulate. As a result, I am not persuaded that the commitment letter gave rise to an equitable mortgage in the circumstances of this case.

61 I agree with the motion judge that there was no enforceable equitable mortgage on Parcel One. However, I reach this conclusion for different reasons.

62 As noted by the motion judge, "[t]he legal concept of an equitable mortgage has existed for hundreds of years." Despite this long history, there is a dearth of recent jurisprudence in Ontario on this concept. As such, some comment is in order on the nature of an equitable mortgage, the manner by which an equitable mortgage is created, and the priorities of enforcement.

1) The nature of an equitable mortgage

63 An equitable mortgage is distinct from a legal mortgage. "An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property": A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.

64 The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with

enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law.

65 In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

2) How is an equitable mortgage created?

66 In *Scherer v. Price Waterhouse*, Sutherland J. discussed the manner in which an equitable mortgage is created, at para. 20:

> In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p. 16:
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> > Equitable mortgages of the property of legal owners ... are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.
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> In *Falconbridge, Law of Mortgages*, 4th ed., at p. 80, the following statement is made about equitable mortgages:
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> > An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
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> > **5.2 How an Equitable Mortgage is Created**
> >
> > The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it [ever] so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.
>
> It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p. 83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:
>
> > **(1) Conveyance defective in form**
> >
> > If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.
> >
> > An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.
> >
> > **(2) Agreement to give a Mortgage**
> >
> > An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

67 In this case, we are concerned with a mortgage by an instrument that is insufficient to convey the legal estate — the MCA.

3) Priorities

68 Given that this cross-appeal essentially involves a contest of priority between RBC and BMO to the funds realized upon the sale of the Crawford Avenue property, it is necessary to briefly consider the priorities of enforcement as they relate to equitable mortgages.

69 In this regard, I adopt the following equitable "rules" as summarized in *Falconbridge on Mortgages*, 5th ed., looseleaf (Agincourt, Ont.: Canada Law Book, 2003) at paras. 7:20-7:40:

> Rule 1. *As between two equitable mortgages the first in time has priority, unless the second mortgagee, taking in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee, or by a representation of the first mortgagee which estops him or her from claiming priority over the second mortgage*.
>
> Rule 2. *As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.*
>
> Rule 3. *As between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice* [emphasis added].

4) Does the commitment letter give rise to an enforceable equitable mortgage?

70 In order for the MCA to give rise to an enforceable equitable mortgage in this case, it must have arisen prior to April 1, 1999 — the date of amalgamation.

71 With respect, I disagree with the motion judge that a *Planning Act* consent was required before the MCA could give rise to an equitable mortgage. In reaching this conclusion, the motion judge appears to have been wrongly influenced by the conclusion of Sutherland J. in *Scherer v. Price Waterhouse*.

72 Importantly, in *Scherer*, the loan agreement contravened the *Planning Act* because the mortgagor owned an interest in an abutting parcel of land at the time the loan agreement was signed and accepted. Here, however, 1156712 did not have any interest in any abutting land at the time the MCA was signed and accepted on March 26, 1999. It only acquired an interest in abutting land on April 1, 1999 as a result of amalgamation. Consequently, if an enforceable equitable mortgage is found to have arisen prior to amalgamation, there would be no violation of the *Planning Act*; no consent was required at that time. Unlike *Scherer*, this would not be a case in which provisions of the *Planning Act* were not complied with.

73 With that in mind, I turn to the consideration of whether an enforceable equitable mortgage actually arose prior to the date of amalgamation.

74 RBC signed the MCA on March 15, 1999. It was accepted and signed back to RBC on March 26, 1999. Under the heading "SECURITY", the mortgagor and mortgagee agreed as follows:

> The security for this loan, registered or recorded as required by [RBC], shall be:
>
> - A first charge/mortgage on the freehold property owned by [1156712] and known as 655 Crawford Avenue, in the City of Windsor, being Conc 1, Part 1, Ref Plan 12RI0596 (the "Property").
> - A first ranking security interest in an assignment of rentals payable by all tenants of the Property, present and future.
>
> A first and specific registered assignment of the current leases to those tenants as outlined on Form J attached.
>
> Further, [1156712] will provide [RBC], on request, with a first and specific assignment of such other present and future leases of the Property which [RBC] may designate in writing from time to time.

75 The MCA was subject to the following conditions precedent:

> Prior to an advance of funds hereunder, at [1156712's] expense, [1156712 is] to provide [RBC] with:
>
> • Completion Certificate indicating the new building is completed and that the renovations are completed on the existing building.
>
> • A Remediation Report from Agra Earth & Environmental indicating that the environmental concerns outlined in the Agra Report of December 13, 1995 have been remediated in accordance with MOE guidelines.

76 Thus, before it can be considered a binding contract, the two conditions must have been either satisfied or waived. And the finding of an enforceable equitable mortgage on Parcel One is dependent on satisfaction or waiver prior to April 1, 1999.

77 On the record before this court, there is no evidence of compliance with or waiver of the two conditions prior to the date of amalgamation. As a result, RBC does not have a valid and enforceable equitable mortgage on Parcel One.

78 I conclude with the following observations. Had the conditions precedent been satisfied or waived prior to April 1, 1999, I would have concluded that the MCA gave rise to a valid equitable mortgage for $2,300,000 on Parcel One. But for the conditions, the MCA evidenced a common intention to secure property, which was supported by the valuable consideration of the exchange of promises between RBC and 1156712 regarding the security of that property and the future advance of $2,300,000.

79 In that context, the equitable mortgage would not have been in violation of the *Planning Act*, because it would have arisen prior to amalgamation. As already discussed, this is a key factual difference between this case and *Scherer v. Price Waterhouse*.

80 In addition, the equitable mortgage would have been enforceable in priority to BMO's GSA. This is because, as already discussed, BMO acquired its legal charge with notice of RBC's mortgage financing. In this context, it makes no difference that BMO was not aware of the equitable mortgage, given its knowledge of the registered, albeit invalid, mortgage. As a result, and in accordance with the third rule of priorities already described, the equitable mortgage would rank in priority to BMO's subsequent legal interest.

81 If that were the case, RBC would be entitled to that portion of the $1,670,000 realized upon the sale of 655/755 Crawford Avenue that can be attributed to Parcel One. This would not, as the motion judge feared, "result in a change in ownership [to Parcel One], the very thing the *Planning Act* seeks to prevent or at least, regulate."

III. Net Rental Proceeds

82 In addition to the money it collected from the sale of the property, the Interim Receiver also collected money in rental proceeds from Parcel One.

83 As noted by the motion judge, RBC was granted an Assignment of Rents by Properties, which was registered under both the *PPSA* and the *Land Titles Act.* RBC registered two Financing Change Statements under the *PPSA*. The first was dated April 7, 1998 and referred to an assignment of rents in respect of Parcel One. The second, dated August 31, 2000, referred to a general and specific assignment of rents.

84 RBC conceded before the motion judge that the registration of the Assignment of Rents under the *Land Titles Act* was also void because of the *Planning Act* breach. It argued, however, that the registration under the *PPSA* remained valid and binding and took priority over any subsequent *PPSA* registrations, including those of BMO.

85 I agree with the motion judge's conclusion that the *PPSA* registrations are not inextricably bound to the Assignment of Rents. They are capable of existing independently, such that their valid registrations take priority over BMO's GSA registered under the *PPSA* in 2001. The *PPSA* registrations and the Assignment of Rents evidence an interest in an income stream and,

as a result, are not dependent on the validity of the underlying registration against title to the lands. RBC is entitled to the net rental proceeds.

Disposition

86 In the result, the appeal is dismissed and the cross-appeal is dismissed. Counsel agree that the successful party on the appeal should have costs fixed in the sum of $10,000 and, on the cross-appeal, in the sum of $5000.

87 Accordingly, RBC is entitled to costs of the appeal fixed in the sum of $10,000 and BMO is entitled to costs of the cross-appeal fixed in the sum of $5000. Both figures are inclusive of disbursements and G.S.T.

***O'Connor J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal dismissed.

Tab 9

2005 ABQB 805
Alberta Court of Queen's Bench

Funding Network Inc. v. RSR Enterprises Ltd.

2005 CarswellAlta 1988, 2005 ABQB 805, [2006] A.W.L.D. 1054, 150 A.C.W.S. (3d) 1127, 18 C.B.R. (5th) 210, 390 A.R. 394

The Funding Network Inc. (Plaintiff) and RSR Enterprises Ltd., Brian Pitman, Riverstone Developers Inc., Peter Chamczuk and Christine Mandryk (Defendants)

Master Wacowich

Heard: October 12, 2005
Judgment: October 31, 2005
Docket: Edmonton 0403-15183

Counsel: Frederica Schutz for Plaintiff
Leonard Hendrickson for Defendants
Russell Rimer for Receiver of Harrison

***Master Wacowich*:**

1 RSR Enterprises Ltd. (RSR) required funding to proceed with a project involving a series of properties. It obtained funding from The Funding Network (Fnet) and, subsequently, the Commonwealth Credit Union Limited (CCU). There was also a subsequent builder's lien on one of the RSR properties by Harrison Western Canadian Inc. (Harrison) which is now known as Head West Energy Inc.

2 Fnet was granted a general security agreement (GSA) by RSR. The respondent CCU and Fnet both claim security interests in seven lots. Harrison, through its receiver, claims an interest in a builder's lien on one of the lots. The properties were sold under foreclosure and the contest is with regard to who is entitled to the funds obtained through the foreclosure and whether Fnet is entitled to priority given its prior GSA and prior caveat.

3 Two of the lots in question should be dealt with at the outset as differing from the remaining lots. With regard to Plan 942 3512, Lot 3, there is a mortgage to Fnet which is prior to any other encumbrances and clearly Fnet is entitled to its funds under that mortgage. With regard to Lot 2, Plan 942 3512 CCU's interest was registered prior to Fnet and it is entitled to take first under its security.

4 On the remaining lots, Fnet registered Caveats on three separate dates being September 24, 2003, October 30, 2003 and November 13, 2003. By its caveats, Fnet claims an equitable estate or interest granted under the GSA. In each case, the caveats were filed prior to any other encumbrances and the issue is whether or not the registration of the GSA by way of caveat protects Fenet's interest and gives it priority to the subsequent encumbrances of CCU and Harrison. The position of the respondents is that although the caveats claim an interest pursuant to an agreement dated June 19, 2003 "charging the following lands" the GSA does not give a description of lands within the GSA sufficient to identify the land under s. 102(2)(b) of the Land Titles Act.

5 On June 19, 2004 RSR executed the GSA which was headed, "General Security Agreement (Real and Personal)". In it, RSR granted to Fnet a security interest in all of its present and after acquired property:

1. Security Interest

As general and continuing security for payment of all obligations, indebtedness and liabilities, direct or indirect, of the Undersigned to Fnet ...

A. The Undersigned grants to Fnet a Security Interest in all the Undersigned's present and after acquired property. To the extent that Fnet has given or gives value for the purpose of enabling the Undersigned to acquire rights in or to the property, the Undersigned grants to Fnet a Purchase Money Security Interest in such property and in the proceeds thereof and, in the case of real property, the right to charge the Undersigned's interest in such.

6 The GSA contains the following definition for property:

In this Agreement property shall mean all the Undersigned's property including, but not limited to, the following:

a. Real Property — all legal and equitable interest; in addition to the remedies set out herein and to the extent such are not in conflict with remedies herein, this agreement hereby incorporates by reference all of the obligations of a Mortgagor and the remedies of a Mortgagee as set out in the Standard Form Mortgage under the Land Titles Act of Alberta;

7 The respondent raises two issues. The first is whether the GSA, an eight page detailed document, creates a valid charge having regard to its failure to comply with the requirement of s. 102(2) of the Land Titles Act, R.S.A. 2000, c. L-4 (the Act) which provides:

A mortgage **or encumbrance** shall

. . . . .

(b) give a description of the land intended to be dealt with which is sufficient to identify the land,

and a memorandum of the mortgage or encumbrance shall be made on the certificate of title.

8 The second issue raised by the respondent is whether the GSA is void for uncertainty because: (a) it does not contain any rights or remedies with respect to the real property security purportedly granted; (b) it does not contain the minimum requirements for a mortgage of the Act; (c) it incorporates by reference all the obligations of a mortgagor and remedies of a mortgagee as set out in the Standard Form Mortgage under the Act without specifying which Standard Form Mortgage is being referred to as required by the Act.

9 Dealing first with the second issue, of uncertainty, having reviewed the GSA, it is clear that the document is certain. The agreement between the parties is easily ascertained. Suffice it to say that an equitable mortgage may extend to after-acquired lands and a charge for value on all existing property is not void for uncertainty if the property to which the charge attaches can be ascertained at the time of enforcement, *Royal Bank v. Exner* (1995), 30 C.B.R. (3d) 295 (Alta. Master). Basically, the Respondents are of the view that the GSA should have all of the elements of a "legal" mortgage under the Act. That is not the case. The equitable mortgage does not live under those rules.

10 The respondent's strongest submission on uncertainty is that it, "... incorporates by reference all the obligations of a mortgagor and remedies of a mortgagee as set out in the Standard Form under the Land Titles Act of Alberta" and that the Standard Forms 15 and 16 do not provide for foreclosure proceedings.

11 In *Broda v. Broda*, 2004 ABQB 96527 R.P.R. (4th) 103, 2004 CarswellAlta 1800 (Alta. Q.B.) Veit, J. dealt with a matrimonial property proceeding where the wife had been given a Land Titles Form 16 mortgage by the husband to cover Court costs. When not paid, the wife sought a final order of foreclosure. In refusing the order, Veit J. held that Form 16 did not provide for foreclosure proceedings and there was no evidence before her of any agreement to allow for foreclosure proceedings if there was a default on payment of the amount owing. The respondent's position here is there is no evidence allowing for foreclosure.

12 Where the parties agree to an equitable mortgage one would expect that foreclosure proceedings were contemplated on default. The respondent points out, it is not for the Court to imply terms to make the contract complete. I am prepared to hold that an equitable mortgage has an implied term for foreclosure and that an equitable mortgage does not have to meet the same requirements as a "legal" mortgage under the Act. There is also another answer to this issue.

13 In the *Broda* case, Veit, J. states at page 14 of the Carswell report while denying the ability to foreclose on a Form 16 mortgage under the Act:

> ... The Form 16 has been put into place: the property cannot be sold without the payment out of the encumbrance. That very clog on the title, not the right to take foreclosure proceedings, is the essence of the encumbrance.

14 In this case, Fnet commenced foreclosure proceedings against, among others, RSR. All of the named defendants filed demands of notice and no one appealed the order nisi/order for sale. The property was sold and the proceeds, insufficient to fully satisfy all claims, are being held.

15 Whether or not there is a right to foreclose by Fnet under its equitable mortgage, Fnet also has a valid charge against the land, prior to all other claimants and is entitled to have its claim paid first on the lots in dispute

16 The remaining issue is whether the GSA can be registered by way of caveat and take priority to subsequent encumbrances. The position of the applicant is that the caveat gives notice to all subsequent parties interested in these titles that there is an equitable mortgage on the property and as such it is entitled to have its interest take precedence over any subsequent encumbrances. There are two decisions of Masters which support the applicant's position. These cases are *Powers, Re*, 2005 ABQB 660 (Alta. Q.B.), a decision of Master Laycock, and *Bank of Montreal v. King*, 2003 ABQB 491 (Alta. Master), a decision of Master Funduk. In each case the court determined that an equitable mortgage registered by way of caveat took precedence over any subsequent encumbrances. The respondents are of the view that those cases can be distinguished because in those cases the instrument caveated referred to the lands in question. In this case, the GSA was of a general nature and did not, within its body, refer to the specific lots in questions.

17 In *Powers, Re*, Master Laycock stated at page 3:

> It is my conclusion that having considered the three aforementioned cases and Falconbridge on Mortgages that no specific form of memorandum is required so long as the Court in reading the document can ascertain an intention to grant real property security and can ascertain the property to be charged. Mr. Powers in his handwritten note pledges "any and all assets" well [sic] the note may lack the legalize [sic] often found in bank Security Agreements his intention is clear, he is securing to Mr. Midwinter all of his personal assets, both real and personal, there is nothing in the document that restricts the security to assets that he owned at the time but could include future acquired assets. Accordingly, Midwinter has a valid agreement charging land protected by his Caveat filed July 22, 2003.

18 It is noted that Master Laycock indicated that the Court in reading the document should be able to "ascertain the property to be charged". However, I am of the view that if the land can be ascertained by the land description in the caveat that is sufficient to support an equitable mortgage taking precedence over subsequent encumbrances. In *Powers, Re* the agreement in question identified the lands, but that does not mean to say that is a requirement for all equitable mortgages. It is sufficient that the lands are ascertainable by way of caveat. If there was simply a GSA without reference to the lands by way of caveat I would accept the respondents' position. But that is not the case.

19 This position is consistent with the decision of Andrekson, J. in *Royal Bank v. Donsdale Developments Ltd.*, [1986] A.J. No. 1027 (Alta. Q.B.). Before him was the question of whether an "Agreement re Lodgement of Titles to Real Estate" which was the subject of a caveat, took precedence over subsequent builders liens.

20 In finding that the "Lodgement" was an equitable mortgage protected by caveat, Andrekson, J. states at page 12:

> A caveat is a warning, a notice and a prohibition. It creates no new rights, but prevents new ones arising other than subject to the claim of which it gives notice after registration. It is intended strictly to preserve the status quo anti, to keep things exactly as they are and no more.
>
> . . . . .
>
> It follows that an unregistered instrument protected by caveat claiming an estate or interest in the land for which a Certificate of Title has been issued and which remains in force, must, when the claim is established, be given its full effect, according to its tenor.

21 He concludes at page 20:

> I am of the opinion that on the facts of this case the Lodgement of Title constituted an equitable mortgage which was registered by way of caveat 812229818 and thus became a registered mortgage within the meaning of mortgage in the Land Titles Act and also a registered mortgage within the meaning of s. 9(2) of the Builders' Lien Act.
>
> In the event that I am found to be wrong, I would hold in the alternative that if the Lodgement of Title does not constitute a "mortgage", it, in any event, constitutes an encumbrance within the meaning of the Land Titles Act.

22 The respondents submit that *Donsdale* should be distinguished because the Lodgement specifically describes the lands in question. Again, I disagree with this submission. It is sufficient that the lands can be identified by the caveat. The Torrens System requires notice to those who inspect the register. The caveat gives that notice and there is a valid prior mortgage/encumbrance to the claims of CCU and Harrison.

23 The respondents' position is that the GSA cannot be a mortgage under s. 102(2)(b) of the Land Titles Act nor can it be an encumbrance as defined in s. 1(e) of the Act:

> 'encumbrance' means any charge on land created or effected for any purpose whatever, inclusive of mortgage, mechanics' or builders' liens, when authorized by statute, and executions against land, unless expressly distinguished.

24 The respondents submit that Fnet's encumbrance does not comply with the Act in that s. 102(2)(b) sets out the minimum requirement for an encumbrance which is to "give a description of the land intend to be dealt with that is sufficient to identify the land".

25 This is correct if one can only look at the GSA. In my view s. 102(b) and s. 1(e) are complied with if a reading of the GSA and caveat meet the criteria in the Act. They do and that is sufficient to create an equitable mortgage which is protected and given priority by registration of the caveat at Land Titles.

26 The purpose of a Torrens System is to protect Fnet for its interests claimed in the caveat as against the subsequent encumbrancers of RSR. Justice Moir in *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* (1984), 53 A.R. 96 (Alta. C.A.) states at para. 11, that the purpose of s. 135 of the Land Titles Act is, "... it tells the registrar the caveat, so long as it remains in force, protects the caveator for the interest claimed in the caveat from dealings by third parties". At page 100, Moir, J.A. refers to the following statement of law from *Gibbs v. Messer*, [1891] A.C. 248 (Victoria P.C.), at 254:

> . . . everyone who is a bona fide purchaser for value from a registered proprietor and enters his date of transfer or mortgage on the register shall thereby acquire an indefeasible right . . ..

27 Consequently CCU and Harrison took their interests subject to the GSA of Fnet which was a prior interest in the land protected by a prior registered caveat. To say that the GSA is unable to protect its priority because it did not refer to the specific lots in question is an overly legalistic position which does not lend itself to the Torren System. The caveat was registered against the applicable lots and any person who wished to acquire an interest in title subsequently would be able to see from the register that a prior interest existed on the lands in question.

28 Mr. Hendrickson, was asked what harm there would be in allowing this equitable mortgage to be registered by way of caveat to protect the interest of Fnet. His view was that allowing caveats against possibly after acquired property might allow the mortgagor's land to be encumbered when he did not expect it to be encumbered. But the plain wording of the GSA provides for this.

29 In the result, a declaration is granted that the Fnet claims registered against the properties in issue are claims in priority to and should be paid in priority to all other claims of subsequent encumbrancers. The applicant seeks solicitor client costs pursuant to the GSA and those costs are granted.

Application granted.

Tab 10

1995 CarswellBC 454
British Columbia Supreme Court

Stewart v. 441921 B.C. Ltd.

1995 CarswellBC 454, 10 B.C.L.R. (3d) 390, 23 C.L.R. (2d) 282, 57 A.C.W.S. (3d) 111

WILLIAM CHARLES STEWART v. 441921 B.C. LTD., DOVER CORPORATION (CANADA) LIMITED, NEWCASTLE ELECTRIC LTD., WRIGHT PARRY ENGINEERING LTD., SOVEREIGN WOOD PRODUCTS CORP., STAHL HOLDINGS INC. and ROYAL PAYING LTD.

Master Horn [in Chambers]

Heard: June 30, 1995
Judgment: July 31, 1995
Docket: Doc. Nanaimo 08727

Counsel: *R.N. Rhodes*, for petitioner.
W. Geselbracht, for respondents Royal Paving Ltd. and Stahl Holdings Inc.

***Master Horn*:**

1 This was an application for an order nisi of foreclosure by William Stewart, a second mortgagee. The application is opposed, not by the mortgagor 441921 B.C. Ltd., but by the other respondents, all but one of whom are lien claimants who have registered their claims against title, and Dover Corporation (Canada) Limited who is a claimant under the *Personal Property Security Act* who has registered a claim against title. Although only the claimants Stahl Holdings Inc. and Royal Paving Ltd. were represented at the hearing, the other claimants adopted the position taken by Stahl Holdings Inc. and Royal Paving Ltd. In addition, all the respondents are creditors of 441921 B.C. Ltd. and they have commenced proceedings against the mortgagor company and the mortgagor Stewart to set aside the mortgages upon which this application is based as being a fraudulent conveyance or a fraudulent preference. They have registered certificates of pending litigation against the properties sought to be foreclosed.

2 The lands sought to be foreclosed can be described in three separate groups. Firstly, there is a condominium block in Chemainus which was completed but there are a number of condominium units still unsold. There are no builder's liens registered against this property. Secondly, there is a condominium block in Parksville which is completed, and again some units have been sold and some remain unsold. The claims of builder's lien are registered against this property. Thirdly, there is a group of miscellaneous properties in the Parksville area upon one of which properties there is a restaurant. There are no builder's liens registered against these properties.

3 The history of the matter is this.

4 William Stewart is an investor. John Burrows is a builder. A number of years ago, Stewart became involved with financing some construction projects which Burrows was engaged in. He lent him money and in each case that money was secured on a mortgage. By 1993 they decided that their relationship would change and that Stewart and Burrows would become participants in a joint venture to build some condominiums. For this purpose they decided to form a company and they consulted Mr. Rhodes, who incorporated the company on their behalf under the name 441921 B.C. Ltd. Stewart and Burrows were the only shareholders and the only directors. The shares were issued equally.

5 At the same time the company was formed, they entered into a shareholders' agreement. That agreement can be found at Tab 3 of Ex. 2, and it is dated April 15, 1993. I shall return to particular clauses of this agreement later. For the present it is sufficient to

say that the agreement made elaborate provisions for what should happen should there be a deadlock between the shareholders. Furthermore, the agreement provided that it was expected that Stewart would lend funds to the company and that such loans would be secured by a general security agreement constituting a fixed charge on all of the present and after-acquired property of the company and by real property mortgages. It was also provided that Burrows would manage the company's enterprises and that, save for reimbursement for expenses, he would not be entitled to remuneration for performing those services.

6 Also on April 15, 1993, the company granted to Stewart a mortgage over two parcels of land in Nanaimo to secure a sum of $241,641. That was a sum owing to Stewart by Burrows for the development of the mortgaged properties. Also on the same day, Stewart and the company executed agreements relating to two other lots which were registered in the name of Stewart. Under those agreements Stewart acknowledged that he held the lands in trust for the company about to be formed and that the company was to mortgage its beneficial title to Stewart for certain sums, which again represented funds advanced by Stewart for the developments on these lots.

7 Also on the same day was executed a security agreement between the company and Stewart. The signatories on behalf of the company were Stewart and Burrows. The agreement can be found at Tab 1 of Ex. 3.

8 Clause 1.01 of that security agreement provided that the debtor (being the company) granted to the secured party (being Stewart) a security interest "in the collateral referred to in s. 2.01 hereof" to secure the obligations of the company to Stewart whether incurred prior to or subsequent to the execution of the security agreement.

9 Clause 2.01 described the collateral and it included inventory, equipment, accounts receivable, intangibles, other personal property, and:

> ... all of the debtor's present and after-acquired real property together with all buildings placed, installed or erected on any such property and all fixtures.

10 In cl. 5.01 is set out the undertakings of the company and under para. (i) it is provided that the company will, at Stewart's request, execute all such financing documents as may be reasonably required by Stewart to give effect to the security agreement and it is provided that the company:

> ... hereby constitutes and appoints the Secured Party ... the true and lawful attorney of the debtor to execute all such documents ... with the right to use the name of the debtor whenever and wherever it may be deemed necessary or expedient.

11 Clause 7.01 provides that Stewart may at his option declare the company to be in default under this agreement and declare that the unpaid balance of all obligations shall be immediately due and payable if certain events occur including the events that the debtor fails to pay when due any of the obligations secured by the agreement.

12 Clause 12.02 provides that, with respect to any part of the collateral to be acquired by the company after the date of the agreement, the company warrants that it intends the security interest created by the agreement to attach as soon as the company has rights therein.

13 On April 16, 1993, that security agreement was registered in the Personal Property Security Registry. It was not then or later registered as a mortgage of land in the Land Title Office for two reasons. Firstly, it was not in a form which could be registered as a mortgage in the Land Title Office. Secondly, it was anticipated that the projects which the company was about to embark upon would require financing by way of first mortgage and that it would be inconvenient and expensive if there was a prior mortgage on title, which would have to be discharged or modified every time money was advanced or a condominium unit was sold. For these, and perhaps for other, reasons, Stewart never called upon the company to execute a mortgage of land to secure the advances that he subsequently made in respect of the building of the two condominium projects until the happening of the events which will be subsequently described.

14 At the time that these transactions were entered into, the company was solvent and its prospects looked extremely favourable.

15 The money which Stewart lent to the company was, it is agreed, at an interest rate of 12 percent per annum. There may, or may not, have been a further agreement that Stewart was to receive a bonus upon the sale of each condominium unit but that is not of any significance in this application.

16 Thereafter, the company acquired the property in Chemainus and received mortgage funds from a lending institution and funds from Stewart, and the Chemainus condominium project was completed in 1993 and went on the market. The company also acquired the Parksville property in 1993 and it was completed in the fall of 1994. The units did not move quickly after completion. It had originally been hoped that the sale of the Chemainus units would finance the Parksville units, but this did not happen. The failure to sell the units was due to market conditions. Recently, the condominium units have had to be put up for sale by auction.

17 Burrows had been constructing the condominiums through a company of which he was the chief shareholder, Stahl Holdings Inc. It was through this company that supplies were purchased and tradesmen were paid. The monies advanced either by Stewart or by the first mortgagee were paid into the company account and the bills, including those of Stahl Holdings, were paid from that account. Generally, Stahl Holdings was paid promptly but by November there was about $28,000 outstanding. Burrows had requested monies from Stewart to pay the company's creditors, but Stewart became more and more reluctant to put further monies into the project.

18 By the beginning of the summer at the latest it was clear to Stewart that the company was not in a position to pay its current liabilities. By November, 1994, Stewart had obtained figures from Mr. Burrows of what the final cost estimate was on the Parksville apartments and he became concerned that the monies that he invested were at risk.

19 At this point Stewart determined that he ought to secure his investment as best he could. He executed a mortgage on December 7, 1994, on behalf of the company, under his signature alone, and that mortgage was registered in the Land Title Office against all the land owned by the company including the Chemainus and Parksville projects. The amount shown as being secured by the mortgage was $1,559,000, the interest rate was being shown as 12 percent, the money advanced was shown as being payable on demand and the terms of the mortgage were shown as the standard terms on file in the Land Title Office. That mortgage was registered on December 14, 1994. All of this was done without any knowledge of Mr. Burrows and he only discovered that the mortgage had been given in late December.

20 On December 14, 1994, but after the filing of the mortgage, Dover Corporation registered its financing statement relating to the installation of an elevator in the Parksville project. On January 23, 1995, Stahl registered a builder's lien and Royal Paving did the same thing on January 29, 1995. The other respondents filed their liens before January 30, 1995.

21 On January 27, 1995, Stewart caused a meeting of the company directors to be called which meeting Burrows refused to attend. A resolution was passed (Tab 1 of Ex. 4) ratifying the actions of Stewart in executing the real property mortgage in December and empowering Stewart to grant further mortgage security over the real property and to execute it on behalf of the company. Pursuant to that agreement, Stewart executed a further mortgage on behalf of the company and that was registered in the Land Title Office on January 30, 1995. On February 3, 1995, a demand letter sent by Stewart to the company called for payment and when payment was not made the foreclosure proceeding was commenced.

22 In the meantime, on February 3, 1995, Stahl Holdings Inc. had commenced action to set aside the mortgages as being fraudulent conveyances or fraudulent preferences. Other creditors followed suit and registered certificates of pending litigation against the titles of all the properties of the company.

23 When this application first came before me I declined to make an order nisi of foreclosure holding that there were facts which had to be decided and I ordered that there be an examination of Mr. Stewart and Mr. Burrows. That examination took place before me on June 2, 1995 and June 7, 1995. Transcripts of those examinations are in the file.

24 While there were some matters which were in dispute, there was nothing in dispute which would materially advance one party's cause or damage that of the other, and in argument, neither counsel has relied upon any evidence which was disputed by the other. Accordingly, neither party is asking that this proceeding go to trial.

25 Certainly, the quantum of Mr. Stewart's debt will have to be established by evidence, but both parties agree that this can be done by way of accounting as a normal part of an order nisi of foreclosure.

26 Nor does Mr. Geselbracht contest that the mortgage registered on January 30, 1995, is a good mortgage as against the company and that the mortgage is in default. He does not oppose the granting of an order nisi of foreclosure with an accounting, as against the company only.

27 What is in dispute is whether the security agreement of April 15, 1993, constitutes a good equitable mortgage, securing Stewart's past and future loans to the company, and whether that security is effective to give priority to Stewart over the claims of the respondents other than the company. What is further in dispute is whether the mortgage registered on December 14, 1994, is a good legal mortgage and has priority over the claims of the respondents other than the company. As to those two issues, Mr. Geselbracht does not argue that a trial is necessary to determine them. He is content that the issue be decided in chambers on the evidence before the court by way of affidavit and by way of examination of the two witnesses.

28 At this point I must consider the question of my jurisdiction as a master. By direction of the Chief Justice of May 22, 1990, a master has the same jurisdiction as a judge in chambers unless the Chief Justice has given a direction that a master shall not exercise that jurisdiction. The direction of the Chief Justice of May 22, 1990, which lists matters in which a master shall not exercise jurisdiction does not exclude a master from exercising jurisdiction to grant an order nisi or a final order of foreclosure in chambers. However, in an accompanying explanatory note, the Chief Justice explains that a master may make some final orders such as "orders under Rule 50(5) where no matter is contested or where there is no triable issue." While that note is not a direction, it is, as explained in the notice, a guideline. I intend to follow that guideline and I will approach this matter, as counsel have invited me to do, on the basis that there is no matter which is contested on the evidence and that the only issues are issues of law, or perhaps of interpretation, which arise out of facts which are not disputed. Those issues are not "triable" because they need not be sent to a trial but can be determined in chambers.

29 I turn to the first issue which is whether the security agreement of April 15, 1993, constitutes an equitable mortgage. It is upon this proposition that the petitioner's entire case rests. Mr. Rhodes made the frank admission that if the security agreement was not an equitable mortgage, then the legal mortgage which was registered on December 14, 1994, was void as against creditors because it was a conveyance given at a time when the company was unable to pay its debts. But he argues that the mortgage which was granted in December, 1994, was the same security which was granted in April, 1993, but now in registrable form.

30 Was the security agreement an equitable mortgage?

31 Under cls. 1.01 and 2.01(f) of the security agreement (Tab 1 of Ex. 2) the company granted to Stewart a "security interest" in all of the company's "present and after-acquired real property." The security interest was to secure the payment of all obligations of the company incurred prior to or subsequent to the execution of the agreement. Under cl. 5.01(i) the company agreed to execute all further documents as might be reasonably required by Stewart to give effect to the security agreement. I interpret this as meaning that the company would, when called upon, execute a legal mortgage in registrable form.

32 In *Falconbridge on Mortgages*, 4th ed., the subject of equitable mortgages is dealt with in c. 5. In para. 5.4(2), p. 83, the learned authors state:

> An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

In para. 5.4(3), pp. 83, 84 and 85, the learned authors state:

> An agreement in writing duly signed, however informal, by which any property is made a security for a debt due or a present advance, creates an equitable charge upon the property ...
>
> The agreement need not specifically describe the property if it is otherwise sufficiently ascertained or ascertainable, and the charge created by the agreement may extend to after acquired lands. A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement, and such a charge is not contrary to public policy.

33 I hold that the instrument created here was an equitable mortgage.

34 An equitable mortgage has priority over a subsequently registered judgment (*Yeulet v. Matthews* (1982), 36 B.C.L.R. 173 [[1982] 4 W.W.R. 5] (S.C.)), and over the claim of a trustee in bankruptcy (*Sifton Credit Union Ltd. v. Barber*, [1986] 4 W.W.R. 341 (Man. Q.B.)). If the respondents here became judgment creditors, their judgments if registered against the land would rank in priority after the interest of Stewart created by the equitable mortgage.

35 But the respondents are not just potential judgment creditors, they are also lien claimants, except for Dover Corporation (Canada) Limited whose claim may be different. Are their claims subordinated to those of the petitioner under an equitable mortgage?

36 Section 6 of the *Builders Lien Act* provides that:

> 6. (1) A registered mortgage has priority over a lien to the extent of the mortgage money bona fide secured or advanced in money prior to the filing of the claim of lien ...

37 The Act is silent as to where the priorities lie in relation to an unregistered legal mortgage or an equitable mortgage. I am prepared to assume against the petitioner that a registered claim of lien has priority over an unregistered or an equitable mortgage. But these claims were registered after the registration of the legal mortgage in December. If that mortgage is good, then the claimants are liable to be foreclosed.

38 I turn then to the question of the validity of the legal mortgage registered on December 14, 1994. That mortgage was attacked on two grounds. Firstly, that it was invalidly executed and secondly, that it was a fraudulent preference.

39 As to its execution, Stewart was a director and the president of the company. Section 8.4 of the articles of association provided that "every debt obligation of the company shall be signed manually by at least one director or officer of the company." As far as the outside world is concerned this mortgage document was validly executed and the company would be bound by such a document. However, the argument is not so much that the document was not duly executed but that the granting of the mortgage was not duly authorized. The shareholders' agreement provided in cl. 3.01 that any loans from Stewart to the company be secured not only by a general security agreement but also by a real property mortgage. The security agreement provided in cl. 5.01(i) that the company appointed Stewart as its lawful attorney to execute all such documents as were reasonably required by Stewart to give effect to the security agreement with the right to use the name of the company whenever and wherever it might be deemed necessary or expedient.

40 There is nothing oppressive or fraudulent about such a clause. Stewart was about to lend large sums of money to the company unsecured on any land and only lightly secured as to any chattels. Creating him the attorney of the company to convert a floating charge over land to a registrable charge over land whenever he felt insecure was to Stewart's advantage, but it was not to the disadvantage of the other shareholder, Burrows, who was not going to be lending money to the company. Nor was it to the disadvantage of any creditor. If the mortgage was good against them, it mattered not by whom or how it was executed within the company.

41 When the mortgage was signed and registered by Stewart in December, 1994, it was, I hold, within the power of Stewart to do so.

42 Was the granting of the mortgage a fraudulent preference?

43 The equitable mortgage secured Stewart's debt. The subsequent legal mortgage secured the same debt. The company was no poorer after the legal mortgage was executed than it was before. Its balance sheet would have remained exactly the same except that Stewart's debt would have been shown as a secured long-term liability instead of an unsecured short-term liability. The position of the creditors did not change for the worse. They had no security before the mortgage was registered and they had no less afterwards. The creditors only acquired their security when they filed a claim of lien and that occurred after the mortgage was registered.

44 Pursuant to s. 5 of the *Fraudulent Preference Act* a disposition is deemed to give a creditor preference over other creditors if the creditor is given, recovers or is placed in a position to recover security for all or part of the debtor's indebtedness greater proportionately than could be recovered by unsecured creditors generally out of assets of the debtor left available to judgment. But the equitable mortgage did not leave any assets of the debtor available to judgment. All of the assets of the debtor were already pledged to Stewart before any credit was advanced to the company by the respondents.

45 Where a creditor perfects a security to which he is already entitled, this is neither a fraudulent conveyance nor a fraudulent preference (see *Smeds v. Olney* (1990), 3 C.B.R. (3d) 85 at 92 (B.C.S.C.), and *Bank of Nova Scotia v. Sedlacek* (1982), 40 B.C.L.R. 306 at 311 to 312 (S.C.)).

46 I conclude that the petitioner's mortgage of December 14, 1994, merely perfected security already granted by the equitable mortgage of April 15, 1993.

47 I conclude, therefore, that the petitioner, Stewart, is entitled to an order of foreclosure against all of the respondents with the exception of Dover Corporation (Canada) Limited.

48 As to Dover Corporation, they were not separately represented at the hearing and no argument was presented to me as to any priority given by the registration against land by that corporation of an instrument given under the *Personal Property Security Act*. In respect of Dover Corporation, I will adjourn the application for foreclosure in respect of the Parksville property to allow that respondent to determine whether its position is any stronger than that of the other respondents. The matter may be set down by the petitioner on praecipe with notice to Dover Corporation after the expiry of three weeks.

49 The petitioner will be entitled to its normal costs of obtaining an opposed order nisi on Scale 3.

Application allowed.

Tab 11

Court File No. CV-19-00632079-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 21ST
	)	
JUSTICE HAINEY	)	DAY OF APRIL, 2020

SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

APPROVAL AND VESTING ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, *inter alia*, (i) approving the Share Purchase Agreement (the "**Sale Agreement**") among Wayland Group Corp. ("**Wayland**"), Maricann Inc. ("**Maricann**"), and Canadelaar B.V. (the "**Purchaser**") dated April 15, 2020 and attached as Exhibit "A" to the affidavit of Matthew McLeod sworn April 15, 2020 (the "**Seventh McLeod Affidavit**") and the transactions contemplated thereby (the "**Transactions**"), (ii) adding 2751609 Ontario Inc. ("**Residual Co**") as an Applicant to these CCAA proceedings, (iii) vesting all of Maricann's right, title and interest in and to the Excluded Assets (as defined in the Sale Agreement) in Residual Co, (iv) transferring and vesting all of the Excluded Contracts and Excluded Liabilities in Residual Co, (v) vesting all of Wayland's right, title and interest in and to the Transferred Assets (as defined in the Sale Agreement) in Maricann, (vi) vesting all of the right, title and interest in and to the Maricann Shares (as defined in the Sale

Agreement) in the Purchaser, (vii) granting the Payables Charge (as defined below), and (viii) granting certain related relief, was heard this day in writing at Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Seventh McLeod Affidavit, the sixth report of PricewaterhouseCoopers Inc., in its capacity as monitor of the Applicants (the "**Monitor**"), dated April 16, 2020, and on hearing the submissions of counsel for the Applicants, the Monitor, the Purchaser, the DIP Lender and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Karin Sachar sworn April 16, 2020:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein have the meaning ascribed to them in the Seventh McLeod Affidavit and/or the Sale Agreement and/or the Second Amended and Restated Initial Order of this Court in the within proceedings dated December 2, 2019 (as amended and restated on December 16, 2019 and otherwise modified, the "**Initial Order**"), as applicable.

APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that the Sale Agreement and the Transactions are hereby approved and the execution of the Sale Agreement by Wayland and Maricann is hereby authorized and approved, with such minor amendments as the parties thereto may deem necessary, with the approval of the Monitor and the DIP Lender. The Applicants are hereby authorized and directed to perform their obligations under the Sale Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the Maricann Shares to the Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Applicants to proceed with the Transactions (including, for certainty, the Pre-Closing Reorganization) and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "A" hereto , the following shall occur and shall be deemed to have occurred at the Effective Time in the following sequence:

(a) first, all of Maricann's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co, and all Claims and Encumbrances (each as defined below) shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

(b) second, (i) all of Wayland's right, title and interest in and to the Transferred Assets shall vest absolutely and exclusively in Maricann free and clear of and from any and all Claims and Encumbrances (each as defined below); and (ii) all Assumed Liabilities which are to be assigned by Wayland to, and assumed by Maricann pursuant to the Sale Agreement shall be and are hereby assigned to, assumed by and shall vest absolutely and exclusively in Maricann; and for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Transferred Assets are hereby expunged and discharged as against the Transferred Assets;

(c) third, all Excluded Contracts and Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of Maricann other than the Assumed Liabilities) shall be transferred to, assumed by and vest absolutely and exclusively in, Residual Co such that the Excluded Contracts and Excluded Liabilities shall become obligations of Residual Co and shall no longer be obligations of Maricann, and Maricann and all of its assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (including, for certainty, the Transferred Assets and the Retained Assets, the "**Maricann Property**") shall be and are hereby forever released and discharged from such Excluded Contracts and Excluded Liabilities and all related Claims (as defined below), and all Encumbrances (as defined below) affecting or relating to the Maricann Property are hereby expunged and discharged as against the Maricann Property;

(d) fourth, all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as defined below) and are convertible or exchangeable for any securities of Maricann or which require the issuance, sale or transfer by Maricann, of any shares or other securities of Maricann, or otherwise evidencing a right to acquire the Maricann Shares and/or the share capital of Maricann, or otherwise relating thereto, shall be deemed terminated and cancelled; and

(e) fifth, all of the right, title and interest in and to the Maricann Shares shall vest absolutely in the 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 have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order, the KERP & SISP Approval Order of this Court dated January 13, 2020, or any other Order of the Court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C" hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Maricann Shares are hereby expunged and discharged as against the Maricann Shares; and

(f) sixth, Maricann shall and shall be deemed to cease to be an Applicant in these CCAA proceedings, and Maricann shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings, save and except for this Order the provisions of which (as they relate to Maricann) shall continue to apply in all respects.

6. **THIS COURT ORDERS** that upon the registration in the Land Registry Office #37 for the Land Titles Division of Norfolk (Simcoe) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and/or the *Land Registration Reform Act* (Ontario), the Land Registrar is hereby directed to vacate and expunge from title to the subject real property identified in Schedule "D" hereto (the "**Real Property**") all of the Claims listed in Schedule "B" hereto.

7. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in connection with the Transactions.

8. **THIS COURT ORDERS** that the Monitor may rely on written notice from Wayland and the Purchaser regarding the fulfillment of conditions to closing under the Sale Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

9. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Maricann Shares (including, for greater certainty, the net proceeds realized from the Cash Payment and any Conditional Payments) (the "**Proceeds**") shall stand in the place and stead of the Maricann Shares, and that from and after the delivery of the Monitor's Certificate and the payment of the Priority Payments pursuant to paragraph 27 hereof, all Claims and Encumbrances shall attach to the remaining Proceeds, if any, following the payment of the Priority Payments with the same priority as they had with respect to the Maricann Shares immediately prior to the sale, as if the Maricann Shares had not been sold and remained in the possession or control of the Person having that possession or control immediately prior to the sale.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Applicants or the Monitor, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in Maricann's records pertaining to past and current employees of Maricann. The Purchaser shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by Maricann.

11. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Purchaser and Maricann shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Applicants (provided, as it relates to Maricann, such release shall not apply to Taxes in respect of the business and operations conducted by Maricann after the Effective Time), including without limiting the generality of the foregoing all taxes that could be assessed against the Purchaser or Maricann (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), or any provincial equivalent, in connection with the Applicants.

12. **THIS COURT ORDERS** that except to the extent expressly contemplated by the Sale Agreement, all Contracts to which Maricann is a party upon delivery of the Monitor's Certificate (including, for certainty, those Contracts constituting Transferred Assets) will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Monitor's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any Applicant);

(b) the insolvency of any Applicant or the fact that the Applicants sought or obtained relief under the CCAA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Sale Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

(d) any transfer or assignment, or any change of control of Maricann arising from the implementation of the Sale Agreement, the Transactions or the provisions of this Order.

13. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 12 hereof shall waive, compromise or discharge any obligations of Maricann in respect of any Assumed Liabilities, and (b) the designation of any Claim as an Assumed Liability is without prejudice to Maricann's right to dispute the existence, validity or quantum of any such Assumed Liability, and (c) nothing in this Order or the Sale Agreement shall affect or waive Maricann's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

14. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Applicant then existing or previously committed by any Applicant, or caused by any Applicant, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and Maricann (including, for certainty, those Contracts constituting Transferred Assets) arising directly or indirectly from the filing by the Applicants under the CCAA and the implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 12 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a

Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse Maricann or Wayland from performing their obligations under the Sale Agreement or be a waiver of defaults by Maricann or Wayland under the Sale Agreement and the related documents.

15. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against Maricann or the Maricann Property relating in any way to or in respect of any Excluded Assets or Excluded Liabilities and any other claims, Obligations and other matters which are waived, released, expunged or discharged pursuant to this Order.

16. **THIS COURT ORDERS** that, from and after the Effective Time:

(a) the nature of the Assumed Liabilities retained by Maricann, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residual Co;

(c) any Person that prior to the Effective Time had a valid right or claim against Maricann under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against Maricann but will have an equivalent Excluded Liability Claim against Residual Co in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residual Co; and

(d) the Excluded Liability Claim of any Person against Residual Co following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against Maricann prior to the Effective Time.

17. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time:

(a) Residual Co shall be a company to which the CCAA applies; and

(b) Residual Co shall be added as an Applicant in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to (i) an "Applicant" or the "Applicants" shall refer to and include Residual Co, *mutatis mutandis*, and (ii) "Property" shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, of Residual Co. (the "**Residual Co. Property**"), and, for greater certainty, each of the Charges (as defined in the Initial Order and including for greater certainty the Payables Charge (as defined below)), shall constitute a charge on the Residual Co. Property.

CLOSING FUNDING AND CHARGE

18. **THIS COURT ORDERS** that the Closing Funding is hereby approved, and Wayland is hereby authorized and empowered to obtain and borrow the Closing Funding from the Purchaser (or one of its Affiliates) (the "**Closing Funding Lender**") in accordance with the terms of the Sale Agreement, provided that such Closing Funding shall not exceed the aggregate principal amount of \$1,000,000 and that the Closing Funding shall be on the terms and subject to the conditions set forth in the Sale Agreement and, without limitation, shall be used solely for the purposes set out in the Sale Agreement.

19. **THIS COURT ORDERS** that the Closing Funding Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Payables Charge**") on the Property of the Applicants (including the entitlement of any Applicant to receive the Conditional Payments), which Payables Charge shall not secure an obligation that exists before this Order is made. The Closing Funding Charge shall have the priority set out in paragraph 22 hereof.

20. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the Purchaser may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Payables Charge; and

(b) upon the failure of the Applicants to comply with their obligations under the Sale Agreement as they relate to the Closing Funding (including the use and repayment thereof), the Purchaser, upon seven (7) days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Sale Agreement and the Payables Charge, including to apply for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants.

21. **THIS COURT ORDERS AND DECLARES** that the Purchaser shall be treated as unaffected in any plan of arrangement or compromise filed by any Applicant under the CCAA, or any proposal filed by any Applicant under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any advances of Closing Funding made under the Sale Agreement.

22. **THIS COURT ORDERS** that the Payables Charge shall rank in priority to all Encumbrances (as defined in the Initial Order) other than the Administration Charge, the Directors' Priority Charge, the KERP Charge, and the DIP Lender's Charge, and the priority as among the Charges shall be as follows:

First – Administration Charge (to the maximum amount of $1,000,000);

Second – Directors' Priority Charge (to the maximum amount of $200,000);

Third – KERP Charge (to the maximum amount of $500,000);

Fourth – DIP Lender's Charge;

Fifth – Payables Charge (to the maximum amount of $1,000,000); and

Sixth – Directors' Subordinate Charge (to the maximum amount of $250,000).

23. **THIS COURT ORDERS** that the filing, registration or perfection of the Payables Charge shall not be required, and that the Payables Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected

subsequent to the Payables Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

24. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances (as defined in the Initial Order) over any of their Property that rank in priority to, or *pari passu* with, the Payables Charge unless the Applicants also obtain the prior written consent of the Closing Funding Lender and the beneficiaries of the Directors' Subordinate Charge.

25. **THIS COURT ORDERS** that the Sale Agreement (as it pertains to the Closing Funding) and the Payables Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Purchaser thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances (as defined in the Initial Order), contained in any Agreement which binds any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Payables Charge nor the execution, delivery, perfection, registration or performance of the Sale Agreement shall create or be deemed to constitute a breach by any Applicant of any Agreement to which it is a party; and

(b) the Purchaser and the Closing Funding Lender shall have no liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from Wayland and Maricann entering into the Sale Agreement or the creation of the Payables Charge.

26. **THIS COURT ORDERS** that the Payables Charge over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

PRIORITY PAYMENTS

27. **THIS COURT ORDERS AND DIRECTS** that the Proceeds shall be distributed by the Monitor as soon as is practicable following the Effective Time through the following payments in the following order (collectively, the "**Priority Payments**"):

(a) First, an amount equal to $100,000 to the Monitor to establish the Post-Closing Reserve (as defined below);

(b) Second, to the beneficiaries of the Administration Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(c) Third, to the beneficiaries of the Directors' Priority Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(d) Fourth, to the beneficiaries of the KERP Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(e) Fifth, to the DIP Lender in satisfaction of the DIP Obligations (as defined in the Initial Order) secured by the DIP Lender's Charge;

(f) Sixth, to the Closing Funding Lender in satisfaction of the Applicants' obligations secured by the Payables Charge; and

(g) Seventh, to the beneficiaries of the Directors' Subordinate Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge.

28. **THIS COURT ORDERS** that any remainder of the Proceeds following the payment in full of the Priority Payments shall be held by the Monitor pending further order of the Court, subject to paragraphs 29 and 30 of this Order.

POST-CLOSING RESERVE

29. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to establish a cash reserve (the "**Post-Closing Reserve**") from the Proceeds, which shall be held in a segregated account and shall be used to pay costs and fees incurred by the Monitor or the Applicants following the Effective Time in connection with completing these CCAA proceedings, including for greater certainty, (i) the fees and disbursements of the Applicants' counsel, the Monitor, counsel to the Monitor, and other professionals engaged by the Applicants or the Monitor incurred following the Effective Time, including in the exercise of the Applicants' and Monitor's powers and duties pursuant to the CCAA, the Initial Order, this Order, and any other Order granted in these proceedings, and (ii) any fees, expenses, or disbursements incurred in relation to any proceeding under the BIA in respect of any of the Applicants (collectively, the "**Post-Closing Costs**").

30. **THIS COURT ORDERS** that the Monitor is hereby authorized to pay any Post-Closing Costs in its own name or in the name of and on behalf of the Applicants, as it deems necessary, appropriate, or desirable, in its discretion.

RELEASES

31. **THIS COURT ORDERS** that effective upon the filing of the Monitor's Certificate, (i) the current directors, officers, employees, legal counsel and advisors of the Applicants (including, for certainty, Maricann), and (ii) the Monitor and its legal counsel (collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitations, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Certificate (a) undertaken or completed pursuant to the terms of this Order, or (b) arising in connection with or relating to the SPA or the completion of the Transaction (collectively, the "**Released Claims**"), which

Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or that arose in or relates to the period prior to the granting of the Initial Order. For greater certainty, nothing in this paragraph 31: (i) affects any claims against the directors and officers of any of the Applicants for breach of trust arising from acts or omissions occurring before the date of the Initial Order; or (ii) releases, fetters or prejudices: (a) the right of any person or entity to commence a claim against Wayland Group Corp. or any directors and officers of Wayland Group Corp. with respect to the class action or the issues giving rise to the class action against Wayland Group Corp., including without limitation for contribution and indemnity, or contractual indemnity (in each case subject to the stay of proceedings); and (b) the availability of any applicable insurance to satisfy such class action claims (including any future cross and third party claims).

32. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Applicants and any bankruptcy order issued pursuant to any such applications; and

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

the Sale Agreement, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contract and Excluded Liabilities in and to Residual Co, the transfer and vesting of the Transferred Assets in and to Maricann, and the transfer and vesting of the Maricann Shares in and to the Purchaser), the payment of the Priority Payments, the granting of the Payables Charge, and any payments by or to the Purchaser, the Closing Funding Lender, the Applicants or the Monitor authorized herein shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and/or Residual Co and shall not be void or voidable by creditors of the Applicants or Residual Co, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

GENERAL

33. **THIS COURT ORDERS** that, following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the Maricann Shares and the Maricann Property.

34. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings is hereby changed to:

> IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
>
> AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WAYLAND GROUP CORP., 2751609 ONTARIO INC. AND NANOLEAF TECHNOLOGIES INC.

35. **THIS COURT DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

36. **THIS COURT DECLARES** that the Applicants shall be authorized to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Applicants. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

37. **THIS COURT HEREBY 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 Applicants, the Monitor and their respective 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

Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order.

38. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof.

Hainey J

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 2 1 2020

PER / PAR:

Schedule "A" – Form of Monitor's Certificate

Court File No. CV-19-00632079-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to the Initial Order of the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated December 2, 2019, the Applicants were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and PricewaterhouseCoopers Inc. was appointed as the monitor (the "**Monitor**") of the Applicants.

B. Pursuant to an Approval and Vesting Order of the Court dated April 21, 2020 (the "**Order**"), the Court approved the transactions (the "**Transactions**") contemplated by the Share Purchase Agreement (the "**Sale Agreement**") among Wayland Group Corp. ("**Wayland**"), Maricann Inc. ("**Maricann**"), and Canadelaar B.V. (the "**Purchaser**") dated April 15, 2020, and ordered, *inter alia*, that (i) all of Maricann's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co, (ii) all of Wayland's right, title and interest in and to the Transferred Assets shall vest absolutely and exclusively in Maricann, (iii) all of the Excluded Contracts and Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in, Residual Co, and (iv) all of the right, title and interest in and to the Maricann Shares shall vest absolutely and exclusively in the Purchaser, which vesting is, in each case, to be effective upon the delivery by the Monitor to the Purchaser of a certificate confirming that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Purchaser and Wayland that all conditions to closing have been satisfied or waived by the parties to the Sale Agreement.

C. Capitalized terms used but not defined herein have the meanings ascribed to them in the Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Purchaser and Wayland, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the Sale Agreement.

2. This Monitor's Certificate was delivered by the Monitor at ________ on ______________, 2020.

PricewaterhouseCoopers Inc., in its capacity as Monitor of the Applicants, and not in its personal capacity

Per: ________________________________

Name:

Title:

Schedule B – Claims to be deleted and expunged from title to Real Property

Mortgages:

1. Instrument No. NK104626 is a Charge registered October 27, 2017 in favour of TSX Trust Company for $31,000,000

2. Instrument No. NK122473 is a Charge registered August 12, 2019 in favour of Cryptologic Corp. for $5,000,000

   - Instrument No. NK123545 is an Amending Agreement registered September 17, 2019 amending the terms of Charge registered as Instrument No. NK122473 to increase the amount of the loan to $50,000,000

Construction Liens (with no corresponding Certificates of Action):

1. Instrument No. NK124619 is a Construction Lien registered October 17, 2019 in favour of Newfab Ltd. for $1,758,481

Construction Liens (with corresponding Certificates of Action):

1. (a) Instrument No. NK124416 is a Construction Lien registered October 10, 2019 in favour of North Shore Electric Inc. for $96,050

   (b) Instrument No. NK124417 is a Construction Lien registered October 10, 2019 in favour of North Shore Electric Inc. for $1,152,542

   (c) Instrument No. NK125666 is a Construction Lien registered November 19, 2019 in favour of North Shore Electric Inc. for $64,191

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125761

2. (a) Instrument No. NK124494 is a Construction Lien registered October 15, 2019 in favour of 2296642 Ontario Inc. for $18,080

   (b) Instrument No. NK124495 is a Construction Lien registered October 15, 2019 in favour of 2296642 Ontario Inc. for $111,915

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125762

3. Instrument No. NK124806 is a Construction Lien registered October 24, 2019 in favour of MG Miscellaneous Metals Inc. for $173,865

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125758

4. Instrument No. NK124828 is a Construction Lien registered October 24, 2019 in favour of Vive Mechanical Inc. for $352,226

   - Certificate of Action registered January 20, 2020 as Instrument No. NK127377

5. Instrument No. NK125256 is a Construction Lien registered November 5, 2019 in favour of 1573082 Ontario Inc. for $45,858

- Certificate of Action registered November 21, 2019 as Instrument No. NK125757

6. Instrument No. NK125322 is a Construction Lien registered November 7, 2019 in favour of Decloet Greenhouse Manufacturing Ltd. for $581,897

   - Certificate of Action registered January 31, 2020 as Instrument No. NK127745

7. Instrument No. NK125432 is a Construction Lien registered November 12, 2019 in favour of Mat 4 Site Engineers Ltd. for $72,932

   - Certificate of Action registered December 23, 2019 as Instrument No. NK126777

8. Instrument No. NK125433 is a Construction Lien registered November 12, 2019 in favour of Rassaun Services Inc. for $320,151

   - Certificate of Action registered January 24, 2020 as Instrument No. NK127504

9. Instrument No NK125500 is a Construction Lien registered November 14, 2019 in favour of Zimcoat Inc. for $246,282

   - Certificate of Action registered December 17, 2019 as Instrument No. NK126533

10. Instrument No. NK125507 is a Construction Lien registered November 14, 2019 in favour of Gerrie Electric Wholesale Limited for $2,010,872

    - Certificate of Action registered January 31, 2020 as Instrument No. NK127743

11. Instrument No. NK125598 is a Construction Lien registered November 15, 2019 in favour of Gerrie Electric Wholesale Limited for $177,995

    - Certificate of Action registered January 31, 2020 as Instrument No. NK127744

12. (a) Instrument No. NK125625 registered November 18, 2019 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $115,944

    (b) Instrument No. NK125627 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $276,585

    (c) Instrument No. NK125628 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $817,534

    - Certificate of Action registered November 21, 2019 as Instrument No. NK125760

13. Instrument No. NK125834 is a Construction Lien registered November 22, 2019 in favour of Stinson Security Services Limited for $105,033

    - Certificate of Action registered December 13, 2019 as Instrument No. NK126494

14. Instrument No. NK126155 is a Construction Lien registered December 3, 2019 in favour of Trane Canada, ULC for $283,828

    - Certificate of Action registered January 24, 2020 as Instrument No. NK127527

15. Instrument No. NK127222 is a Construction Lien registered January 15, 2020 in favour of Havecon Projects BV and Havecon North America Inc. for $899,027

    - Certificate of Action registered January 21, 2020 by Instrument No. NK127395

- Instrument No. NK125624 is a Construction Lien registered November 18, 2019 in favour of 1820819 Ontario Inc. for $95,578

    - Certificate of Action registered March 16, 2020 by Instrument No. NK128831

Schedule C – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

Leases

1. Instrument No. NR587644 is a Lease registered February 22, 2005 between Lucien Phillips Jr. also known as Lucien Albert Phillips Jr., Mariette Denise Phillips and Metalore Resources Limited

   - Instrument No. NR591536 is an Assignment of Lease registered as Instrument No. NR587644 registered July 12, 2005 from Metalore Resources Limited to Leader Energy Corp.

   - Instrument No. NK72540 is an Application to Change Name - Instrument registered August 11, 2014 regarding Instrument Nos. NR587644, NR591536 to change the name from Leader Energy Corp. to Leader Capital Corp.

   - Instrument No. NK73385 is an Application (General) re: Assignment of Lease registered as Instrument No. NR587644 registered September 11, 2014 from Leader Capital Corp. to Magnum Gas Corp.

   - Instrument No. NK73740 is an Application (General) re: Assignment of Lease registered as Instrument No. NR587644 registered September 24, 2014 from Magnum Gas Corp. to Tribute Resources Inc.

   - Instrument No. NK107595 is an Application (General) re: Assignment of Leases registered as Instrument Nos. NR587644, NR591536, NK72540, NK73385, NK73740 registered February 1, 2018 from Tribute Resources Inc. to On-Energy Corp.

   - Instrument No. NK109419 is a Notice (Fixed and Floating Charge Demand Debenture) registered April 19, 2018 regarding Instrument Nos. NR587644, NR591536, NK72540, NK73385, NK73740, NK587644 between On-Energy Corp. and Pace Savings & Credit Union Limited for $2,800,000.00

   - Instrument No. NK126996 is an Application to Change Name - Instrument registered January 6, 2020 regarding NK107595 to change the name from On-Energy Corp. to Clearbeach Resources Inc.

General Encumbrances with respect to the Property

1. The reservations, limitations, exceptions, provisos and conditions, if any, expressed in any original grants from the Crown including, without limitation, the reservation of any mines and minerals in the Crown or in any other person.

2. Encumbrances respecting minor encroachments by the Property over abutting lands and minor encroachments over any portion of the Property by improvements of abutting land owners.

3. Any unregistered easements, rights-of-way or other unregistered interests or claims not disclosed by registered title.

Schedule "D" - Legal Description of the Real Property

PROPERTY DESCRIPTION:	PT LT 2 CON 7 NORTH WALSINGHAM AS IN NR306706 SAVE & EXCEPT PT 1 ON 37R10232; NORFOLK COUNTY
	PIN 50127-0217 (LT)

Tab 12

M.L. Wilkins & Son Ltd, Re: CCAA 2008 NBQB 391

S/M/93/2007

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.C.S.. 1985, c. C-36 AS AMENDED

-and-

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE APPLICANT M.L. WILKINS & SON LTD.

BEFORE:	**Justice Peter S. Glennie**
HEARING HELD:	**Saint John**
DATE OF HEARING:	**April 4, 2008**
DATE OF DECISION:	**December 5, 2008**

COUNSEL:

K. Chipp McCrea on behalf of M.L. Wilkins & Son Ltd.
R. Gary Faloon, Q.C. on behalf of Bank of Nova Scotia
Kathryn L. Stratton on behalf of Business Development Bank of Canada
Catherine A. Lahey and Lee Bell-Smith on behalf of J.D. Irving Limited

D E C I S I O N

GLENNIE, J.

[1] M.L. Wilkins & Son Ltd., a company granted protection pursuant to the *Companies Creditors Arrangement Act*, seeks an order discharging a certain Notice of Debenture and Notice of Crystallization which have been registered in the York County Registry office and that the Court appointed Monitor be permitted to sell certain property identified in the Debenture consisting of the seventeen parcels of vacant land described therein free and clear of any encumbrance or charge created by the registration of the Notice of Debenture and Notice of Crystallization.

Factual Overview

[2] M.L. Wilkins & Son Ltd. was granted protection by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "Act") on October 29, 2007 when an initial stay order (the "Initial Stay Order") was issued providing that, with the exception of the appointment of a Receiver by Bank of Nova Scotia ("BNS") on October 26, 2007, all proceedings and actions against M.L. Wilkins & Son Ltd., and particularly with respect to the collateral and security held by its secured creditors, were stayed and prohibited until November 25, 2007. A.C. Poirier & Associates Inc. was appointed as Court Monitor. The specific proceedings and actions which were stayed are enumerated in clauses 3(a) to 3(n) of the Initial Stay Order.

[3] The stay period and all terms within the Initial Stay Order were extended to December 19, 2007, by an Order issued by this Court on November 23, 2007 and subsequently extended to March 5, 2008.

[4] On December 19, 2007, the Monitor along with Counsel for M.L. Wilkins & Son Ltd. and Counsel for J.D. Irving Limited ("JDI"), BNS and Business

Development Bank of Canada ("BDC") appeared before this Court and made submissions with respect to the various positions of the parties in reply to three separate motions, one of each which was brought by M. L. Wilkins & Son Ltd., BDC and BNS. At the December 19, 2007 hearing JDI stated that it valued its security and collateral it held with respect to M.L. Wilkins & Son Ltd. at "$0". The Monitor says that JDI had ample opportunity to make submissions to the Court through its legal counsel present on that date relative to the matters raised.

[5] Subsequent to the December 19, 2007 hearing, legal Counsel for all parties consulted with each other concerning the terms and intent of the two orders. The wording of the two orders was finally agreed to by all Counsel in early February of 2008. The two orders were consented to and endorsed by legal Counsel for all parties represented at the December 19th hearing, including JDI, and were issued by the Court on February 14, 2008, effective December 19, 2007.

[6] One of the two orders issued on February 14, 2008, which is referred to as the 'BDC Order', extended the stay period and the terms of the Initial Stay Order to March 5, 2008, subject to certain rights provided to BDC therein. The second order is referred to as the 'BNS Order'.

[7] Both the BDC Order and the BNS Order set out the allocation, priorities, and certain rights and obligations with respect to the Administrative and DIP charges that had accrued up to December 19, 2007, and with respect to future Administrative and DIP charges to accrue subsequent to December 19, 2007. Counsel for BNS says his client would not have agreed to the terms and conditions of those orders if it had known that JDI was going to register a Notice of Debenture and Notice of Crystallization against the seventeen parcels of land which were unencumbered on February 14, 2008, and that JDI was going to

value its security at any amount other than $0. In this regard, JDI did not file an amended valuation of its security. JDI's lawyers advance the argument that since the moment in time that the Notice of Debenture and Notice of Crystallization have been filed, the floating charge contained in the JDI Debenture has been transformed into a fixed charge on the seventeen vacant parcels of land and as a consequence, the argument goes, the security is worth much more than $0 as it had been previously valued by JDI.

[8] Paragraph 3(j) of the BDC Order provides as follows:

> "The Company, with the consent of the Monitor, shall be permitted **to encumber or to sell the unencumbered real property owned by the Company** without further Order of this Court, provided the monies obtained from encumbering or sale of such property are used for purposes of payment of Administrative Charges or DIP Lender's Security incurred as part of the CCAA process, including The Bank of Nova Scotia DIP Charge." [Emphasis Added]

[9] The land referred to at the hearing held on December 19, 2007 are referred to in clause 3(j) of the BDC Order, as the "unencumbered" real property of M.L. Wilkins & Son Ltd. These parcels of land which are identified by seventeen separate PID numbers were referred to at the hearing of December 19 on several occasions by the various parties as being approximately one thousand acres of cut over, unencumbered real property.

[10] Paragraph 3(k) of the BDC Order also references the seventeen parcels of vacant land and provides as follows:

> "Notwithstanding the foregoing, and notwithstanding the Initial Stay Order herein, an Administration Charge and Debtor In Possession Charge shall be granted to counsel to the Applicant, M.L. Wilkins & Son Ltd., the Monitor, and the DIP Lender, (the "Secured Parties" for the purposes of this paragraph) from the

> Effective Date, to secure professional fees and disbursements incurred and new advances from the DIP Lender form the Effective Date. This Administration Charge and Debtor In Possession Charge shall be a first ranking priority against the real property more particularly described as PID numbers: 75401109, 1498039, 75064022, 75064048, 75083014, 75142745, 75142919, 75155788, 75172239, 75187880, 75256354, 75256602, 75258046, 75354696, 75354704, 75355941 and 75372334 (the "Lands"). The Secured Parties shall, in their sole and unfettered discretion, be entitled to encumber or sell the Lands, or any part thereof, without the consent of the Court or any other party, and to use the proceeds of any and all mortgages or sales to pay the costs secured by the Administration Charge and Debtor In Possession Charge incurred from the Effective Date. The Applicant, M.L. Wilkins & Son Ltd., shall execute such mortgages, deeds or transfers, or any other documentation, as may be required by the Secured Parties to give effect to such mortgages or sales."

[11] The 'Effective Date' is stated to be the 19th day of December 2007 pursuant to clause 2 of the BDC Order.

[12] The Monitor, along with Counsel for M.L. Wilkins & Son Ltd., and Counsel for BNS and BDC all say that the intention of the provisions of clauses 3(j) and 3(k) of the February 14, 2008 BDC Order was that the unencumbered lands, namely the seventeen parcels of vacant land, would be used to pay all administration and debtor in possession ("DIP") charges incurred with respect to M.L. Wilkins & Son Ltd.'s proceedings pursuant to the Act. The drafter of those provisions has confirmed that was the intention. In my opinion clause 3(j) supports the conclusion that all Administration Charges and the indebtedness under the DIP Lender's Security, including those incurred prior to the Effective Date of December 19, 2007, were to be payed from the proceeds garnered by encumbering or selling the unencumbered real property of M.L. Wilkins & Son Ltd. It should be noted that section 3(k) begins with the words "Notwithstanding the foregoing...."

[13] Counsel for JDI argue that the seventeen parcels of land were encumbered from the moment in time that it registered the Debenture from M.L. Wilkins & Son Ltd. on November 6, 2003 even though JDI had not yet crystallized the floating charge contained in the Debenture. With respect, I disagree. The November 5, 2003 Debenture from M.L. Wilkins & Son Ltd. to JDI (the "JDI Debenture") grants, mortgages and charges in favour of JDI in accordance with Schedule "F" to the Debenture. Schedule "F" creates a fixed and specific mortgage and charge on the four specified parcels under the heading "Fixed and Specific Mortgage and Charge" in Schedule "A". Schedule "A" to the Debenture lists four parcels under the heading "Fixed and Specific Mortgage and Charge" namely as follows: Parcel Identifiers: Fixed and Specific Mortgage and Charge; 1413566; 75229880; 75229898; 75401349. The Parcel Identifiers listed under "Floating Charge" are as follows: Floating Charge: 75120659; 75187880; 75354696; 75083014; 75354704; 75172239; 75355941; 1498039; 75372334; 75256602; 75064048; 75258046; 75064022; 75256354; 75142919; 75155788; 75142745; 75127100; 75401109. These property identifiers are the seventeen parcels of land in question. Attached to the JDI Debenture is a 'Certificate of Legal Effect' which reads as follows:

"CERTIFICATE OF LEGAL EFFECT

PID: 1413566; 75229880; 75229898; 75401349

Registered Owner: M.L. Wilkins & Son Ltd.

THIS IS TO CERTIFY THAT the legal effect of the registration of the attached DEBENTURE on the current Certificate of Registered Ownership for the specified parcel is as follows:

Addition: To add an encumbrance: J.D. IRVING, LIMITED
Instrument: Debenture

Deletion: N/A

Date: 7th day of November, 2003"

[14] Accordingly, the solicitor who registered the JDI Debenture on November 8, 2003 certified that the legal effect of the registration of the JDI Debenture for the four specified parcels, namely PID 1413566, 75229880, 75229898, and 75401349 was to add an 'encumbrance' against those four parcels of land with the JDI Debenture. The seventeen parcels of vacant land are not included or mentioned. Thus, at the moment in time when the BDC Order was issued on February 14, 2008 (which was effective as of December 19, 2007) the seventeen parcels of land were unencumbered and the floating charge was uncrystallized. BNS and BDC say the agreement was that the seventeen parcels of land would be first used to pay Administration Charges and the indebtedness under the DIP Lender's security. Counsel for JDI was present at the February 14, 2008 hearing and consented in writing to the BDC Order. The Court appointed Monitor is of the opinion that the seventeen parcels were available to be encumbered or sold to pay for all administration and DIP charges incurred.

[15] On February 11, 2008 Counsel for M.L. Wilkins & Son Ltd. advised the Court and all other parties that M.L. Wilkins & Son Ltd. was unable to proceed with reorganization under the Act. Pursuant to the BDC Order, BDC was then free to have its Receiver proceed to take proceedings against M.L. Wilkins & Son Ltd. as of February 15, 2008.

[16] On February 21, 2008, the BDC Order was registered in the York County Registry Office as document number 25221434. As a consequence, the rights and obligations of the parties set out therein became an encumbrance on the lands mentioned in paragraph 3(k) of the BDC Order, namely the seventeen parcels of vacant land.

[17] On February 22, 2008 BDC sought and obtained an order that allowed it to file a Petition for Bankruptcy against M. L. Wilkins & Son Ltd. The BDC Order

lifted the CCAA stay solely to the extent set out in paragraph 3(a) of the Initial Stay Order. All other provisions of the Initial Stay Order remained in full force and effect.

[18] Two third parties approached the Monitor with an interest in purchasing the unencumbered real property of M.L. Wilkins & Son Ltd., namely the seventeen parcels of vacant land. The Monitor along with Counsel for M.L. Wilkins & Son Ltd. and the DIP Lender considered both offers, and on February 28, 2008, the highest offer was accepted by “the Secured Parties” referred to in clause 3(k) of the BDC Order.

[19] A search of the Service New Brunswick Real Property Registry determined that on February 26, 2008, JDI had registered a Notice of Debenture and a Notice of Crystallization of the debenture in the York County Registry Office thereby placing an encumbrance on the unencumbered real property of M.L. Wilkins & Son Ltd., namely the seventeen parcels of vacant land.

[20] Mr. Powell, on behalf of the Monitor, says that he has been advised by the Solicitor for M.L. Wilkins & Son Ltd. that despite requests JDI has refused to discharge these encumbrances thus prohibiting M. L. Wilkins & Son Ltd. and the Monitor from selling the seventeen parcels of vacant land to the bona fide third party purchaser, as provided for in the BDC Order.

[21] In preparation for the transfer of the seventeen parcels of land to the third party purchaser, M.L. Wilkins & Son Ltd. transferred title to the seventeen parcels to the Monitor “In Trust”. That transfer of the seventeen parcels of land is dated February 27, 2008 and was registered in the York County Registry office on March 13, 2008 as Document 25295396. The Certificate of Legal Effect stated that the intended effect was “to change owners name to: A.C. Porrier & Associates Inc. In Trust”.

[22] Counsel for M.L. Wilkins & Son Ltd. says that a Service New Brunswick search ascertained that when JDI registered its Notice of Debenture and Notice of Crystallization, Service New Brunswick erroneously placed JDI on title to the various properties as “owner” as opposed to merely creating an “encumbrance” in favour of JDI on the title to the seventeen parcels of land. As a consequence, title to the seventeen parcels could not be transferred by M.L. Wilkins & Son Ltd. to the Monitor In Trust until this was corrected, which was not done until March 12, 2008. The Monitor now stands ready to transfer title to the third party purchaser but can only do so if the JDI encumbrances are discharged.

[23] A Petition for a Receiving Order was filed by BDC against M.L. Wilkins & Son Ltd. and a Receiving Order under the *Bankruptcy and Insolvency Act* was issued on March 18, 2008 placing M.L. Wilkins & Son Ltd. into bankruptcy.

[24] Counsel for M.L. Wilkins & Son Ltd. and the Monitor want to pay all outstanding Administrative Charges and DIP Lender’s Security from the proceeds of the sale of the unencumbered property, namely the seventeen parcels of land, as contemplated by the parties at the December 19, 2007 hearing, and was intended by and provided for in the BDC Order issued on February 14, 2008. Any surplus proceeds of the sale would be paid over to the Trustee in Bankruptcy of M.L. Wilkins & Son Ltd.

[25] Counsel for JDI do not agree with the manner in which the Monitor intends to use the proceeds of the sale of the seventeen parcels of land. As a consequence, JDI refuses to discharge the Notice of Debenture and Notice of Crystallization. The Monitor says that JDI’s refusal to discharge its Notice of Debenture and Notice of Crystallization of Debenture is prohibiting the Monitor from selling the subject property to the third party purchaser.

[26] For its part, JDI says that M.L. Wilkins & Son Ltd. is indebted to it in the amount of $339,145.00 which is secured by the JDI Debenture dated November 5, 2003. The JDI Debenture was registered pursuant to the New Brunswick Land Titles Act on November 8, 2003 but it contained only a floating, not a fixed, charge with respect to the seventeen parcels of vacant land and the Certificate of Legal Effect stated that it was adding “an encumbrance” with the JDI Debenture only against the four PID numbers specifically listed and not with respect to the seventeen vacant parcels of land. In my opinion the JDI Debenture did not create a fixed charge or encumbrance on the seventeen parcels of land until JDI registered the Notice of Debenture and Notice of Crystallization of Debenture on February 26, 2008. The seventeen parcels of vacant land remained unencumbered until that point in time.

[27] As mentioned, on February 26, 2008, JDI authorized its legal counsel to register a Notice of Debenture and Notice of Crystallization of Debenture (the “Notices”) against the seventeen parcels of vacant land, over which a floating charge had been granted by M.L. Wilkins & Son Ltd. in favour of JDI under and pursuant to the JDI Debenture.

[28] At the time of registration of the Notices, JDI says it had no information as to the market value of the seventeen parcels of land.

[29] Subsection 3(k) the BDC Order grants an Administration Charge and a Debtor Possession Charge, to the “Secured Parties” defined therein, to secure professional fees and disbursements incurred, and new advances from the DIP Lender, from the Effective Date.

[30] Subsection 3(i) of the BDC Order provides that the allocation of the Administration Charges and the Indebtedness under the DIP Lender’s Security to the Effective Date is to be allocated on a pro rata basis, using the actual gross

realizations of the Secured Lenders from the collateral subject to Secured Lenders' interest, as the basis. The subsection defines "realizations" as "the sale of any collateral or security by any secured lender, including, but not limited to BDC and The Bank of Nova Scotia".

[31] JDI asserts that it appears, based upon the BDC Order, that all Administration Charges and DIP Charges prior to the Effective Date, are to be allocated on a pro rata basis across all classes of collateral and that a further DIP Charge and Administration Charge has been created against the Property, to secure only professional fees and disbursements and new advances (if any), form the Effective Date (the "Post-Effective Date Charges").

[32] JDI argues that in order to protect its interest in any value which remained in the seventeen parcels of land subsequent to the payment of the Post-Effective Date Charges, it registered the Notices prior to M.L. Wilkins & Son Ltd. being adjudged bankrupt.

[33] Rod MacDonald, the Area Manager of Special Accounts for BDC was present at the hearing of the December 19, 2007 BDC motion before this Court. Mr. MacDonald deposes in an affidavit as follows:

> "4. I was present at the hearing of the BDC motion on December 19, 2007. It was disclosed during the hearing that M.L. Wilkins & Son Ltd. (the "Company") owned various parcels of land which were then unencumbered by security granted to any of the parties present (the "Unencumbered Lands").
>
> 5. Following submissions by counsel at the hearing, it was agreed that the Unencumbered Lands could be mortgaged or sold by the Company, with the consent of the Monitor, without further review or Order by the Court, provided that any monies obtained from the encumbering or sale of the Unencumbered Land would be used for payment of the Administration Charges and DIP Lender's Security incurred as part of the CCAA process, including the Bank of Nova

Scotia DIP Charge. The Unencumbered Lands were described in paragraph 3(k) of the BDC Order by their Service New Brunswick parcel identifier numbers. Seventeen (17) PIDs are listed in the BDC Order, identifying those Unencumbered Lands owned by the Company at the date of the hearing.

6. The Company, the Monitor, counsel to the Monitor, and the DIP Lender (as defined in the BDC Order), were granted and Administration Charge and Debtor in Possession Charge to secure their professional fees and disbursements and any new advances from the DIP Lender incurred post-December 19th, 2007. The BDC Order provides that the Administration Charge and the Debtor in Possession Charge shall form the first ranking priority against the Unencumbered Lands.

7. I was present at the December 19th, 2007, hearing and I believe that it was the understanding and agreement of tall parties that so long as any monies coming to the Company or to the Monitor from dealings with the Unencumbered Lands were used to pay Administration Charges or Debtor Possession Charges, such dealings were authorized and agreed to by all parties.

8. I believe that counsel present at the hearing concurred in the agreement that the Unencumbered Lands would remain with the Company, and could be mortgaged or sold to pay Administration Charges and Debtor Possession Charges, and that no counsel submitted contrary argument to the Court at that time.

9. Subsequently, following the hearing, counsel for BDC drafted and order (the "BDC Order") which outlined the agreement of the parties during the December 19th hearing. I am advised by our solicitors, McInnes Cooper, and I believe that following consent of all counsel, the BDC Order was forwarded to the Court for review...

10. The BDC Order was issued on February 14th, 2008, with and effective date of December 19th, 2007.

11. On February 15th, 2008, following issuance of the BDC Order by the Court, BDC appointed Green Hunt Wedlake Inc. its receiver (the "Receiver") to take control of the assets of the Company subject to BDC security. BDC had by that date been advised by the Company that it would not be filing a plan of arrangement pursuant to the CCAA and BDC in its appointment letter confirmed with the

Receiver that upon acceptance of the appointment, the Receiver could go into possession of the assets subject to the BDC Security.

12. The Receiver took possession on February 19th, 2008. BDC, upon advice from the Receiver, determined that is was appropriate to issue a Petition for Receiving Order against the Company. In order to reorder certain priorities pertaining to the assets and property of the Company encumbered by the BDC security. In order to issue a Petition, the Receiver and McInnes Cooper advised BDC that a motion to the Court to lift the stay of proceedings issued by the Initial Order under the CCAA, as extended by further orders to March 5th, 2008, would have to be made to allow BDC to file a Petition for Receiving Order during the currency of the Initial Order, as extended.

13. By Motion returnable on February 22nd, 2008, BDC sought and was issued an Order lifting the stay of proceedings provide for in the Initial Stay Order issued under the CCAA.

14. BDC filed its Petition for Receiving Order on February 25th, 2008. A Receiving Order adjudging the Company bankrupt and appointing Green Hunt Wedlake Inc. as trustee of the estate of the Bankrupt (the "Trustee") was issued on March 18th, 2008.

15. I am advised by McInnes Cooper, legal counsel to BDC, and I believe, that BNS registered the Order it obtained upon a motion brought by BNS returnable December 19th, 2007, (the "BNS Order") in the New Brunswick Land Titles Registry on February 21, 2008, as Document Number 25221434. Paragraph 9 of the BNS Order is identical to paragraph 3(k) of the BDC Order.

16. I am advised by McInnes Cooper, legal counsel to BDC, and I believe that JDI caused to be registered in the York County Registry Office on February 26th, 2008, a Notice of Debenture and a Notice of Crystallization of Debenture thereby encumbering each of the seventeen (17) PIDs listed in paragraph 3(k) of the BDC Order.

17. I am advised by McInnes Cooper, legal counsel to BDC, and I believe that by From 13 Transfer dated February 27, 2008, registered in the New Brunswick Land Titles Registry on March 13th, 2008, as Document Number 25295396, the Company transferred to the Monitor, In Trust, the seventeen (17) PIDs listed in paragraph 3(k) of the BDC Order.

18. I am advised by McInnes Cooper, legal counsel to BDC, and I believe that the Monitor and legal counsel to the Company have received and accepted an offer to purchase the Unencumbered Lands, now encumbered by the JDI Debenture, for the price of $219,000.

19. I am advised by McInnes Cooper, legal counsel to BDC, and I believe that the Monitor and legal counsel to the Company have asked JDI to discharge the Debenture and Notice of Crystallization encumbering each of the seventeen (17) PIDs in order to allow the sale of the lands, and that JDI's refusal to discharge the Debenture had resulted in this present motion.

20. BDC, BNS, JDI and the Company entered into a Priority Agreement dated May 6, 2005, (the "Priority Agreement"), in which the parties to the agreement concurred in the respective priorities of the security granted to each of them by the Company.

21. BDC supports the request for relief claimed in paragraph 2 if the Notice of Motion. BDC submits that JDI should be ordered to discharge the Notice of Debenture and Notice of Crystallization registered in the New Brunswick Land Titles Registry on February 26^{th}, 2008, for two reasons. JDI consented to the agreement among the parties as to the sale of the Unencumbered Lands and the application of any proceeds of sale through its counsel upon signing and signifying its consent to the BDC Order prior to issuance of that Order by the Court. Also, JDI, in executing the Priority Agreement dated May 6^{th}, 2005, agreed to postpone its security interest in the Company's property under its registered security interest, and pursuant to such other security as JDI might receive from the Company, regardless of the dates of crystallization of any floating charges, held by JDI, to the security interests of BDC and BNS."

[34] Robert Smith, a Senior Vice President of PricewaterhouseCoopers Inc. ("PWC") has been involved in this matter prior to the granting of protection and issuance of the Initial Stay Order to M.L. Wilkins & Son Ltd. on October 29, 2007. PWC was appointed by BNS as Receiver of M.L. Wilkins & Son Ltd. on October 26, 2007, prior to the issuance of the Initial Stay Order.

[35] Mr. Smith was also present in Court on December 19th, 2007 when the applications were made on behalf of M.L. Wilkins & Son Ltd., BDC and BNS. In an affidavit, he deposes as follows:

> "On December 19th, 2007, the Court advised that Wilkins owned unencumbered real property as stated in paragraph 9 of Robert Powell's Affidavit, (the "unencumbered real property"). Counsel for BDC, the Bank and JDI agreed with the Monitor and counsel for Wilkins that this unencumbered real property could be sold and the proceeds used for the purpose of payment of Administration Charges and DIP Lender's Security as more particularly described in paragraph 3(j) of the BDC Order and paragraph 8 of the BNS Order. Counsel for JDI did not object on December 19th, 2007 to the unencumbered real property being sold and the proceeds used in this manner and in deed consented in writing to both the BDC Order and the BNS Order."

[36] In paragraph 9 of his affidavit, Robert Powell, on behalf of the Court appointed Monitor, references paragraph 3(j) of the February 14, 2008 BDC Order as "the unencumbered real property owned by the Company" as being "approximately 1000 acres of cut over, unencumbered real property". Mr. Powell says that there was no other real property owned by M.L. Wilkins & Son Ltd. that could have been considered to be the "unencumbered real property" referred to at the December 19th hearing. Those same properties are specifically enumerated in paragraph 3(k) of the BDC Order by their Service New Brunswick PID numbers and consist of the same seventeen parcels of land which JDI registered its Notice of Crystallization against in the Land Titles Office on February 26, 2008.

[37] Mr. Smith goes on in his affidavit to say as follows:

> "13. At the hearing of the Bank's application on December 19th, 2007, the Court read my Affidavit sworn November 23rd, 2007. In my Affidavit I deposed that I believed the Estimated Collateral Valuation of JDI security was $337,939 and therefore JDI should

> pay a portion of the Administration Charge. At the hearing Lee Bell-Smith advised the Court that JDI did not agree with my valuation and advised the Court that JDI did not agree with my valuation and advised the Court that JDI valued their security and collateral at "NIL".
>
> ...
>
> 16. On February 21st, 2008, the Bank caused the BNS Order to be registered in the Land Titles office for Your County, New Brunswick as document number 25221434. Paragraph 9 of the BNS Order provides as follows:
>
>> 9. Notwithstanding the foregoing, and notwithstanding the Initial Stay Order herein, an Administration Charge and Debtor In Possession Charge shall be granted to counsel to the Applicant, M.L. Wilkins & Son Ltd., the Monitor counsel to the Monitor, and the DIP Lender, (the "Secured Parties" for the purpose of this paragraph), from the Effective Date, to secure professional fees and disbursements incurred and new advances from the DIP Lender, (the "Secured Parties" for the purpose of this paragraph), from the Effective Date. This Administration Charge and Debtor In Possession Charge shall be a first ranking priority against the real property more particularly described as PID numbers: 75401109, 1498039, 75064022, 75064048, 75083014, 75142745, 75142919, 75155788, 75172239, 75187880, 75256354, 75256602, 75258046, 75354696, 75354704, 75355941 and 75372334 (the "Lands"). The Secured Parties shall, in their sole and unfettered discretion, be entitled to encumber or sell the Lands or any part thereof, without the consent of the Court or any other party, and to use the proceeds of any and all mortgages, deeds or transfers, or any other documentation, as may be required by the Secured Parties to give effect to such mortgages or sales."

[38] Counsel for JDI say they listed their client's secured claim in a Notice of Claim delivered to the Monitor at $339,193.99 but stated in the Notice that JDI held assets in respect of that debt as security valued at "0" because no notice of crystallization had been issued or registered at that point in time, namely December 28, 2007, with respect to the seventeen parcels of vacant land.

Counsel for JDI advanced the argument that once the stay was lifted the parties were entitled to "maneuver their positions".

[39] The February 22, 2008 BDC Court Order was granted at the behest of BDC which filed the affidavit of Mr. MacDonald, BDC's Area Manager of Special Accounts, in support of its motion which included the following paragraph:

> "Because the Company is not prepared to voluntarily assign itself into bankruptcy without conditions, BDC asks the Court to lift the stay provided for under the Initial Stay Order, as extended by the BDC Order, to allow BDC to initiate proceedings against the Company pursuant to the provisions of the BIA. The lifting of the stay of proceedings will allow BDC, and it's appointed Receiver, to take action to move the realization process along to its ultimate conclusion, and will prevent further delay while awaiting the expiration of the existing stay of proceedings."

[40] The Court Appointed Monitor says that the February 22, 2008 BDC Order was sought and obtained by BDC in order to allow it to file a Petition for Bankruptcy. In an affidavit, Mr. Powell deposes as follows: "*The Order lifted the CCAA stay to the extent set out in paragraph 3(a) of the Initial Stay Order to allow BDC to proceed with Bankruptcy proceedings.*"

[41] The February 22, 2008 BDC Order does not rescind the entire Initial Stay Order. Paragraph 1(a) of the February 22, 2008 BDC Order only lifts the stay established in paragraph 3(a) of Initial Stay Order. The provisions of clauses 3(b), 3(c) and (d) of the Initial Stay Order remained in full force and effect.

[42] Section 3(a) of the Initial Stay Order stayed any and all "proceedings" including, without limitation: "suites, actions, extra-judicial proceedings, enforcement processes or other remedies".

[43] In my opinion, when JDI took steps to register a Notice of Crystallization against the seventeen parcels of land over which it held a floating charge, it was not enforcing its security as part of an 'enforcement process' nor was it commencing a proceeding or some other remedy as contemplated by Section 3(a) of the Initial Stay Order. It had not issued a demand for payment of the JDI Debenture it held form M.L. Wilkins & Son Ltd., nor had it issued a notice of non-payment or a Notice of Intention to Enforce the JDI Debenture as required by section 244(1) of the *Bankruptcy and Insolvency Act*.

[44] As mentioned, the provisions of clauses 3(b), (c) and (d) of the Initial Stay Order remained in full force and effect. Those provisions were not lifted or diluted by the February 22, 2008 BDC Order and accordingly JDI was subject to the prohibitions and restrictions contained therein.

[45] Section 3(c) of the Initial Stay Order specifically restrained the right of any creditor to take any step in "asserting, perfecting or registering" any right or interest. Section 3(d) specifically restrained the right to make any demand, to send any notice, or to crystallize any security interest. In contravention of section 3(c) JDI registered a Notice of the JDI Debenture. In contravention of section 3(d) it registered a Notice of Crystallization of the JDI Debenture.

[46] The words contained in sections 3(c) and 3(d) of the Initial Stay Order have meaning and in my opinion JDI was restrained by sections 3(c) and 3(d) of the Initial Stay Order from registering the Notice of Debenture and the Notice of Crystallization of Debenture until after March 5, 2008.

[47] On February 21st, 2008, JDI signed a Form 59, Notice of Crystallization of Debenture. It appears that immediately upon this Court signing the Order lifting section 3(a) of the Stay of Proceedings JDI attempted to register the Form 59 at the Land Titles office on February 22nd, 2008. The Form 59 was rejected by SNB

as JDI had failed to register the Debenture against the title lots whose PID numbers are set out in the Schedule “A” attached to its Form 59.

[48] On February 26th, 2008, JDI registered a Form 57, Application to Register Debenture in the Land Titles Office for York County. The Form 57 was registered as number 25234635. This procedure was apparently carried out to correct the failure of JDI to register the Debenture against the title to the parcels of land which were subject to the floating charge contained in the JDI Debenture. However, by February 26th, 2008, both the BDC Order and the BNS Order had been registered in the Land Titles office for York County and as a consequence constituted, pursuant to the terms of each Order, a first charge on the title of the seventeen parcels of land.

[49] On February 26th, 2008, JDI again attempted to register a Form 59, Notice of Crystallization of Debenture dated February 21st, 2008 in the Land Titles Office. This time JDI successfully recorded the Form 59 as document number 25234759.

[50] Attached to the Form 59, Notice of Crystallization of Debenture is a Certificate of Effect. Paragraph 2 of the Certificate of Effect contains the following wording:

> “The registered owner of the specified parcel and all other encumbrances are not affected by the registration of the attached Notice of Crystallization of Debenture.”

[51] Pursuant to paragraph 9 of the BNS Order, BNS has a first charge on the unencumbered real property which I am satisfied consists of the seventeen parcels of vacant land. The ‘Secured Parties’, as referenced therein, have “in their sole and unfettered discretion” the right to sell the unencumbered real property identified by the specific seventeen PID numbers and to use the

proceeds as set out therein. I am of the view that the intent of the February 14, 2008 BDC Order was to allow M.L. Wilkins & Son Ltd., the Monitor and Counsel for M.L. Wilkins & Son Ltd. to apply all of the proceeds from the sale of the seventeen parcels of land to all of the Administrative Charges and DIP Lender's Security Charges.

[52] Notwithstanding its consent to both the BDC Order and the BNS Order the effect of registering the JDI Debenture and a Notice of Crystallization thereof is to prejudice BNS and BDC and to obtain priority over the seventeen parcels of land of M.L. Wilkins & Son Ltd. after advising the Monitor and the Court on December 19, 2007 that the value of its security was $0.

[53] In my opinion, subparagraph 3(1) of the BDC Order is the operative paragraph, such that the Monitor is free to sell the seventeen parcels of land and use all sale proceeds therefrom to pay all DIP and Administration Charges.

<u>Crystallization of the Floating Charge</u>

[54] Counsel for JDI say that arguably the floating charge contained in the JDI Debenture had automatically crystallized prior to notice or registration thereof. There are conflicting views as to when a floating charge crystallizes and the effect of same. For a discussion of this issue see *Bayhold Financial Corp. v. Clarkson Co.*, 1991 CarswellNS 33 commencing at paragraph 59.

[55] However, Counsel for JDI concede that whether or not the floating charge contained in the JDI Debenture had previously crystallized, it did not bind any third party until the registration of the notice of such crystallization in the Land Titles office. Counsel for JDI say that is why they valued the JDI security at $0 on December 19, 2007.

[56] JDI takes the position that whether or not the floating charge had crystallized, the seventeen parcels of land were never "unencumbered" and accordingly were not free to be sold pursuant to subparagraph 3(i) of the BDC Order. JDI concedes that the subject property remained subject to the DIP Charge created by subparagraph 3(k). In my opinion the seventeen parcels of land remained unencumbered until the moment in time when JDI registered its Notice of Crystallization contrary to the provisions of the February 22, 2008 BDC Order.

[57] In my opinion the floating charge contained in the JDI Debenture had not crystallized until the Notice of Crystallization was registered by JDI and accordingly the seventeen parcels of land were unencumbered until that moment in time and were unencumbered when the BNS Order was registered.

Conclusion and Disposition

[58] JDI was not legally able to file a Notice of Debenture and a Notice of Crystallization of Debenture when it did so on February 26, 2008 because it was restrained and prohibited from doing so by clause 3(c) of the Initial Stay Order [not to perfect or register any right or interest] and clause 3(d) [not to crystallize any security interest]. JDI acknowledges that it was not enforcing its security (as contemplated by clause 3(a) of the Initial Order), nor was it intending to enforce its security. It argues that it was only attempting to preserve its rights in the seventeen parcels of land. Paragraphs 3(c) and 3(d) of the Initial Stay Order were not lifted or rescinded by the February 22, 2008 BDC Order. Those paragraphs and the restraining provisions contained therein remained in full force and effect until after March 5, 2008 and accordingly prohibited JDI from effecting the registration of the Notices on February 26, 2008.

[59] The registration by JDI of the Notice of Debenture and Notice of Crystallization on February 26, 2008 are accordingly null and void and of no force

and effect. An order will issue to that effect and to direct that JDI is to forthwith discharge the Notice of Debenture and Notice of Crystallization that it registered in the York County Registry Office on February 26, 2008 as document numbers 25234635 and 25234759 respectively.

[60] Pursuant to the terms of the Order of this Court dated February 14, 2008, and effective December 19, 2007, and registered in the York County Registry on February 21, 2008, as document number 25221434, the Monitor is permitted to sell the property described as PID numbers 75401109, 1498039, 75064022, 75083014, 75155788, 75142745, 75142919, 75155788, 75172239, 75187880, 75256354, 75256602, 75258046, 75354696, 75354704, 75355941, and 75372334, free and clear of any encumbrance created by the registration by JDI of the Notice of Debenture and Notice of Crystallization on February 26, 2008.

[61] In the result, the Monitor is permitted to use the proceeds from the sale of the seventeen parcels of land to pay all of the outstanding Administrative and DIP charges incurred as part of the CCAA proceedings of M.L. Wilkins & Son Ltd., subject to a final taxation of all Administrative and DIP charges accruing since December 19, 2007.

[62] Costs in the amount of $1,000.00, inclusive of disbursements, are to be paid by JDI to each of M. L. Wilkins & Son Ltd., BNS and BDC.

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Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

Tab 13

CITATION: GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173
COURT FILE NO.: CV-12-9856-00CL
DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: GE Canada Real Estate Financing Business Property Company, Applicant

AND:

1262354 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Pillon and Y. Katirai, for the Receiver

L. Rogers, for the applicant, GE Canada Real Estate Financing Business Property Company

C. Reed, for the Respondent and for Keith Munt, the principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for the proposed purchaser, 5230 Harvester Holdings Corp.

HEARD: February 18, 2014

REASONS FOR DECISION

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

[1] PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

[2] The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by

the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

[3] After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

[4] The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for $10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of $9.95 million. In January, 2013, the listing price was reduced to $8.2 million.

[5] In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

[6] Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

[7] Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to $6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

[8] One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property

under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to $6.8 million.

[9] On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

[10] As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

[11] The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at $6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

[12] In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

[13] By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately $593,000 of the $600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

[14] The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

[15] In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

[16] The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

[17] The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, "clean" - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations – and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

[18] The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver's materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

[19] At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver's request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

[20] The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the "Receiver's Confidentiality Agreement"). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

[21] By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

> As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

[22] On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

[23] On January 23 Debtor's counsel wrote to the Receiver:

> My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

[24] The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

[25] The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

[26] Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

[27] On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

[28] At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver – i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been

the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

[29] The Receiver's Confidentiality Agreement contained a recital which read:

> The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

> 1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
>
> 2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
>
> 3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
>
> 4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

[30] Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

> The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

[31] By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

[32] In *Sierra Club of Canada v. Canada (Minister of Finance)*[1] the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials 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.[2] As applied in the insolvency context that principle has led this 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 which 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.

[33] 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.[3]

[34] To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, 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. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

[35] From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

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[1] 2002 SCC 41
[2] *Ibid*., para. 53.
[3] *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Gen. Div.).

[36] Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

(i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank of Canada v. Soundair Corp.*,[4] specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;

(ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership – a proper request. The Debtor was prepared to agree to that term;

(iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

[37] In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

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[4] (1991), 4 O.R. (3d) 1 (C.A.)

V. Receiver's request for approval of the sale: The *Soundai*r analysis

[38] The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

[39] The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

[40] Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

[41] Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

[42] As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

[43] As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,[5] motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

[44] First, one had to take into account the economic reality of this receivership – i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

[45] Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to $356,301.40, and its counsel had incurred fees approximating $188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

[46] Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

[47] Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

[48] Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.[6] In this receivership the Receiver had served this motion over a week in advance of

[5] 2011 ONSC 346, para. 7.
[6] *Hryniak v. Mauldin*, 2014 SCC 7, para. 31.

the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

[49] Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

[50] Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of a receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

[51] For those reasons, I refused the Debtor's second adjournment request.

[52] Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

[53] Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

[54] For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

D. M. Brown J.

Date: February 24, 2014

Tab 14

Court File No. CV-12-9761-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 24th
	)	
JUSTICE MORAWETZ	)	DAY OF JULY, 2012

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. and 3024308 NOVA SCOTIA COMPANY

Applicants

SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

ORDER
(Distribution of Heligear Transaction Proceeds)

THIS MOTION, made by Fifth Third Bank in its capacity as agent (in such capacity, the "**Pre-Filing Agent**") for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (collectively in such capacity, the "**Pre-Filing Lenders**"), lenders under the Loan and Security Agreement dated March 29, 2010 (the "**Loan Agreement**") and in its capacity as agent (in such capacity, the "**DIP Agent**") for itself, First Merit Bank, N.A., and North Shore Community Trust Company (collectively in such capacity, the "**DIP Lenders**") under the DIP Term Sheet and the Canadian Funding and Agency Agreement (collectively, the "**DIP Agreement**") both dated as of June 13, 2012, for an order authorizing and directing Ernst & Young Inc., in its capacity as monitor (the "**Monitor**") of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "**CCAA Entities**"), on the closing of the transaction (the "**Heligear Transaction**") contemplated by the agreement of purchase and sale between Northstar

Aerospace Inc., Northstar Aerospace (Canada) Inc., Northstar Aerospace (USA) Inc., Northstar Aerospace (Chicago) Inc. and D-Velco Manufacturing of Arizona, Inc. d/b/a Northstar Aerospace (Phoenix), and Heligear Canada Acquisition Corporation (the "**Canadian Purchaser**") and Heligear Acquisition Co. dated June 14, 2012 (the "**Heligear Agreement**"), to make certain distributions to the Pre-Filing Agent and the DIP Agent, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Donald K. Mitchell, sworn July 23, 2012 and the Exhibits attached thereto, the Third Report of the Monitor dated July 23, 2012, the affidavits of Nigel Meakin sworn July 18, 2012 and July 24, 2012 and the Exhibits attached thereto, the affidavit of Phil Shewen sworn July 18, 2012 and the Exhibits attached thereto, the affidavit of Dr. Liana Nolan sworn July 19, 2012 and the Exhibits attached thereto, the affidavit of Steven Sagle sworn July 19, 2012 and the affidavit of Dawn Cartwright sworn July 23, 2012, and on hearing the submissions of counsel for the DIP Agent and the Pre-Filing Agent, the CCAA Entities, the Monitor, The Boeing Company and Boeing Capital Loan Corporation, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment, The Corporation of the City of Cambridge, the Regional Municipality of Waterloo, the Canadian Autoworkers Union, General Electric Company Canada and the Canadian Purchaser, no one appearing for any other person on the service list, although such parties were served via electronic mail as appears from the affidavit of service of Maria Konidis, sworn July 23, 2012, filed, or were served via overnight courier, messenger or regular mail as appears from the affidavit of service of Maria Konidis sworn July 24, 2012, filed,

1. **THIS COURT ORDERS** that, unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Heligear Agreement.

SERVICE

2. **THIS COURT ORDERS** that the time for and manner of service of the Notice of Motion and the Motion Record be and is hereby abridged and validated so that the Motion is properly returnable today and further that the requirement for service of the Notice of Motion and Motion Record upon interested parties, other than those served, is hereby dispensed with and that the service of the Notice of Motion and Motion Record, as effectuated by Fifth Third Bank is hereby validated in all respects.

PAYMENT OF PURCHASE PRICE

3. **THIS COURT ORDERS AND DIRECTS** that the Canadian Closing Cash Payment payable on the Closing Date pursuant to Section 3.3 of the Heligear Agreement shall, subject to the terms of the Heligear Agreement, be paid to the Monitor on the Closing Date.

RESERVES

4. **THIS COURT ORDERS AND DIRECTS** that immediately following the filing of the Monitor's Certificate (as defined in the Approval and Vesting Order of the Court dated the date hereof (the "**Approval and Vesting Order**")), the Monitor shall be authorized and directed to establish, hold and maintain reserves as cash collateral from the sale proceeds of the Heligear Transaction paid to it by the Canadian Purchaser (the "**Sale Proceeds**"), which for greater certainty, does not include the Canadian Working Capital Escrow Amount or the US Working Capital Escrow Amount, which shall be dealt with in accordance with the Canadian Escrow Agreement and the US Escrow Agreement, respectively, as follows:

(a) in the sum of $1,000,000 (the "**Administration Charge Reserve**") to which the Administration Charge (as defined in the Initial Order of the Court dated June 14, 2012 (the "**Initial Order**")) shall attach with the priority provided by the Initial Order as modified by the Order re Comeback Motion of the Court dated June 27, 2012 (the "**Comeback Order**");

(b) in the sum of $1,750,000 (the "**D&O Charge Reserve**") to which the Directors' Charge (as defined in the Initial Order) shall attach with the priority provided by the Initial Order as modified by the Comeback Order;

(c) in the sum of $350,526 (the "**KEIP Charge Reserve**") to which the KEIP Charge (as defined in the Order Re Amended KEIP and Stay Extension of the Court dated July 10, 2012 (the "**KEIP Order**")) shall attach with the priority provided by the KEIP Order;

(d) in a sum to be agreed upon between the Pre-Filing Agent, the CCAA Entities, the Canadian Purchaser and the Monitor or as otherwise determined by further Order of the Court that is sufficient to satisfy the aggregate of any amounts asserted to be Cure Costs which are not paid on the closing of the Heligear Transaction (the "**Cure Costs Reserve**");

(e) in a sum to be agreed upon between the Pre-Filing Agent, the CCAA Entities, the Canadian Purchaser and the Monitor or otherwise as determined by further Order of the Court, to satisfy the Canadian Working Capital Deficit, if any (the "**Canadian Working Capital Deficit Reserve**");

(f) in a sum to be agreed upon between the Pre-Filing Agent, the CCAA Entities and the Monitor or otherwise as determined by further Order of the Court, to which the Critical Supplier Charge (as defined in the Initial Order) shall attach with the priority provided by the Initial Order as modified by the Comeback Order, to satisfy (i) the accrued but unpaid post-filing payables arising as a result of the supply or delivery of goods or services to any of the CCAA Entities in the ordinary course of business which are not secured against the Administrative Charge Reserve and are incurred in accordance with previous Orders granted in these proceedings by the CCAA Entities in the period from the date of the Initial Order to and including the Closing Date, which for greater certainty shall include without limitation amounts for any potential claim pursuant to the Critical Supplier Charge; and (ii) any amounts which are not secured against the Administration Charge Reserve and may be incurred by the CCAA Entities and/or the Monitor after the Closing Date in connection with the exercise of the Monitor's powers pursuant to a further Order of this Court granting the Monitor additional powers in relation to the remaining assets of the CCAA Entities and other matters arising after the Closing Date (collectively, the "**Post-Filing Payables Reserve**");

(g) in a sum to be agreed upon between the CCAA Entities, the Monitor, the Pre-Filing Agent and Harris Williams Inc. or otherwise as determined by further Order of the Court, to satisfy all amounts owing to Harris Williams Inc. in accordance with the Harris Williams Engagement Letter (as defined in the Comeback Order), including, without limitation, the Closing Fee (as defined in the Harris Williams Engagement Letter) (the "**Harris Williams Reserve**"). For greater certainty, the amount of the Harris Williams Reserve in respect of the Closing Fee shall not exceed the amount necessary to satisfy the CCAA Entities' *pro rata* share of the Closing Fee as between the CCAA Entities and the Chapter 11 Entities[1] based on the Canadian Purchase Price and the US Purchase Price; and

(h) in the sum of the aggregate amount that the Monitor, counsel to the Monitor, the CRO, counsel to the CRO, counsel to the CCAA Entities and independent counsel to Northstar Inc.'s Board of Directors (collectively, the "**Professionals**") estimate (as evidenced by estimates provided by each of the Professionals to the Monitor and the Pre-Filing Agent on or prior to Closing) for all fees and expenses relating to services rendered up to and including Closing which are secured by the Administration Charge, or as otherwise determined by further Order of the Court (the "**Pre-Closing Professional Services Reserve**").

(the Administration Charge Reserve, the D&O Charge Reserve, the KEIP Charge Reserve, the Cure Costs Reserve, the Canadian Working Capital Deficit Reserve, the Post-Filing Payables Reserve, the Harris Williams Reserve and the Pre-Closing Professional Services Reserve are collectively, the "**Reserves**")

DIP DISTRIBUTION

5. **THIS COURT ORDERS AND DIRECTS** that immediately following the filing of the Monitor's Certificate, the Monitor shall be authorized and directed, without further Order of the Court, to distribute cash or cash equivalents from the Sale Proceeds in an amount equal to the outstanding DIP Obligations (as defined in the DIP Agreement) to the DIP Agent for the DIP Lenders, free and clear of all Encumbrances (as defined in the Approval and Vesting Order) other than those in favour of the DIP Agent, in satisfaction of the indebtedness owing by the CCAA Entities to the DIP Lenders under the DIP Agreement (the "**DIP Distribution**").

6. **THIS COURT ORDERS** that upon payment of the DIP Distribution, the DIP Lenders' Charge (as defined in the Initial Order) shall be fully and finally discharged.

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[1] Northstar Aerospace (USA) Inc., Derlan USA Inc., Northstar Aerospace (Chicago) Inc. and D-Velco Manufacturing of Arizona, Inc.

PRE-FILING LOAN DISTRIBUTION

7. **THIS COURT ORDERS AND DIRECTS** that immediately following the filing of the Monitor's Certificate, the Monitor shall be authorized and directed, without further Order of the Court, to distribute to the Pre-Filing Agent for the benefit of itself and the Pre-Filing Lenders, the balance of the Sale Proceeds (after establishment of the Reserves and the payment of the DIP Distribution), free and clear of all Encumbrances other than those in favour of the Pre-Filing Agent, to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to the Pre-Filing Lenders under the Loan Agreement and the other Financing Agreements (as such term is defined in the Loan Agreement) (the "**Pre-Filing Loan Obligations**").

8. **THIS COURT ORDERS AND DIRECTS** that immediately following the filing of the Monitor's Certificate, the Pre-Filing Agent shall be authorized and empowered, without further Order of the Court, to transfer all funds in any account of the CCAA Entities that have been deposited at Fifth Third Bank, less the estimated amount as provided by the CCAA Entities in the process of being cleared, as the Pre-Filing Agent directs, which funds shall be free and clear of all Encumbrances other than those in favour of the Pre-Filing Agent, to be applied against the Pre-Filing Loan Obligations.

DISTRIBUTIONS FROM ADMINISTRATION CHARGE RESERVE

9. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Administration Charge Reserve to the beneficiaries of the Administration Charge on account of valid claims made to such Administration Charge Reserve pursuant to a protocol to be agreed upon between the Monitor, the Pre-Filing Agent and any beneficiaries of the Administration Charge Reserve or by further Order of the Court, free and clear of all Encumbrances other than those in favour of the beneficiary of such disbursement, to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to such beneficiary.

10. **THIS COURT ORDERS** that once all claims to the Administration Charge Reserve have been finally determined and all applicable payments have been made, the Administration Charge shall be fully and finally discharged.

DISTRIBUTIONS FROM THE KEIP CHARGE RESERVE

11. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered to make disbursements from the KEIP Charge Reserve to the employees of the CCAA Entities that are subject to the Amended KEIP (as defined in the KEIP Order) in the amount owing by the CCAA Entities to such employees pursuant to the Amended KEIP, subject to the approval of the Pre-Filing Agent and the Monitor or otherwise by further Order of the Court, free and clear of all Encumbrances other than those in favour of the beneficiary of such disbursement, in satisfaction of the amounts owing by the CCAA Entities to such employees pursuant to the Amended KEIP.

12. **THIS COURT ORDERS** that once all claims to the KEIP Charge Reserve have been finally determined and all applicable payments have been made, the KEIP Charge shall be fully and finally discharged.

DISTRIBUTIONS FROM THE CURE COSTS RESERVE

13. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Cure Costs Reserve to the applicable party on account of Cure Costs in an amount agreed upon between the CCAA Entities, the Monitor, the Canadian Purchaser and the Pre-Filing Agent or otherwise as determined by further Order of the Court, free and clear of all Encumbrances, in satisfaction of the Cure Costs owing by the CCAA Entities to such beneficiary.

DISTRIBUTIONS FROM THE CANADIAN WORKING CAPITAL DEFICIT RESERVE

14. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Canadian Working Capital Deficit Reserve, to the Canadian Purchaser on account of the Canadian Working Capital Deficit in an amount determined in accordance with Section 3.9(4) of the Heligear Agreement, in an amount to be agreed upon between the CCAA Entities, the Monitor, the Canadian Purchaser and the Pre-Filing Agent or otherwise as determined by further Order of the Court, free and clear of all Encumbrances, to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to the Canadian Purchaser under the Section 3.9(4) of the Heligear Agreement.

DISTRIBUTIONS FROM THE POST-FILING PAYABLES RESERVE

15. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Post-Filing Payables Reserve pursuant to a protocol to be agreed upon between the Monitor and the Pre-Filing Agent or by further Order of the Court, to the applicable party on account of valid claims made to the Post-Filing Payables Reserve (as evidenced by invoices delivered to the Monitor by such beneficiary), free and clear of all Encumbrances other than those in favour of the beneficiary of such disbursement (to the extent such party is a beneficiary of the Critical Supplier Charge) to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to such beneficiary.

16. **THIS COURT ORDERS** that once all claims to the Post-Filing Payables Reserve have been finally determined and all applicable payments have been made, the Critical Supplier Charge shall be fully and finally discharged.

DISTRIBUTIONS FROM THE HARRIS WILLIAMS RESERVE

17. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Harris Williams Reserve to Harris Williams Inc. in the amount owing by the CCAA Entities to Harris Williams Inc. pursuant to the Harris Williams Engagement Letter, in an amount agreed upon between the Pre-Filing Agent, Harris Williams Inc. and the Monitor or otherwise as determined by further Order of the Court, free and clear of all Encumbrances to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to Harris Williams Inc. under the Harris Williams Engagement Letter (the "**Harris Williams Payment**").

DISTRIBUTIONS FROM THE PRE-CLOSING PROFESSIONAL SERVICES RESERVE

18. **THIS COURT ORDERS** that each of the Professionals shall submit accounts to the Monitor and the Pre-Filing Agent for all fees and expenses relating to services rendered up to and including Closing ("**Pre-Closing Services**") within five (5) business days after Closing (the "**Pre-Closing Admin Fee Bar Date**").

19. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered, without further Order of the Court, to make disbursements from the Pre-Closing Professional Services Reserve to the Professionals on account of Pre-Closing Services five (5) business days after the submission of such accounts, free and clear of all Encumbrances other than those in favour of the Professional that is the beneficiary of such disbursement, to be applied against the indebtedness, liabilities and obligations owing by the CCAA Entities to such Professional.

20. **THIS COURT ORDERS** that, subject to payment in accordance with paragraph 19 hereof, the Administration Charge shall not apply for the benefit of any fees or expenses relating to Pre-Closing Services unless applicable accounts have been submitted in accordance with paragraph 18 prior to the Pre-Closing Admin Fee Bar Date.

SURPLUS RESERVE DISTRIBUTION

21. **THIS COURT ORDERS AND DIRECTS** that once the Pre-Filing Agent receives written confirmation from the Monitor that all claims to a Reserve, other than the D&O Charge Reserve, have been finally determined and all applicable payments have been made or a further Order of the Court so holds, the Monitor is hereby authorized and directed, without further Order of the Court, to distribute all amounts remaining in such Reserve to the Pre-Filing Agent for the benefit of itself and the Pre-Filing Lenders, free and clear of all Encumbrances other than those in favour of the Pre-Filing Agent, to be applied against the Pre-Filing Loan Obligations.

ESCROW DISTRIBUTION

22. **THIS COURT ORDERS** that, notwithstanding anything else contained in this Order, the Monitor, as Escrow Agent, is hereby authorized and empowered, without further Order of the Court, to hold and distribute the Canadian Working Capital Escrow Amount in accordance with the Canadian Escrow Agreement and to hold and distribute the US Working Capital Escrow Amount in accordance with the US Escrow Agreement. Any amount payable out of escrow pursuant to either of the aforesaid agreements that would be payable to the CCAA Entities shall be deemed to be Sale Proceeds and paid to the Pre-Filing Agent for the benefit of itself and the Pre-Filing Lenders, free and clear of all Encumbrances other than those in favour of the Pre-Filing Agent, to be applied against the Pre-Filing Loan Obligations.

GENERAL

23. **THIS COURT ORDERS** that no distributions shall be made from the D&O Charge Reserve pending further Order of the Court.

24. **THIS COURT ORDERS** that, for greater certainty, no amounts shall be payable from any Reserve on account of a claim to any other Reserve.

25. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

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

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

the payments and transfers made under paragraphs 5, 7, 8, 9, 11, 13, 14, 15, 17, 19, 21 and 22 of this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the CCAA Entities and shall not be void or voidable by creditors of the CCAA Entities, nor shall they constitute nor be deemed to be fraudulent preferences, assignments, fraudulent conveyances or other reviewable transactions under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

26. **THIS COURT ORDERS** that each of the Monitor, the CCAA Entities, the Pre-Filing Agent, the Canadian Purchaser, Harris Williams Inc., or any party asserting a claim to a Reserve may apply to the Court for directions in respect of any aspect of this Order.

27. **THIS COURT ORDERS** that the Monitor, in carrying out the terms of this Order, shall have all of the protections given to it by the *Companies' Creditors Arrangement Act* (Canada) and the Initial Order or as an officer of this Court, including the stay of proceedings in its favour, and shall incur no liability or obligation as a result of the carrying out of its obligations under this Order.

28. **THIS COURT HEREBY 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 Monitor 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 Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 02 2012

PER/PAR:

Court File No. CV-12-9761-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC. et al.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Distribution of Heligear Transaction Proceeds)

BLAKE, CASSELS & GRAYDON LLP
Suite 4000, Commerce Court West
199 Bay Street, Suite 4000
Toronto, Ontario M5L 1A9

Steven Weisz LSUC No.: 32102C
Tel: (416) 863-2616

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Lawyers for Fifth Third Bank in its capacity
as Pre-Filing Agent and DIP Agent

22260352.9

Tab 15

COUR SUPÉRIEURE

Chambre commerciale

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000167-134

DATE : 26 septembre 2014

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.

In the matter of the plan of arrangement with the creditors of:

MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE & ATLANTIC CANADA CO.) (M.M.A.)
Petitioner
And
RICHTER ADVISORY GROUP INC.
(RICHTER GROUPE CONSEIL INC.)
Monitor
And
UNITED STATES OF AMERICA, represented by the Secretary of Transportation, acting through the Federal Railroad Administration (FRA)

JUGEMENT SUR REQUÊTE POUR APPROBATION D'UNE DISTRIBUTION PARTIELLE DU PRODUIT DE LA VENTE DES ACTIFS DE LA DÉBITRICE

---

[1] Le tribunal est saisi d'une requête en approbation d'une distribution partielle du produit de la vente des actifs de la débitrice.

[2] En date du 8 août 2013, une ordonnance initiale est rendue en faveur de la débitrice.

[3] En vertu de l'ordonnance initiale, Richter Advisory Group inc. est nommée contrôleur de la débitrice.

[4] Les faits ayant donné lieu au dépôt d'une requête en vertu de la LACC découlent d'un accident ferroviaire survenu le 6 juillet 2013 en la ville de Mégantic.

[5] L'ordonnance initiale est rendue par l'honorable Martin Castonguay, j.c.s., dont le soussigné a pris la relève depuis plus d'un an puisque le dossier a été transféré dans le district de Saint-François.

[6] Le soussigné a déjà rendu plusieurs jugements sur lesquels il n'est pas nécessaire de revenir.

[7] Qu'il suffise de mentionner qu'en date du 14 mars 2014, le soussigné a rendu un jugement sur une requête pour augmentation de la charge administrative augmentant la charge administrative à la somme de 4 000 000 $.

[8] Les motifs du jugement du 14 mars 2014 s'appliquent toujours et doivent être considérés comme faisant partie du présent jugement, d'autant plus que ce jugement implique les mêmes parties et les mêmes procureurs. De plus, ce jugement du 14 mars 2014 référait à un autre jugement rendu le 17 février 2014 par lequel le soussigné ordonnait une audition commune devant le tribunal de la faillite canadien et le tribunal de faillite américain.

[9] La trame factuelle décrite au jugement du 17 février 2014 s'applique également au présent jugement.

[10] Le procureur des États-Unis d'Amérique agissant par la *Federal Railroad Administration* (FRA) soumet à nouveau la même jurisprudence qu'il avait soumise au soussigné le 14 mars et à laquelle référait le soussigné dans son jugement.

[11] La requête demandant la distribution partielle du produit de la vente des actifs de MMA est la suite logique du jugement qui augmentait la charge administrative.

[12] Dans le jugement du 14 mars 2014, le soussigné mentionnait :

> « [63] Le tribunal est d'accord avec la juge La Vigne[4] lorsqu'elle affirme :
>
> > « [36] À mon sens, le tribunal doit prendre en considération les facteurs ci-dessous lorsqu'il se penche sur les honoraires d'avocat exigés dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* :

- le temps consacré à l'affaire par l'avocat;
- la compétence dont l'avocat a fait montre;
- les frais et la conduite des procédures en général;
- les résultats du travail de l'avocat et la part de succès obtenue;
- la nature, l'importance et l'urgence des questions à régler;
- la taille et la complexité de l'entreprise à restructurer;
- les attentes raisonnables des diverses parties, notamment les estimations transmises au tribunal ou à d'autres intervenants;
- le fonds à partir duquel les honoraires doivent être payés;
- la situation et l'intérêt de la compagnie;
- la capacité de payer de la compagnie;
- les vues du contrôleur, des créanciers principaux et de la compagnie insolvable. »

[4] *In re : Tepper Holdings inc*., 2011 NBBR 311 »

[13] Le soussigné ajoutait que ce n'est pas au moment de l'augmentation ou de l'établissement d'une charge qu'il y a lieu d'appliquer ces critères mais plutôt au moment où les professionnels demandent le paiement de leurs honoraires.

[14] Au soutien de sa requête, les requérants produisent en liasse et sous scellé des factures totalisant un solde impayé de près de 2 000 000 $. C'est pourquoi les requérants demandent qu'une somme de 1 373 156 $ soit distribuée.

[15] Le procureur des États-Unis d'Amérique a parcouru les comptes d'honoraires et déclare admettre que les services professionnels qui sont mentionnés ont effectivement été rendus et que le total des sommes réclamées représente le travail effectué.

[16] Le procureur des États-Unis d'Amérique plaide que le soussigné étant le gardien du processus, il lui appartient de s'assurer de la raisonnabilité des honoraires et de s'assurer que ceux-ci soient justes et raisonnables.

[17] De fait, le procureur ne plaide pas que les honoraires sont déraisonnables, mais indique qu'il est difficile d'expliquer à un client que les honoraires équivaudront au montant de la réalisation des actifs.

[18] Le tribunal peut difficilement refuser le paiement des honoraires des professionnels alors que ceux-ci répondent entièrement aux critères établis par la jurisprudence pour déterminer la raisonnabilité des honoraires.

[19] Tous les critères mentionnés dans la décision *Tepper Holdings*[1] sont rencontrés sauf, peut-être, les résultats du travail de l'avocat et la part de succès obtenus.

[20] Par contre, il est inutile de répéter ce que le soussigné mentionnait aux paragraphes 55 et suivants de la décision du 14 mars 2014.

[21] La Federal Railroad administration (FRA), qui représente les États-Unis d'Amérique, a toujours consenti au processus de réalisation des actifs de MMA. Tout laissait croire que la réalisation des actifs serait plus élevée en procédant avec une entreprise en opération. Les professionnels ont travaillé en ce sens. Les procureurs ont toujours agi de façon transparente pendant tout le processus et ont toujours avisé la FRA des honoraires encourus et des honoraires prévisibles. Le travail des professionnels ne consistait pas seulement à la réalisation des actifs, mais à la continuation des opérations.

[22] Les procureurs de la FRA ont été invité à transmettre tout commentaire concernant les honoraires des professionnels; invitation à laquelle ils n'ont pas répondu.

[23] Dans le jugement du 14 mars 2014, le soussigné mentionnait :

> « [68] Il est d'ailleurs intéressant de noter que jamais la FRA ou ses procureurs n'ont indiqué aux professionnels impliqués en quoi les comptes qu'ils ont reçus à ce jour ne seraient pas raisonnables. »

[24] Nous n'avons pas encore eu de réponse à cette question.

[25] Comme déjà mentionné, ce n'est pas parce que les honoraires sont élevés qu'ils ne sont pas raisonnables. Le travail effectué dans le dossier était fort complexe et personne ne pouvait présager que la réalisation des actifs serait si faible.

[26] La FRA a participé au processus depuis le début. Elle a consenti à toutes les prolongations qui lui ont permis de réaliser les actifs et rien de permet de croire qu'un autre mode de réalisation aurait été plus avantageux pour elle.

[27] Il est de plus assez difficile de croire que les honoraires des professionnels canadiens seraient déraisonnables alors que la FRA considère raisonnables les honoraires américains qui s'élèvent actuellement à 4 500 000 $ US.

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[1] *In re : Tepper Holdings inc.*, 2011 NBBR 311

<u>POUR CES MOTIFS, LE TRIBUNAL</u> :

[28] **ACCUEILLE** la requête;

[29] **ORDERS** that the Motion is properly presentable on September 24, 2014;

[30] **ORDERS** the Monitor to distribute the amount of CAD$1,373,156.00 from the Canadian Sale Proceeds as follows :

a) CAD$439,410.00 to the Monitor as partial payment for services rendered;

b) CAD$288,363.00 to the Monitor's counsel, Woods LLP as partial payment for services rendered;

c) CAD$645,383.00 to Petitioner's counsel, Gowling Lafleur Henderson LLP as partial payment for services rendered;

[31] **DECLARES** that the beneficiaries of the Administration Charge (as defined in the Initial Order, as amended) shall be entitled to no more than an aggregate amount of CAD$4,000,000 from the Canadian Sale Proceeds and the Canadian Settlement Amount which said sum of CAD$4,000,000 will have been paid in full with the execution of the present Order;

[32] **DECLARES**, without limiting the foregoing, that despite the said distribution, the rights of the parties and of all the creditors are expressly reserved, including those of the United States of America (Federal Railroad Administration) and of the Government of Quebec, to debate at a later date the sequence by which and extent to which the fees and disbursements guaranteed by the Administration Charge are to be allocated between or paid from the Property of the Debtor, including between the Canadian Settlement Amount and the Canadian Sale Proceeds, as if the Canadian Settlement Amount and the Canadian Sale Proceeds would still be available for distribution;

[33] **ORDERS** the provisional execution of the Order notwithstanding any appeal, without the necessity of furnishing any security;

[34] **THE WHOLE** without costs.

GAÉTAN DUMAS, J.C.S.

Me Patrice Benoit
Gowling Lafleur Henderson s.e.n.c.r.l
Procureurs de la débitrice

Me Sylvain Vauclair
Woods s.e.n.c.r.l.
Procureurs du contrôleur

Me Jacques Darche
Borden Ladner Gervais, s.e.n.c.r.l., s.r.l.
Procureurs des États-Unis d'Amérique

Service list

Date d'audience : 24 septembre 2014

Tab 16

Court File No. 31-OR-207854-T

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

THE HONOURABLE REGIONAL	)	**FRIDAY, THE 26TH**
	)	
SENIOR JUSTICE MORAWETZ	)	**DAY OF JANUARY, 2018**

IN THE MATTER OF THE BANKRUPTCY OF MF GLOBAL CANADA CO., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

ORDER
(Surplus Funds)

THIS MOTION, made by KPMG Inc., in its capacity as trustee in bankruptcy of the Estate of MF Global Canada Co. ("**MF Global Canada**"), a bankrupt (in such capacity as the "**Trustee**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the tenth report of the Trustee dated January 18, 2018 (the "**Tenth Report**"), the fifth report of the Independent Cost Counsel dated January 15, 2018 (the "**ICC Fifth Report**"), the fee affidavit of Nick Brearton sworn January 17, 2018, the fee affidavit of Evita Ferreira sworn January 17, 2018, and on hearing the submissions of counsel to the Trustee, no one else appearing although duly served as set out in the Affidavits of Service of Evita Ferreira sworn January 18, 2018 and January 19, 2018, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that the Trustee is an "interested person" for the purposes of s. 209(1) of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44 (the "**CBCA**").

3. **THIS COURT ORDERS** that the Trustee be and is hereby authorized to apply to the Director appointed under the CBCA for a revival of 4298632 Canada Limited ("**429**"), pursuant to the provisions of the CBCA.

4. **THIS COURT ORDERS** that the Trustee is authorized to take all such steps as may be required to seek the return of the property of 429 from the Crown.

5. **THIS COURT ORDERS** that the Trustee be and is hereby authorized to pursue the issuance of an Application for Bankruptcy Order against 429, subject to completing the revival of 429.

6. **THIS COURT ORDERS** that KPMG Inc. be and is hereby authorized to act as the trustee in bankruptcy of 429.

7. **THIS COURT ORDERS** that the Trustee be and is hereby authorized to transfer $30,000 from the MF Global Canada estate to KPMG Inc., as proposed trustee in bankruptcy of 429, for the costs of administration of the 429 bankruptcy.

8. **THIS COURT ORDERS** that the Trustee is hereby granted a charge (the "**Trustee's Charge**") on the property of MF Global Canada to secure the payment of the fees and disbursements of the Trustee and Borden Ladner Gervais LLP ("**BLG**"), counsel to the Trustee.

9. **THIS COURT ORDERS** that notwithstanding any bankruptcy of 429, the Trustee's Charge shall continue to charge the property of MF Global Canada until further Order of this Court.

10. **THIS COURT ORDERS** that, except as required by paragraph 7 of this Order, no other amounts shall be transferred by the Trustee to KPMG Inc. as proposed trustee in bankruptcy of 429, pending further Order of this Court.

APPROVAL OF TENTH REPORT

11. **THIS COURT ORDERS** that the Tenth Report and the activities set out therein, be and are hereby approved.

APPROVAL OF THE STATEMENT OF RECEIPTS AND DISBURSEMENTS

12. **THIS COURT ORDERS** that the Statement of Receipts and Disbursements for the period November 4, 2011 to December 15, 2017 be and is hereby approved.

APPROVAL OF ICC FIFTH REPORT

13. **THIS COURT ORDERS** that the ICC Fifth Report be and is hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS

14. **THIS COURT ORDERS** that the accounts of the Trustee for the period from January 1, 2017 to October 31, 2017 (the "**Trustee Fee Period**"), including fees in the amount of $266,194.00 and disbursements in the amount of $3,158.51 (plus applicable HST on the foregoing amounts) for services rendered and recorded during the Trustee Fee Period be and the same are hereby approved.

15. **THIS COURT ORDERS** that the accounts of Borden Ladner Gervais LLP ("**BLG**"), counsel to the Trustee, for the period from January 1, 2017 to October 31, 2017 (the "**BLG Fee Period**"), including fees in the amount of $219,115 and disbursements in the amount of $2,357.19, (plus applicable HST on the foregoing amounts) for services rendered and recorded during the BLG Fee Period be and the same are hereby approved.

Court File No. 31-0R-207854-T

IN THE MATTER OF THE BANKRUPTCY OF MF GLOBAL CANADA CO., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

PROCEEDINGS COMMENCED AT TORONTO

ORDER
(Surplus Funds)

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Lawyers for KPMG Inc., in its capacity as
The Trustee of MF Global Canada Co., a bankrupt

Court File Number: 31-207854-T

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

M.F. Global.
Plaintiff(s)

AND

Defendant(s)

Case Management ☐ Yes ☐ No by Judge: ______________

Counsel	Telephone No:	Facsimile No:
Court Call		
In Person – N. Brereton	KPMG	

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ______________
☐ Time Table approved (as follows):

By Court Call
J.D.G. Douglas, R. Jaipargas, E. Ferreira
- BLG - Counsel to KPMG
J. Wigley - Cost Counsel.
The motion was not opposed.
The MF Global Estate has a surplus.
All creditors have received the full
amount of their proven claims plus
applicable statutory interest

Jany 26 / 2018
Date

[signature] RSJ
Judge's Signature

☑ Additional Pages 1 to 4

Court File Number: ______________________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

The Trustee has recommended that steps be taken to return the surplus to the sole shareholder of the bankrupt, namely 4298632 Canada Limited ("429"). In order to achieve this, 429 has to first be revived.

In my view, KPMG Inc as Trustee of TF Global qualifies as an "interested person" within the meaning of s. 209 (1) of the CBCA and ~~[illegible]~~ accordingly may apply for 429's revival.

In arriving at this conclusion, I have taken into account the submissions of counsel to KPMG ~~in the~~ as set out in their factum.

I am also satisfied that it is appropriate to authorize KPMG to commence a Application for a Bankruptcy Order in respect

Judges Initials [initials]

Court File Number: ____________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

of 429.

By proceeding with the Application for Bankruptcy Order a mechanism can be put in place whereby the surplus in ~~the~~ the TDF Global Estate can flow to 429 and then be distributed to the ~~shareholders~~ shareholders of 429. This is a very practical ~~matter~~ method by which the surplus can be distributed.

KPMG Inc should be protected for its fees in the 429 proceedings and for this reason I am satisfied that the Trustee's Charge should be granted.

The 10th Report of the Trustee describes the Trustee's recent activities and actions. The Trustee requests ~~an~~ court approval of the 10th Report and the activities described therein. There was

Judges Initials ____________

Court File Number: ______________________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

no opposition to this request, which is granted. It is noted that Mr. Brearton described the circumstances giving rise to the necessity to reissue certain tax slips to former employees of MF Global. The situation has been corrected and the Trustee confirmed that the Estate was not billed for services rendered in correcting what I consider to be an inadvertent error.

The Court Appointed Court Counsel's 5th Report is approved and his recommendations are also approved – namely approval of the accounts of the Trustee and its counsel.

The Trustee's Statement of Receipts and Disbursements is also approved.

The motion is granted and the Order ~~will~~ has been signed in the form submitted.

[signature] RSJ.

Page 4 of 4 Judges Initials [initials]

[subject to edit if typed] [initials]

Tab 17

2020 ONSC 7920
Ontario Superior Court of Justice [Commercial List]

Urbancorp

2020 CarswellOnt 18990, 2020 ONSC 7920, 327 A.C.W.S. (3d) 17

KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC. (Applicant) and URBANCORP RENEWABLE POWER INC. (Respondent)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: December 11, 2020
Judgment: December 23, 2020
Docket: CV-18-600624-00CL

Counsel: Robin Schwill, Robert Nicholls, Shane Freedman, for Monitor and Receiver, KSV Restructuring Inc. (formerly KSV Kofman Inc.)
Neil Rabinovitch, for Israeli Functionary, Adv. Guy Gissin
Suzanne Murphy, Heather Meredith, Alex Steele, for Purchaser, Enwave Geo Communications LP
Jeffrey Larry, for King Towns North Inc.
Scott Bomhof, for First Capital Realty
Robert Drake, Mario Forte, for Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.
Maria Dimakas, for Condominium Corporations

Subject: Civil Practice and Procedure; Insolvency
Table of Authorities
Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

Dundee Oil and Gas Limited (Re) (2018), 2018 ONSC 3678, 2018 CarswellOnt 9960, 61 C.B.R. (6th) 68 (Ont. S.C.J. [Commercial List]) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — 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.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Stephen Francis Podgurski (Re) (2020), 2020 ONSC 2552, 2020 CarswellOnt 5708, 79 C.B.R. (6th) 96 (Ont. S.C.J.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Yukon (Government of) v. Yukon Zinc Corporation (2020), 2020 YKSC 16, 2020 CarswellYukon 40, 80 C.B.R. (6th) 229 (Y.T. S.C.) — considered

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — considered

Statutes considered:

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

s. 84.1 [en. 2005, c. 47, s. 68] — considered

s. 84.1(4) [en. 2005, c. 47, s. 68] — considered

s. 243(1)(c) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(3)(c) [en. 2005, c. 47, s. 128] — considered

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

s. 100 — considered

APPLICATION by receiver for relief including approval of sale and assignment order as well as sealing order.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

Introduction

1 KSV Restructuring Inc. (formerly KSV Kofman Inc.), Court-appointed receiver (the "Receiver") of Urbancorp Renewable Power Inc. ("URPI") and as Court-appointed Monitor of Urbancorp Cumberland 1 LP ("Cumberland LP"), Urbancorp Cumberland 1 GP Inc., and certain related entities (the "Monitor", and as Receiver and Monitor, the "Court Officer") for and on behalf of Urbancorp New Kings Inc. ("UNKI"), Vestaco Homes Inc. ("VHI") and 228 Queen's Quay West Limited ("QQW") seeks, among other things, approval of the sale of certain assets (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Monitor (together, also referred to as the "Vendor"), and Enwave Geo Communities LP, by way of assignment from Enwave Energy Corporation (the "Purchaser") dated November 2, 2020 and appended to the Fifth Report of the Receiver and Forty-Third Report of the Monitor dated November 30, 2020 (the "Report"), and vesting in the Purchaser URPI's, Cumberland LP's, UNKI's, VHI's and QQW's (collectively, the "Urbancorp Entities") respective rights, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"). The geothermal assets located at three condominiums developed by entities in the Urbancorp Group of Companies (the "Geothermal Assets") make up the vast majority of the Purchased Assets.

2 The Receiver also seeks an Order sealing the Confidential Appendix to the Report (the "Sealing Order") pending further order of the Court.

3 Finally, the Receiver seeks an Order (the "Assignment Order") compelling the assignment to the Purchaser of the rights and obligations of VHI and URPI as tenants (the "Tenants"), under a lease dated July 10, 2010 (the "Berm Lease") with King Towns North Inc. ("KTNI") as landlord.

4 The Receiver recommends approval of the Transaction. Gus Gissen, First Capital Realty, The Fuller Landau Group Inc., the Condominium Corporations and the Purchasers support the Receiver.

5 KTNI is opposed to the Assignment Order.

6 The background to this matter is set out in the Report. All capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of some of the facts central to this motion.

7 Pursuant to an order issued on December 10, 2019, the Receiver was authorized to commence a sale process (the "Sale Process") for the Geothermal Assets (the "Sale Process Order"). The bid deadline under the Sale Process was October 20, 2020 (the "Bid Deadline").

8 Following the Bid Deadline, the Sale Agreement was executed on November 2, 2020. The Purchase Price, subject to adjustments which are expected to be immaterial, is $24,000,000.

9 KTNI owns land adjacent to the condominium development. The Tenants own and operate the geothermal system.

10 KTNI entered into a long-term lease (the "Berm Lease") with the Tenants and VHI for the lease of the Berm Lands. The Berm Lease was designed to allow the Tenants to use the 82 geothermal wells on the Berm Lands for the Geothermal System.

11 The Berm Lease provides for a 50-year term (of which some 40 years remain). The Berm Lease further provides that the Tenants have a unilateral right to extend the term of the lease on the same terms and conditions (i.e., for the same $100 annual rent) in the event that the Tenants' Geothermal Supply Contracts are extended.

12 When KTNI entered into the lease, each of KTNI, URPI, and VHI was owned and controlled by Saskin family entities. KTNI takes the position that the parties were indifferent about the nominal rent that was below the fair market value for use of the lands.

13 The Berm Lease contains an assignment clause which provides that KTNI must consent to any assignment or transfer of the Berm Lease by the Tenants, and that KTNI may unreasonably withhold consent to any assignment or transfer of the Berm Lease.

14 KTNI claims its consent has not been sought.

15 The Receiver claims that issues relating to the assignment in the context of a transaction were raised a year ago and KTNI was not prepared to consent to the assignment of the Berm Lease.

16 The Purchaser has allocated $2.049 million of the Purchase Price to the Berm Lease (although KTNI does not agree with this allocation).

Law and Analysis

17 All parties agree that the Sale Process was properly conducted and produced a Purchase Price that is commercially reasonable in the circumstances. For this reason, it is not necessary, in my view, to review the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), at para. 16 concerning sales by a receiver.

18 There is, however, opposition from KTNI as to whether the Assignment Order, which is critical to the Transaction, should be granted.

19 KTNI submits that since URPI, one of the Tenants, is in receivership, the Court Officer, in its capacity as Receiver, has no statutory authority to seek the Assignment Order.

20 In support of its argument that the Assignment Order should not be granted, KTNI references s. 84.1 of the *Bankruptcy and Insolvency Act* ("BIA") and s. 11.3 of the *Companies' Creditors Arrangement Act* ("CCAA") which provide the court, in bankruptcy and CCAA proceedings, with statutory jurisdiction to make an order assigning a debtor company's rights and obligations under an agreement, on notice to every party to the agreement and to the court officer.

21 Since there is no corresponding provision in Part XI of the BIA dealing with Secured Creditors and Receivers, KTNI submits there is no jurisdiction to grant the Receiver's request for the Assignment Order.

22 In addition, KTNI submits it is not "appropriate" to grant the Assignment Orders as:

a. KTNI is not being treated fairly and equitably, and

b. KTNI's consent has not been sought.

23 In response, counsel to the Receiver submits that Canadian courts have repeatedly stated that the BIA and the CCAA are to be interpreted harmoniously. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.). While s. 84.1 of the BIA does not specifically refer to receivers, upon a purposive analysis, this policy and its underlying principles suggest an application to receivers. While the BIA is silent on when a receiver can apply for an order assigning a debtor contract, if both a trustee and a monitor may apply for such an order, the only purposive interpretation which harmonizes the Canadian insolvency regimes and prevents the loss of value from the estate of the debtor is the application of section 84.1 of the BIA to receivers.

24 The Supreme Court recently confirmed in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para. 40 that the remedial objectives of Canadian insolvency laws are to provide timely, efficient and impartial resolution of a debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company.

25 In *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16 (Y.T. S.C.), at para. 46, in determining the scope of the Court's authority to authorize the actions of the receiver, the Court held that "insisting on a purposive analysis... helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court."

26 Counsel to the Receiver also submitted that an order compelling the assignment of contracts is only required where the counterparty to such contract declines to provide their consent to the assignment. The Court held in *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at paras. 22-23, that it had the discretion to issue an assignment order even if consent to assignment was reasonably withheld by the counterparty. While Playdium is a pre-2009 amendment example of a forced-assignment, the Receiver submits that it continues to inform courts' analyses in post-amendment cases.

27 In my view, it is necessary to take into consideration that the Purchase Price is $24,000,000. If the Transaction flounders as a result of the inability to assign the Berm Lease, the result would clearly be harmful to creditors. It is also necessary to take into account that an alternative route is available to the Receiver, specifically to take steps to bankrupt URPI and then rely on s. 84.1 of the BIA as the basis to seek the Assignment Order.

28 If the Receiver is required to take this alternative approach, it would only result in a delay in completing the Transaction and would increase the cost of completing the Transaction. This is not a desirable outcome.

29 Rather, it is preferable in my view to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws.

30 Section 243(1)(c) of the BIA provides:

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:

. . .

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

31 This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* ("CJA") is broad enough to form the basis of the Receiver's request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

32 An alternative approach is to resort to the inherent jurisdiction of the court.

33 I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 (Ont. S.C.J.).

> [65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable "in any situation where the requirements of justice demands it" (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that "nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so" (*Board v. Board*, [1919] A.C. 956at pp. 17-18, per Viscount Haldane).
>
> [66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia*, 2016 SCC 42, and described it as follows:
>
>> [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31. The Supreme Court acknowledges that the doctrine of inherent jurisdiction is amorphous in nature: *Ontario v. Ontario Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 22. As a result, the parameters of what a Superior Court judge may do or not do under the power of inherent jurisdiction are unknown.
>>
>> . . .
>
> [68] In the oft-cited *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), the Court of Appeal for Ontario held that except where provided specifically to the contrary, the court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters." The Court of Appeal set out the jurisprudential basis for this holding:
>
> In *Re-Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266 at pp. 268 - 9, Stark J, after considering the relevant provisions of the Judicature Act and the authorities, said:
>
>> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantial law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* [1667], 1 Wms. Sound. 73 at p. 74, 85 E.R.84:
>>
>> ... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.
>
> [69] However, the doctrine is not unlimited: it is subject to both statutory and purposive limitations. The doctrine cannot be exercised so as to contradict a statute or rule. Inherent jurisdiction is also limited to exercises that fulfil the underlying purpose of the doctrine, being to regularize and protect the administration of justice. Inherent jurisdiction should be exercised "sparingly and with caution:" *R c. Caron*, 2011 SCC 5, at para. 28.
>
> [70] In *Endean*, the Supreme Court set out that before exercising the court's inherent jurisdiction, a justice should first determine the scope of express grants of statutory powers before dipping into this "important but murky pool of residual authority" (*Endean*, at para. 24). Having done so, in my view, it is both necessary and appropriate to exercise inherent jurisdiction in responding to this motion.

34 There is no statutory provision in the BIA that prohibits a superior court from granting the requested relief. In these circumstances, I am of the view that if s. 243(1)(c) of the BIA, in conjunction of s. 100 of the CJA, does not provide the basis for considering the Assignment Order, then it is appropriate to resort to the inherent jurisdiction of the Superior Court.

35 Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, it is necessary to review the criteria the Court will consider in determining whether to order an assignment. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA informs the analysis for an assignment by the Receiver. The criteria are as follows:

(a) whether the monitor approved the proposed assignment (only relevant to CCAA proceedings);

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

36 KTNI accepts that the first two factors have been established in that the Monitor has approved of the assignment and the financial obligations of the proposed assignee are nominal.

37 The remaining issue is whether it would be appropriate to assign the rights and obligations to that person.

38 The Receiver submits that it is appropriate to assign the rights and obligations of the Tenants under the Berm Lease to the Purchaser for the following reasons:

(a) the Sale Process was approved by the Court;

(b) the assignment of the Berm Lease does not preclude KTNI from asserting a claim as to an allocation of a portion of the Sale Proceeds based on the value inherent in the Berm Lease;

(c) there is no prejudice to KTNI from the assignment since no amendments are being sought by the Purchaser in respect of the Berm Lease. KTNI's rights under the Berm Lease will be unaffected as a result; and

(d) the 82 boreholes located on the Berm Lands are an integral part of the Purchased Assets.

39 Further, the Receiver submits that the proposed assignment meets the "twin goals" of assisting the reorganization process by providing valuable liquidity to the estate of the Urbancorp Entities, while treating the counterparty fairly and equitably, as KTNI will be unaffected by the assignment without any prejudice to KTNI claiming that the value allocated to the Berm Lease ought to be directed to it rather than remain in the estate.

40 KTNI previously advised the Court Officer that it would not consent to the assignment of the Berm Lease without receiving a portion of the proceeds from the sale of the Geothermal Assets prior to closing. The Court Officer states that it has been unable to obtain the consent of KTNI to the assignment of the Tenants' interests under the Berm Lease, without prejudice to KTNI's rights to subsequently advocate for its allocation entitlements, if any.

41 The Receiver also submits that if the Court has the jurisdiction to assign a contract where the counterparty reasonably withholds its consent and notwithstanding any provision to the contrary in the agreement, then this Court has the requisite jurisdiction to issue the Assignment Order, notwithstanding that KTNI has unreasonably withheld consent, as permitted under the Berm Lease.

42 KTNI takes issue with the Receiver's submission.

43 KTNI submits that s. 11.3 of the CCAA is designed to protect parties in KTNI's exact position. This is why it is necessary to treat KTNI differently from "other creditors" who are not afforded the protections under s. 11.3 of the CCAA. KTNI references *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 (Ont. S.C.J. [Commercial List]) at para. 27:

> Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page. [Emphasis added.]

44 In my view, KTNI's reliance on the foregoing passage is misdirected. The passage concerns the credit-risk of the assignee. In this case, the credit risk is for annual rent minimal. Issues relating to the environmental indemnity are addressed at [52] and [53] below.

45 KTNI also submits that the application should fail, however, on the third factor to consider — whether it is "appropriate" to assign the rights and obligations in this case. Section 11.3(3)(c) of the CCAA provides that in deciding whether to make an order, the court must consider whether it would be appropriate to assign the rights and obligations to the assignee.

46 In this case, KTNI submits that forcing an assignment of the Berm Lease, without modification of the commercially unreasonable rent or the payment of consideration to KTNI, does not treat KTNI fairly and equitably.

47 If the assignment of the Berm Lease is approved, KTNI submits that it would be stripped of the very protection that it bargained for while diverting the entire value of the Berm Lands away from KTNI. This is not a fair, equitable or appropriate result in the circumstances.

48 In my view, the arguments presented by KTNI have been addressed by the Receiver. Allocation entitlements will be addressed at a future date. As noted, the Purchaser has allocated $2.049 million for the Berm Lease, an amount that KTNI disputes. The Purchaser is clearly of the view that the Berm Lease has value.

49 KTNI is also of the view that it is not appropriate to force the assignment of the Berm Lease where KTNI's consent has not even been sought.

50 In response to this submission, I accept the explanations put forth by the Receiver at [15] and [40]. A transaction involving the Geothermal Assets has been contemplated for a considerable period of time and comes as no surprise to KTNI. The Receiver and KTNI have not been able to agree on terms and, as a result, no consent has been forthcoming.

51 Finally, in oral argument, counsel to KTNI referenced that the Sale Agreement had recently been assigned by Enwave Energy Corporation to Enwave Geo Communications LP. While KTNI was satisfied as to the financial capability of the assignor, it has no financial information about the assignee.

52 Although the annual rent is nominal, KTNI raised the subject of the Environmental Indemnity in s. 7.3 of the of the Berm Lease.

53 In my view, the existence of the Environmental Indemnity does not result in a reason to not approve the Transaction. The Sales Agreement provides for an assignment by the purchaser and there is no evidence of any environmental concerns having been raised in the first ten years of the term. 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. Finally, KTNI can raise this as an allocation issue.

54 Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, I conclude that, in these circumstances, the Transaction should be approved and that the Assignment Order should be granted.

55 The Court Officer also requests an order sealing the Confidential Appendix to the Report pending the closing of the Transaction. No party raised an objection to this request.

56 In my view, the Confidential Appendix contains highly sensitive commercial information including the Offer Summary, which, if made public, could detrimentally affect the price that could be obtained on a subsequent sale of the Purchased Assets should the Transaction not close.

57 Having considered the guidance set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), at para. 53, I am satisfied that the Confidential Appendix should be sealed.

Disposition

58 In the result, I am satisfied that it is both just and convenient to grant this motion and approve the Transaction and also grant the Sealing Order and the Assignment Order.

Application granted.

Court File No. CV-20-00649154-00CL

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP. **-and-** **TRIGGER WHOLESALE, INC. et al.**

Applicant — Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES
(Returnable December 6, 2021)

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