Court File Number:

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

BETWEEN

TEMISKAMING DEVELOPMENT FUND CORPORATION

Applicant

-and-

1793082 ONTARIO LTD. o/a K.D. Quality Pellets

Respondent

# APPLICANT'S BOOK OF AUTHORITIES

January 9, 2019


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1. *Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc.,* [2002] O.J. No. 3717

2. *Nash v CIBC Trust Corp.* [1996] O.J. No. 394

3. *Bank of Montreal v. Dedicated National Pharmacies Inc.,* 2011 ONSC 346

4. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen. Div.))

5. *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235

6. *Bloom Lake, g.p.l., Re*, 2015 QCCS 1920

TAB 1

**COURT FILE NO.:** 02-CL-4684
**DATE:** 20020925

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

| | |
|---|---|
| **B E T W E E N:** | |
| THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED | *Frederick L. Myers and Derek J. Bell*, for the Moving Party |
| Plaintiff (Moving Party) | |
| **- and -** | |
| 1167970 ONTARIO INCORPORATED, JOHN COSTA (also known as GIOVANNI COSTA) and ANNA MARIA COSTA (also known as ANNA MARIA NUNNARO) | *Thomas G. Heintzman, Q.C. and David Sterns*, for the Responding Parties |
| Defendants (Responding Parties) | |
| | **HEARD:** September 24, 2002 |



**FARLEY J.:**

[1] The Great Atlantic & Pacific Company of Canada, Limited ("A&P") has given notice pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c.B.3 as amended (the "BIA") and now requests the appointment of an interim receiver pursuant to Section 47 and Rule 41. A&P has the authority under its security to appoint a private receiver but recognizing that it is the likely purchaser, it wishes to avoid the difficulties inherent with a private receiver in such circumstances.

[2] The appointment of the interim receiver is a discretionary decision of the Court. The judge must consider the relevant circumstances to see if it is just and convenient in the weighing of the factors to make such an appointment.

[3] A&P and 1167970 Ontario Incorporated ("Costa") have a multifaceted relationship: not only is Costa a franchisee of A&P, but a tenant of the real estate, a lessee of certain equipment and A&P is the financier of Costa. Indeed it seems obvious that Costa will have to mightily scramble to find replacement financing to take out the A&P; otherwise the calling of even this portion (the promissory note) will likely sound the death knell of Costa.

[4] A&P alleges that it was troubled by substantial losses in the last two periods ($49,272.00 to August 10 and $44,159.00 to September 21, 2002) and that such a loss was unusual for this store. However A&P did not indicate in its material that apparently a major contributing factor to this loss was the outage of refrigeration equipment as to which the insurance company has admitted coverage. However it is troubling that when A&P indicated that it wished to conduct an audit as it was entitled to do so as per the Franchise Agreement, co-operation in providing requested financial information was not forthcoming. Indeed it took a week for Costa to indicate that the "daily information" requested was available at the store (September 19) but this was seemingly countermanded by the Sotos letter of September 20 indicating that this enquiry should cease until John Costa returned to work from an anxiety illness. Notwithstanding that A&P personnel were on premises over the past several days, no financial information was provided.

[5] A&P alludes to the perishable nature of some of the inventory. However it seems to me that the inventory of the store is being sold and one would assume "in the ordinary course of business" (unless otherwise advised) by the volunteers – namely under the supervision of another franchisee, Brian Bahm, assisted by several other franchisees (Orr and Marchand). I do not see that removal of the inventory from this location is a practical solution given the costs of handling, transportation and ensuing deterioration. It would seem preferable that the inventory be dealt with *in situ*.

[6] Notwithstanding John Costa's illness, as indicated there appears to be experienced "management" in place. However one does recognize that these volunteers are also under a contractual duty to devote full time and attention to their own stores pursuant to their own Franchise Agreements. It would seem that this arrangement is one of a reasonably short emergency duration.

[7] I understand that it was proposed that Grant Thorton Inc. ("GTI") be appointed the interim receiver but that as opposed to having a hands-on running of the operational aspects of the store, that it was presumed that GTI would be assisted by personnel from A&P. As opposed to the financial aspects of the store, I see no material advantage to replacing the stop gap volunteer arrangement with A&P "volunteers".

[8] Costa asserts that it is entitled to the benefit of set off of rebates and other allowances that it says it is owed pursuant to the Franchise Agreement and that such amounts are in essence liquidated amounts. This claim is incorporated on the *Class Proceedings Act* litigation being case managed by Winkler J. The language as to this in the Franchise Agreement is both precise and vague at the same time and even employing the doctrine of *contra proferrentum* it would seem to me that in the material before me now that this litigation will unfortunately have to mature before the franchisees' entitlement, if any, will be determined. With A&P claiming relief pursuant to a promissory note debt (coupled with a security interest) and thereby being of the nature of a bill of exchange, it does not seem to me that at this time Costa can avail itself of set off. See *Marketing Products Inc. v. 1257419 Ontario Ltd.* (2000), 11 C.P.C. ($5^{th}$) 201 (Ont. C.A.) applying *Iraco Ltd v. Staiman Steel Ltd.* (1986), 54 O.R. (2d) 488 (H.C.J.) affirmed (1987), 62 O.R. (2d) 129 (C.A.).

[9] Costa asserts that A&P is not dealing in good faith as required by section 3 of the *Arthur Wishart Act* (Franchise Disclosure), 2000 S.O. 2000 c. 3 and that this (pursuant to an expansive meaning given to "Franchise Agreement" as per the definition section) would include the financing arrangement. Indeed Costa asserts that A&P is exerting pressure on it to attempt to fracture the franchisee group which is involved in the class proceeding. I note however that the *Arthur Wishart Act* does not give any remedy to Costa which could be employed by it with respect to the calling of the loan, but rather it gives a right in damages for breach of good faith dealings.

[10] In the end result, I do not see that it is just and convenient to appoint an interim receiver giving that officer of the court the extensive powers that A&P proposes – but rather that the appointment of the interim receiver would be just and convenient with powers desirable in the circumstances. The power to appoint a private receiver is reasonably significant in my determination that there should be an interim receiver. I am of the view that GTI will be able to reasonably safeguard A&P's interest in the property as to which it holds security with the following powers:

(a) full access to the books, records and materials ancillary thereto for the purpose of monitoring the financial activities of Costa – in this regard A&P personnel may, using such material and information, conduct the requested audit. Costa personnel and the volunteers of the franchisees are to fully co-operate and provide access and respond to questions and produce reports. A reasonable balance will have to be struck so that Costa staff are not overwhelmed and thereby unable to perform their necessary day to day work. Through this mechanism A&P is to receive daily reports regarding sales, cash, purchases and inventory and as daily as possible, bank statements;

(b) supervisory power to monitor the ongoing business of Costa with a view to being assured that the business is being carried on "in the ordinary course" and that all reasonable efforts are being made to conduct business on a profitable basis and to collect an appropriate amount pursuant to the insurance claim; with the objective of ensuring that A&P's security does not materially or unnecessarily deteriorate. In this regard a reasonable number of A&P personnel may be on site to review operations. John Costa (and the volunteers) on the one hand and the A&P personnel on the other hand may consult with each other and offer and receive advice as to appropriate methods of operation;

(c) GTI may be designated as a "monitor" as opposed to an "interim receiver".

[11] If desired, cross-examinations on the affidavits are to be conducted within the next week.

[12] I would assume that counsel can work out the language of the formal order, but if they are unable, I may be spoken to at a 9:30 appointment provided counsel provide me with competing versions and indicate the areas of difference by letter in advance.

J.M. FARLEY

**Released:** September 25, 2002

TAB 2

1996 CarswellOnt 4068
Ontario Court of Justice (General Division)

Nash v. CIBC Trust Corp.

1996 CarswellOnt 4068, [1996] O.J. No. 3940, 18 O.T.C. 161, 66 A.C.W.S. (3d) 930, 7 C.P.C. (4th) 263

# Dr. Lawrence Nash, Ashak Rustom, Dennis Proudlove, Dr. John Kwak, Robert Bond, Joe Pacsuta, Dr. Donald R. Johnson and Margaret Johnson (Plaintiffs) and CIBC Trust Corporation (Defendant)

Ground J.

Heard: September 5 and 6, 1996
Judgment: November 7, 1996
Docket: 94-CQ-58919-CP

Counsel: *Alan J. Lenczner* and *Ronald G. Chapman*, for plaintiffs.
*Bonnie Tough* and *Paul Schabas*, for defendant.

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts

**Related Abridgment Classifications**

Civil practice and procedure
VI Actions
VI.2 Cause of action
VI.2.h Judgment as cause of action

Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles

Remedies
I Damages
I.1 Causation
I.1.f Compensable inury [damnum absque injuria; injuria sine damno]

Torts
XVI Negligence
XVI.13 Defences
XVI.13.h Miscellaneous

**Headnote**

Receivers --- Appointment — Validity of appointment
Receivers — Appointment — Validity of appointment — Defendant mortgagee in trust for plaintiffs obtaining court order appointing receiver for assets of mortagor — Plaintiffs commencing action against defendant alleging that applying for receivership order constituted negligence, breach of trust and breach of contract — Action dismissed — Granting of court

  

order appointing receiver in and of itself establishing reasonable and probable grounds for applying to court for order.

Actions --- Cause of action — Judgment as cause of action
Actions — Cause of action — Judgment as cause of action — Collateral attacks on court orders not allowed — Defendant mortgagee in trust for plaintiffs obtaining court order appointing receiver for assets of mortgagor — Plaintiffs commencing action against defendant alleging that applying for receivership order constituted negligence, breach of trust and breach of contract — Action dismissed as collateral attack on receivership order.

Negligence --- Defences — General
Negligence — Defences — Defendant mortgagee in trust for plaintiffs obtaining court order appointing receiver for assets of mortgagor — Plaintiffs alleging that applying to court to appoint receiver constituted negligence — Action dismissed — Granting of court order appointing receiver in and of itself establishing reasonable and probable grounds for applying to court for order.

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles
Practice — Judgments and orders — Res judicata and issue estoppel — Issue estoppel — Positive conduct not required — Defendant mortgagee in trust for plaintiffs obtaining court order appointing receiver for assets of mortgagor — Plaintiffs not disputing original order and waiting more than five years to commence action against defendant alleging that applying for receivership order constituting negligence, breach of trust and breach of contract — Plaintiffs estopped from suing by failing to take action.

Damages --- Bars to damages — No legal injury (damnum absque injuria; injuria sine damno)
Damages — Bars to damages — No legal injury (damnum absque injuria; injuria sine damno) — Plaintiffs commencing action for damages after defendant mortgagee in trust for plaintiff obtaining court order appointing receiver for assets of mortgagor — Damages arising from valid court order not actionable — Action dismissed.

The defendant was mortagee in trust for the plaintiffs, who had invested in mortgages in properties owned by a third party. In 1990, after the Ministry of Consumer and Commercial Relations obtained Freeze, Investigation and Cease and Desist Orders against the third party pursuant to the *Mortgage Brokers Act* (Ont.), the defendant obtained a court order appointing a receiver and manager of the assets and property of the third party. At that time, the plaintiffs did not object to the appointment of the receiver, but five and a half years later, they commenced an action for damages against the defendant, alleging that applying for the receivership order constituted negligence, breach of contract, and breach of trust. Both parties then brought motions for summary judgment, with the defendant arguing that its conduct was not negligent, that the plaintiffs were estopped from proceeding by their failure to commence the action within a reasonable period of time, and that the action constituted a collateral attack on the receivership order.

**Held:**

The plaintiffs' motion for summary judgment was dismissed, the defendant's motion for summary judgment was granted, and the plaintiffs' was action dismissed.

There was no evidence to support the claim that applying for the receivership order constituted negligence, with the decision by a judge to appoint the receiver being, of itself, proof that there were reasonable and probable grounds to bring the application.

Also, the action, in of itself, constituted a collateral attack on the receivership order, with it being a general principle that an action based on the commencement of a legal proceeding will not be allowed except where the original proceeding has been resolved in favour of the plaintiff. It had been commenced without reasonable and probable cause, was motivated by fraud, malice, or bad faith, and the plaintiff had suffered legally recoverable damages. The plaintiffs were unable to satisfy any of these criteria.

The plaintiffs were also estopped from proceeding with the action. A person can be estopped by failing to take action. In this case, the plaintiffs had never directly challenged the receivership order, and, in fact, had participated in a number of motions brought in the receivership proceedings. Furthermore, commencing the action more than five years after the original proceeding amounted to an abuse of process.

 

The plaintiffs, as well, had not suffered any damages that were actionable in law. Their claims were based on the initiation of the receivership application, and, as a matter of law, no action can lie for damages resulting from a judicial decision.

**Table of Authorities**

**Cases considered:**

*Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329 — *applied*

*Manufacturers Life Insurance Co. v. Gordon* (1992), 126 A.R. 354 (Master) — *considered*

*Nelles v. Ontario* (1985), 32 C.C.L.T. 291, 51 O.R. (2d) 513, 13 Admin. L.R. 213, 1 C.P.C. (2d) 113, 46 C.R. (3d) 289, 21 D.L.R. (4th) 103, 10 O.A.C. 161, (sub nom. *Nelles v. R.)* 16 C.R.R. 320, reversed 49 C.C.L.T. 217, [1989] 2 S.C.R. 170, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 60 D.L.R. (4th) 609, 98 N.R. 321, 69 O.R. (2d) 448 (note), 35 O.A.C. 161, 42 C.R.R. 1, 41 Admin. L.R. 1 — *applied*

*Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674 (C.A.) — *applied*

*R. v. Wilson*, [1983] 2 S.C.R. 594, [1984] 1 W.W.R. 481, (sub nom. *Wilson v. R.)* 37 C.R. (3d) 97, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 4 D.L.R. (4th) 577, 51 N.R. 321 — *applied*

*Royal Bank v. Fogler, Rubinoff* (1991), 84 D.L.R. (4th) 724, 43 E.T.R. 131, 5 O.R. (3d) 734, 50 O.A.C. 209 (C.A.) — *considered*

*Royal Bank v. W. Got & Associates Electric Ltd.*, 17 Alta. L.R. (3d) 23, [1994] 5 W.W.R. 337, 150 A.R. 93 (Q.B.) [additional reasons at (1994), 18 Alta. L.R. (3d) 140, 154 A.R. 277 (Q.B.)] — *applied*

**Statutes considered:**

Class Proceedings Act, 1992, S.O. 1992, c. 6

s. 5(5)*referred to*

Mortgage Brokers Act, R.S.O. 1980, c. 295 [R.S.O. 1990, c. M.39]

generally*referred to*

Trustees Act, R.S.O. 1990, c. T.23

s. 35*referred to*

**Words and phrases considered:**

**COLLATERAL ATTACK**

. . . the principle of collateral attack states that an order made by a court having jurisdiction is binding and conclusive, and cannot be attacked in a proceeding where the object of that proceeding is other than the reversal, variation or nullification of the order or judgment.

MOTIONS by plaintiff and defendant for summary judgment.

***Ground J.:***

1 The motions before this court are brought in the within action which was certified as a class proceeding by orders dated February 15, 1996 and April 24, 1996. The plaintiffs' motion is for summary judgment with a reference directed to the master with respect to the quantum of damages suffered by the plaintiffs. The defendant's motion is for summary judgment in favour of the defendant dismissing the plaintiffs' claim. Submissions on both motions were heard together.

**Factual Background**

2 The representative plaintiffs Ashak Rustom and Dennis Proudlove represent a class of plaintiffs who were investors in mortgages with Mater's Management Limited and related companies (collectively "Mater's") as of January 29, 1990. Each member of the class invested in one or more mortgages on various residential and commercial properties owned by Mater's. Mater's was owned and/or controlled by one Alberto DoCouto ("DoCouto").

3 Many of Mater's mortgages were arranged through Falloncrest Financial Corporation ("Falloncrest"), a mortgage broker registered under the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, in the Province of Ontario.

4 The defendant CIBCTrust Corporation was previously named Morgan Trust Company of Canada ("Morgan Trust").

5 Morgan Trust was the mortgagee in trust for investors in Mater's projects. There were essentially two types of investors: (a) self-directed RRSP clients ("RRSP investors") who carried their investment in their RRSP accounts; and (b) individuals who invested other than through their RRSP accounts ("Non-RRSP investors"). Some investors were both RRSP investors and Non-RRSP investors.

6 In the case of RRSP investors, Morgan Trust was the trustee of the RRSPs and acted on the instructions of the investors to advance funds from their plans to the solicitors for Mater's. In respect of Non-RRSP investors, Morgan Trust was not involved in the disbursement of funds.

7 Following delivery of the funds to Mater's solicitors by Morgan Trust, the funds would be released to Mater's as contemplated in a mortgage commitment executed between Mater's and the investor and as set out in a letter of instruction which each investor would provide to Mater's solicitors.

8 Every investor received from Morgan Trust a participation certificate signed by Morgan Trust with respect to each investment. The participation certificate described the obligations of Morgan Trust as including the following:

> (a) to act honestly, in good faith, and in the best interest of the investors in the course of administration and, if applicable, enforcement of the first mortgage; and,
>
> (b) otherwise, to act in accordance with instructions received from a majority of investors.

9 Commencing in late 1988, RRSP investors signed, in addition to the application, a standard form Mortgage Direction and Undertaking (the "MDU"). An MDU was not signed by any of the Non-RRSP investors: an MDU was signed by some, but not all, of the RRSP investors.

10 On or about January 15, 1990, following an investigation conducted by the Ministry of Consumer and Commercial Relations (the "Ministry"), representatives of the Ministry applied to the Director of the Consumer Protection Division (the "Director") and received orders under the *Mortgage Brokers Act*:

> (i) freezing the assets of Falloncrest and Mater's (the "Freeze Order");
>
> (ii) requiring Falloncrest and Mater's to cease activities relating to the raising of funds from investors (the "Cease and Desist Order"); and
>
> (iii) appointing investigators to investigate further the affairs of Falloncrest and Mater's (the "Investigation Order").

 

11 On or about January 16, 1990, Morgan Trust was advised of the Freeze Order, the Investigation Order and the Cease and Desist Order.

12 On January 19, 1990, Morgan Trust commenced action no. 44941/90 in the Supreme Court of Ontario against Falloncrest, Mater's, DoCouto, et al. In this action, Morgan Trust sought the appointment of a receiver and manager, a tracing and accounting of trust funds, damages for breach of trust and breach of fiduciary duty and costs. This action will be referred to as the "Receivership Proceedings".

13 On January 19, 1990, Morgan Trust applied in the Receivership Proceedings for an order appointing a receiver and manager of the assets and property of Mater's.

14 By order of Mr. Justice Montgomery dated January 19, 1990, Peat Marwick Thorne Inc. ("PMT") was appointed and receiver and manager of the assets of Mater's. Mr. Justice Montgomery made his order returnable in ten days and the order was continued on January 29, 1990. The receivership is continuing to this day.

**Submissions**

15 It is the submission of the plaintiffs that Morgan Trust did not act prudently or responsibly in bringing the application before Mr. Justice Montgomery for the appointment of a receiver, that it was not authorized to bring such and application and that it acted in breach of its contract with the investors in bringing such an application. It is their further submission that Morgan Trust brought the application at the request of Mr. Brian Cass ("Cass"). Superintendent of Deposit Institutions for the Ontario Ministry of Finance, and that Morgan Trust was reluctant not to accede to the request of Cass as he was a senior regulator of financial institutions in Ontario.

16 The plaintiffs also allege that Morgan Trust was negligent in bringing the application for the appointment of a receiver in that the appointment of receiver was the most extreme measure that could be taken and there were other less extreme measures available such as the appointment of a monitor, there was no default under any of the mortgages and Morgan Trust had no information that Mater's had breached any covenant under any of the mortgage documents, there was no immediate risk to any of the assets of Mater's by reason of the Freeze Order issued by the Ministry, there was no evidence that Mater's was insolvent or could not meet its obligations under the mortgages, there was no attempt made by Morgan Trust to contact Mater's or any independent party to verify the information it received from the Ministry and there was no emergency requiring urgent action on the part of Morgan Trust.

17 The plaintiffs submit that Morgan Trust was not authorized and acted in breach of its contract with the investors and in breach of trust in bringing the application for the appointment of a receiver. They refer to the terms of the MDU which state, in part, "I (the investor) acknowledge that, in the event of a non-payment by the mortgagor or breach of any other covenants in a mortgage, any action taken or decision to waive action is my responsibility. ... It is understood that action will not be taken by Morgan Trust to enforce any mortgage covenant or to realize on any mortgage security.". They also submit that, under the terms of the participation certificate, the trustee was not acting in the enforcement of the mortgages in applying for the appointment of a receiver as there had been no default under any of the mortgages and that accordingly the trustee was required to act in accordance with instructions received from a majority of the investors and the trustee did not do so.

18 The plaintiffs submit that, in acting on the instructions of Cass, Morgan Trust was not acting in good faith. A number of the properties on which mortgages were held were raw land or were properties on which no activities were being carried on and did not require the appointment of a receiver and manager. With reference to the provisions of the participation agreement setting out the obligations of the trustee, it is the position of the plaintiffs that the provisions of the MDU narrow the responsibilities and obligations of the trustee under the participation certificate. The question of whether the appointment of a trustee was in the best interests of the investors and whether there were other options available was not considered by Justice Montgomery; he considered only whether the appointment of a receiver was an appropriate remedy vis-à-vis Mater's based on the material before him at the time.

19 It is the position of the plaintiffs that the "collateral attack" rule preventing an action being brought based upon the defendant having commenced an action and obtained a favourable judgment, does not apply where the action is brought by a

 

plaintiff who is not a party to the original proceedings. They point out that the investors were not represented on the hearing before Justice Montgomery and did not have independent counsel until May, 1990.

20 It is the position of the defendant that there is no genuine issue for trial, that the issues on these motions are legal issues only and that there are no material facts in dispute. They submit that the material before this court discloses no genuine issue for trial with respect to breach of trust, negligence or breach of contract. They submit that, as a general rule, the courts have not allowed an action founded on the commencement or ultimate success of a legal proceeding except in certain narrow circumstances, none of which applies to the action before this court. They submit that the only exception where the courts have permitted an action based on the institution of legal proceedings is where the case had ultimately been resolved in favour of the plaintiff, the action was commenced without reasonable and probable cause by the defendant and was motivated by fraud, malice or bad faith and the plaintiff has suffered damages recognizable in law as a result of the initiation of the action or as a result of a judgment subsequently set aside due to fraud or irregularity. They submit that the rationale for the principle that the courts will not permit an action based upon the initiation of, or success in, another legal proceeding is that the public must have access to the courts without fear of retaliatory action, that inconsistent orders and judgments bring the administration of justice into disrepute and that there must be a finality to litigation. They submit that none of the criteria for the exception to this principle is applicable to this action and that the judgments and orders of the court must be free from collateral attack whether such attack is at the instance of the defendant in the earlier proceeding or a third party affected by the proceeding. They submit that this is not a case where the original proceeding has been resolved in favour of Mater's or of the investors, that the evidence before this court establishes that there is ample reasonable cause for commencing the receivership application, that there is no evidence that Morgan Trust was motivated by bad faith, fraud or malice in bringing the application and that, if the plaintiffs have suffered damages, this is not as a result of the initiation of the receivership application but rather as a result of the order of Justice Montgomery which was an intervening act of Justice Montgomery in the exercise of his judicial discretion. It is their submission that the order of Justice Montgomery establishes that receivership was the appropriate remedy in the circumstances and that to permit this action to continue would amount, in effect, to an appeal of the decision of Justice Montgomery. They note that the submissions made by counsel for the plaintiffs on these motions were not made before Justice Montgomery and have not been made to any judge on any of the motions brought during the course of the receivership and that the investors have had independent counsel as a party to the receivership proceedings since May of 1990. They submit that, even though this court has found that the statement of claim on its face discloses a cause of action, on consideration of the legal issues involved and an analysis of the various allegations contained in the statement of claim, there is clearly no genuine issue for trial and summary judgment ought to be granted in favour of the defendant. They point out that in considering a certification application the court need only be satisfied that the pleadings or the notice of application on their face disclose a course of action but that subsection 5(5) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 states that an order certifying a class proceeding is not a determination of the merits of the proceeding. They further submit that, even if the plaintiffs could show implied damage to Mater's as a result of the damage to its reputation from the initiation of the receivership application, Mater's is not the plaintiff in this action and, in any event, the plaintiffs must show that, in addition to damages, there was bad faith, fraud or malice in the initiation of the application and that it was initiated without reasonable and probable cause.

21 The defendant submits that, at common law, the principal duty of the trustee is to preserve and protect the assets of the trust regardless of the terms of the trust agreement or the fact that the trustee is a mere bare or custodial trustee. It is their submission that the participation certificate and not the MDU is the governing document as between Morgan Trust and the investors in that the participation certificate is signed by Morgan Trust, is delivered to every investor and refers to the specific investment or mortgage in respect of which the certificate is given. In contrast, the MDU was only delivered to certain of the RRSP investors amounting to about 1,217 out of the total 4,2096 investors and is generic in its terms and does not refer to a particular asset held in trust. They submit that an application for the appointment of a receiver is an act which can be taken in the administration of mortgage investments and that it was not therefore necessary to obtain instructions from a majority of the investors. They submit that there is no evidence that Morgan Trust was not acting honestly and in good faith and in what it believed at the time to be in the best interests of the investors and accordingly there is no evidence of breach of trust, negligence, lack of authority or breach of contract. They submit that even if, with the wisdom if hindsight and further reflection, it would appear that there may have been other remedies short of receivership which could have been pursued by Morgan Trust, this does not amount to negligence or, if the court should find negligence, the damage suffered by the investors was not as a result of such negligence but as a result of the order made by Justice Montgomery which is an intervening act of judicial discretion and not actionable.

 

22 The defendant points out that the receivership order has never been appealed or overturned at any time during the currency of the receivership and that this motion amounts to an appeal from, or a challenge to the validity of, such order and as such is a collateral attack on Justice Montgomery's order and constitutes an abuse of process. In addition, where a party has knowledge of judicial proceedings in which it is entitled to participate, it is an abuse of process to allow that party to commence a new action raising issues that could have been raised in the initial action. The investors have received separate legal advice and have been separately represented since May 1990 in the receivership proceedings and have participated in such proceedings. The defendant submits that the investors have therefore acquiesced in the receivership and are now estopped from bringing this action.

23 With respect to good faith, they submit that the overwhelming evidence before this court is that the decision by Morgan Trust to apply for the appointment of receiver was made by senior management at Morgan Trust and at CIBC and, after due consideration and the receipt of legal advice, and that the decision was not made as a result of a request from Cass or any pressure put upon Morgan Trust by Cass. The evidence before this court by way of affidavits on these motions and on the application before Justice Montgomery also establishes that there were ample, reasonable and probable grounds for Morgan Trust bringing the application. To establish bad faith, the plaintiffs would have to satisfy the court that the application for the receivership was brought solely to accommodate Cass and to ingratiate Morgan Trust with the regulatory authorities and that Morgan Trust had no other reasonable and probable grounds for initiating the application.

24 Counsel for the defendant also submits that, if the court should find a breach of trust, the court ought to exercise its discretion pursuant to section 35 of the *Trustees Act*, R.S.O. 1990, c. T.23 and relieve Morgan Trust from personal liability.

25 Section 35 provides as follows:

> If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.

26 Finally they submit that, if the motions for summary judgment are not granted and the trial proceeds, the issue re damages is not just the quantum of damages but also the causation of damage and that that question can not be left to a reference to the master.

**Reasons**

27 It is trite law that, on a motion for summary judgment, the court must be satisfied that there is a genuine issue for trial. Legal issues may be determined by the judge hearing the motion for summary judgment but, if there are genuine issues of credibility as to material facts, the matter must go on to trial. On the motion for summary judgment, the responding party must put its best foot forward and provide to the court at that time a coherent set of evidence establishing a genuine issue for trial.

28 The issues before this court on these motions are legal issues except that there appears to be a dispute as to whether Morgan Trust brought the application for appointment of a receiver simply to accede to a request from Cass and accordingly was not acting in good faith in bringing such application. Even though this is a factual matter, I find no evidence before this court to establish that Morgan Trust brought the application merely to accede to a request from Cass; this appears to me to be pure supposition on the part of the plaintiffs. On the other hand, there is ample evidence before this court to establish that the application was brought after receipt of legal advice and consideration by senior management of Morgan Trust and CIBC that it was an appropriate step to take in accordance with the provisions of the Participation Certificate and a trustee's common law duty to protect and preserve the assets of the trust in the best interests of the beneficiaries. Accordingly, I find that the plaintiffs have not satisfied the onus of putting forth coherent evidence establishing a genuine issue for trial with respect to a material fact.

29 With respect to the legal issues raised by the plaintiffs on these motions as to breach of contract, breach of trust, breach

 

of fiduciary duty and negligence on the part of Morgan Trust. I find that the determining document as between Morgan Trust and the investors is the Participation Certificate which was provided to each investor with respect to each investment and was signed by Morgan Trust. As noted above, the Participation Certificate describes the obligations of Morgan Trust as including "to act honestly, in good faith, and in the best interests of the investors in the course of administration and, if applicable, enforcement of the mortgage". There is, in my view, no evidence that Morgan Trust did not act honestly or in good faith and substantial evidence that in bringing the application for the appointment of the receiver, Morgan Trust was acting in what it believed to be in the best interests of the investors to protect the trust property. Accordingly, I find that Morgan Trust was not in breach of contract, in breach of trust, or in breach of fiduciary duty in bringing the application for the appointment of the receiver. As I have found no breach of trust or breach of fiduciary duty, it is unnecessary to resort to section 35 of the *Trustee Act* to relieve Morgan Trust from personal liability.

30 With respect to negligence, in my view, even if there were less serious remedies available to Morgan Trust, I can not conclude that Morgan Trust, in all the circumstances of this case, was negligent in determining to apply to the court for the appointment of a receiver. The decision of Justice Montgomery to appoint the receiver, of itself, establishes that there were reasonable and probable grounds for bringing the application for the appointment of a receiver. The affidavit evidence before Justice Montgomery and before this court sets out ample grounds for Morgan Trust determining that an application ought to be brought before the court for the appointment of a receiver to protect and preserve the assets which it held in trust for the investors.

31 Counsel for the defendant have submitted that its motion for summary judgment should be granted on the principle of collateral attack. I accept the submission of counsel for the defendant that the general principle applied by the courts of not permitting collateral attack is that an action founded on the commencement of, or success in, a legal proceeding will not be allowed and that the only exception to such principle is where the original proceeding has been resolved in favour of the plaintiff, the original proceeding was commenced without reasonable and probable cause and was motivated by fraud, malice or bad faith and the plaintiff has suffered damage which the law will recognize from the initiation of the earlier proceeding or a judgment obtained in the earlier proceeding which has subsequently been set aside as fraudulently obtained. See *Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674 (C.A.); and *Nelles v. Ontario* (1989), 37 C.P.C. (2d) 1 at 21 (Ont.C.A.), varied [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609

32 Even if a trial court should conclude that the application was brought by Morgan Trust in bad faith or was motivated by fraud or malice, which seems to me to be highly improbable, that is not of itself sufficient to permit the action to proceed as an exception to the general principle that no action may be brought based upon the defendant having initiated or succeeded in a legal proceeding. The court must also be satisfied that there was no reasonable or probable cause for bringing the proceeding and that the plaintiffs have suffered damage as a result of the initiation of the proceeding or as a result of a judgment subsequently set aside as fraudulently obtained.

33 The plaintiffs have submitted that the principle of collateral attack is not applicable where the subsequent proceeding is brought by a party which was not a party to the original proceeding and that accordingly this action does not amount to a collateral attack on the order of Justice Montgomery as the investors were not a party to, and did not appear on, the hearings before Justice Montgomery.

34 In *Manufacturers Life Insurance Co. v. Gordon* (1992), 126 A.R. 354 (Master), the plaintiff landlord leased business premises to the defendant, C. Company, but it was not clear whether it or the defendant, B company was the actual tenant. Both companies were owned by the defendant, C.G.. Subsequent to the rent falling into arrears, C.G. obtained an *ex parte* order appointing a receiver for B. The receiver removed some chattels from the leased premises contrary to the terms of the lease. The landlord brought an action against all the parties, including the receiver and its officer for wrongful removal of the goods. The receiver and officer applied to have the action struck.

35 The plaintiff alleged that the receiver took possession of and removed all goods "contrary to the lease" and "without the prior written consent of the plaintiff". In response to the allegation, Master Funduk stated that (at p.360):

> [The plaintiff's claim] is in substance a collateral attack on the receivership order. That is not permissible: *Skegs v. Jamieson* (1986), 72 A.R. 231 (Master); *Abacus Cities v. Bank of Montreal* (1988), 80 A.R. 254 (C.A.). The order authorized the Receiver to take possession of all C. Bailey's property. The Receiver did not need the plaintiff's consent to anything. If the plaintiff is unhappy with the legal consequences to it of the order, the remedy, if there is one, is not to

  

sue the Receiver.

36 In *Royal Bank v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337 (Alta Q.B.), the court considered the principle of collateral attack in the context of a receivership order. The plaintiff bank had advanced funds to a company and held various forms of security. The bank became concerned about the debt and advised the principal of the company that it required further specified security, failing which it would notify parties with whom the company had significant contracts. The bank then decided to appoint a receiver and sent notices to these parties to perfect an assignment of book debts. The bank did not advise the principal or the company's solicitor of its intention to appoint a receiver, although the bank officer involved was aware that both were attempting to contact him. A receivership order was applied for *ex parte*. The order was granted. The bank sued the company for debt and the principal as guarantor. The company counterclaimed against the bank for damages for loss of the company's assets and against the receiver for mismanagement and negligent operation of the business.

37 The court allowed the counterclaim. It held that the validity of the receivership order had been challenged directly in the statement of defence and counterclaim, rather than collaterally, and therefore, was not barred. McDonald J. held the following at pp. 348-349:

> As the application was essentially ex parte, the plaintiff had to act in the utmost good faith and make full, fair an candid disclosure of the facts... Such disclosure must include facts which would militate against the application: *Caisse populaire de Morinville Savings & Credit Union v. Pasay* (1982), 47 A.R. 311 at 316 (Q.B.). If the order was obtained by fraud, or non-disclosure or misleading disclosure, the order might be challenged directly, as by an application to set it aside, or by appeal, but not collaterally - i.e., not in a proceeding in which an attack is made on the order incidentally to the cause: *R. v. Wilson*, [1983] 2 S.C.R. 594 at 603 [[1984] 1 W.W.R. 481]. In my view, where, as in the present case, the validity of the order is challenged directly in the very action in which it was made, the challenge being made in the statement of defence and counterclaim, such a challenge may be the equivalent of a direct attack by an application to set the order aside or on appeal. I do not say that the challenge is bound to succeed if made in that manner, only that it is not barred if made in that manner. Whether, at trial, the challenge should succeed will depend upon a variety of circumstances.

In the case at bar, the attack is clearly a collateral attack. The receivership order was not challenged in the receivership proceedings even though the plaintiffs had notice of the receivership proceedings and failed to do anything about it when the proceedings arose over 5 years ago or since. It is interesting to note that the time to appeal the receivership order expired well before the institution of the present action.

38 The principle that an order or judgment cannot be attacked by a proceeding which is incidental to the cause was set out by the Supreme Court of Canada in *Wilson v. R., supra* [[1983] 2 S.C.R. 594]. At trial, the provincial court judge ruled that wiretap evidence was inadmissible as having been illegally obtained. The accused was acquitted and the Crown appealed. The issue on appeal was whether the provincial court judge exceeded his jurisdiction in refusing to admit the tapes since the wiretaps had been authorized by four Queen's Bench judges. The appeal was granted and a new trial was ordered on the basis that an authorization could not be challenged collaterally in a provincial court. The accused's appeal to the Supreme Court of Canada was dismissed on the basis that a trial judge has no authority to collaterally attack a wiretap authorization. McIntyre J. held at pp.502-503:

> In the Manitoba Court of Appeal, Monnin J.A. said [at p.95]:
>
> > The record of a superior court is to be treated as absolute verity so long as it stands unreversed.
>
> I agree with that statement. It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stand and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well-settled in the authorities that such an order may not be attacked collaterally — *and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.* (Emphasis added)

Essentially, the principle of collateral attack states that an order made by a court having jurisdiction is binding and conclusive, and cannot be attacked in a proceeding where the object of that proceeding is other than the reversal, variation or nullification of the order or judgment.

39 Further, it is clear, that a judicial act such as the appointment of a receiver, is not actionable. In *Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329, the plaintiff brought an action for maliciously, and without reasonable and probable cause, procuring the plaintiff to be adjudicated bankrupt. The court held that no act of bankruptcy was committed by the plaintiff in not paying, securing or compounding the alleged debt. The allegation of the act of bankruptcy was untrue and was either known by the defendant as untrue or not *bona fide* believed by the defendant to be true. Cleasby B. found the defendant liable and the court's error in making the adjudication did not discharge him. The judge found that no action is maintainable where the want of reasonable and probable cause is only error on a point of law and he held at p.339:

> But what I am now considering is a suggestion which was made in the course of the argument, that the matter having been brought regularly before the judge who heard both the parties, the adjudication was the act of the judge, and the person who instituted the proceedings could not be made responsible.

And at p.364:

> But the appointment of a receiver is not a consequence of the presentation of the petition. It could not be unless there had been such presentation, but it is a consequence of an independent application.

Further, at p.380:

> The reason may be that the judgment of the Court is not caused or procured by anyone. It is the independent exercise of the mind of the Court upon the facts before it, and cannot be said to be caused or procured in the sense in which these words are used in such actions as the present.

In other words, the act of appointing a receiver is an independent act. Although the court, in making its decision, considers the evidence and arguments presented by the parties, ultimately, the judicial decision-making process is one that is wholly independent of the parties.

40 A further obstacle to the plaintiffs being permitted to continue with this action is establishing that they have suffered damage as a result of the initiation of the receivership application by Morgan Trust. The law seems to me to clearly establish that, where an order has been made or judgment given as a result of a decision made by a judge or other judicial officer in the exercise of his or her judicial discretion, no action lies for damages resulting from that decision.

41 The basic principle that a plaintiff must establish damages as a result of the initiation of legal proceedings was set out in *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674 (C.A.). In that decision, the plaintiff company brought an action against the defendant who was a former shareholder. The plaintiff alleged that the defendant falsely and maliciously presented a petition under the *Companies Act*, 1862, 1867 to the court for the winding-up of the plaintiff company. At trial, no proof of damage to the company was given beyond the liability to pay its own costs of defending against the petition and upon this ground the company was nonsuited at the end of its case. The Court of Appeal held that where the plaintiff brings a claim against the defendant for instituting a legal proceeding, the plaintiff must show some damages it has suffered in order to establish a cause of action. Brett M.R. stated at p.682:

> I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. The present action is in tort, and in order to support it the plaintiff company must have sustained some damage such as the law takes notice of.

The court then went on to discuss the type of damages a party may sustain in a a bankruptcy proceeding. Brett M.R. stated at pp.684-685

> By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act, 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

  

The court held that a petition to wind-up is like a bankruptcy petition in that the petition is made public before the plaintiff can defend himself. Accordingly, the initiation of the wind-up proceedings caused an injury to the plaintiff's fame. Brett M.R. stated at pp.688-689:

> To speak broadly, and without travelling into every corner of the law, whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious proceedings have been accompanied by damage express or implied.

The distinction between *Quartz Hill* and the present case is that the investors did not personally suffer any damage to their fame. Any damage to fame that may have occurred would have been to Mater's and not the investors.

42 In the case at bar it appears to me that, if damage has been suffered by the plaintiffs as investors in the mortgages in the Mater's mortgages, such damage resulted from the manner in which the mortgage funds were administered by Mater's, the issuance of the various orders by the Ministry and the order of Justice Montgomery and not as a result of the initiation of the receivership application by the defendant. The defendant had no control over the administration of the mortgage funds by Mater's or over the issuance of the various orders by the Ministry and the law is clear that damage resulting from an order made, or judgment issued, by a judicial authority cannot form the basis for an action against the person initiating the legal proceedings except in the limited circumstances discussed above which I have determined are not applicable to the case at bar.

43 With respect to the submissions of the defendant that the plaintiffs are estopped by their conduct from challenging the propriety of the receivership application, the investors were notified of the receiver appointment through press releases and other notices. The original order of Montgomery J. was reviewed 10 days later, at which time no dissent was made by the investors. No appeal was taken by the investors from that order. Accordingly, their conduct of sitting back and watching the proceedings estops them from challenging the receivership order. Even if the investors were not a party to the receivership proceedings in January 1990, they had independent legal counsel appointed in May of 1990 and they could have immediately or shortly thereafter raised issue with the order. On the contrary, they continued to participate in a number of motions brought in the receivership proceedings. For them to come to court some five and a half years after the original proceedings amounts to an abuse of process. Estoppel by conduct does not require a positive act. A person can be estopped by failing to take action.

44 The defendant has also submitted that the plaintiffs should be found to have acquiesced in the appointment of a receiver. Acquiescence does require some positive act or words that demonstrate approval or consent.

45 In *Royal Bank of Canada v. Fogler, Rubinoff* (1991), 5 O.R. (3d) 734 at 746 (Ont. C.A.) Dubin C.J.O. stated:

> What is stated in *Waters, supra*, at p.1010, is applicable here: However, knowledge itself is not sufficient to constitute consent or acquiescence. *There must be some positive act or words which demonstrate that the beneficiary not only knew, but also approved of what was proposed or had been done. A man cannot be said to consent or acquiesce because, though he knows, he does not interfere.* (Emphasis added)

46 It may be that the participation by the investors in subsequent motions in the receivership proceedings could be held to be a positive act implying consent to or approval of the appointment of the receiver. I do not think I am required to determine this question as I am satisfied, as outlined above, that the plaintiffs are estopped by their conduct from ever challenging the appointment.

47 Accordingly, I find no genuine issue for trial in this action and that, in any event, the action commenced by the plaintiffs constitutes a collateral attack on the order of Justice Montgomery and can not be permitted to proceed.. The plaintiffs' motion for summary judgment is dismissed. An order will issue granting summary judgment in favour of the defendant and dismissing the plaintiffs' claim. If counsel wish me to fix costs of these motions, I would ask them to make written submissions as to scale and quantum of costs to me before November 30, 1996.

*Plaintiff's motion for summary judgment granted and action dismissed.*

 

**End of Document**



  

TAB 3

**CITATION**: Bank of Montreal v. Dedicated National Pharmacies Inc. (Fees), 2011 ONSC 346
**COURT FILE NO.:** CV-10-8852-00CL
**DATE:** 20110117



**SUPERIOR COURT OF JUSTICE – ONTARIO**
**(*Commercial List*)**

**RE:** BANK OF MONTREAL

Applicant

**AND:**

DEDICATED NATIONAL PHARMACIES INC., METHADRUG CLINIC LIMITED AND UNION MEDICAL PHARMACY INC.

Respondents

**AND:**

GRANT THORNTON LIMITED, IN ITS CAPACITY AS RECEIVER AND MANAGER OF DEDICATED NATIONAL PHARMACIES INC., METHADRUG CLINIC LIMITED AND UNION MEDICAL PHARMACY INC.

**BEFORE:** Marrocco J.

**COUNSEL:** *Jeff Carhart & Arthi Sambasivan*, for the Receiver, Grant Thornton Limited

*Orestes Pasparakis & V. Sinha*, for Public Access Defibrillation Inc.

*Heath Whiteley,* for the Bank of Montreal

*David Chernos,* for 2141546 Ontario Limited

*John Russo,* for Tolim Management Inc.

*S. Brotman,* for Centric Health Corporation

*M. Adilman,* for Rachel Diena and Joel Diena

**HEARD:** January 11, 2011

## FEES ENDORSEMENT

[1] On July 21, 2008, credit facilities were made available to Dedicated National Pharmacies Inc. by the Bank of Montreal. Methadrug Clinic Limited and Union Medical Pharmacy Inc. provided guarantees of the indebtedness of Dedicated National Pharmacies Inc. to the bank. The companies operated two traditional non-methadone dispensing pharmacies and twelve methadone-dispensing pharmacies in Ontario.

[2] On August 17, 2010, as a result of an application by the bank to enforce its security, Grant Thornton Limited was appointed Monitor of all of the assets of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc. Grant Thornton Limited retained counsel and, on August 30, 2010, reported to the court concerning efforts by Dedicated National Pharmacies Inc. to sell its assets. As a result of that report, on September 8, 2010, Grant Thornton Limited was appointed Receiver of those companies.

[3] On December 15, 2010, the Receiver provided a second report to the court and moved for an order approving its activities, the interim statement of receipts and disbursements, as well as its own, and its counsel's, fees and disbursements. Fees for the Receiver and its counsel exceed $800,000 for the period ending December 12, 2010. The Receiver also sought an order approving the sale of assets of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc. to Centric Health Corporation.

[4] On January 11, 2011, I made an order approving the asset sale as set out in the agreement of purchase and sale between Centric Health Corporation and the Receiver, dated November 29, 2010. I also made an order sealing various confidential appendices that had been filed with the court until the asset sale was completed.

[5] Public Access Defibrillation Inc., a secured creditor of Dedicated National Pharmacies Inc., Methadrug Clinic Limited and Union Medical Pharmacy Inc., as well as a member of the controlling shareholder group of those companies, asks that the court defer approving the Receiver's activities and accounts on the basis that such approval is premature.

[6] In my view, there should be a short delay in deciding whether to approve the activities of the Receiver and the interim fees and disbursements of the Receiver and its counsel. My decision should not be taken as accepting directly, indirectly, expressly or by implication any of the criticisms of the Receiver which were expressed during the argument of this motion.

[7] Applications for the approval of the 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. In this case, the asset sale is expected to close by the end of January. A more appropriate time to consider the Receiver's conduct and the payment of fees would, thus, be shortly after the closing. If the transaction fails to close at the end of January, a new commercial reality will arise. The asset sale process will have to be repeated once again triggering a commercially sensible time to review the Receiver's actions and pay the Receiver and counsel.

[8] This is not a situation where the closing of the asset purchase is a foregone conclusion. There are at least two contingencies which affect the closing.

[9] First, there has to be the trial of an issue concerning the existence of a lease on a property located at 1678 Dufferin St., Toronto. If there is no long-term lease in existence, there will be an abatement of the purchase price. It is the intention of the Receiver that the trial of this issue takes place prior to the asset sale to Centric Health Corporation.

[10] Second, Ontario Addiction Treatment Centres represents twenty-three pharmacy locations. The leases of those properties are important. Now that the asset purchase agreement with Centric Health Corporation has been approved, negotiation of the assignment agreements can proceed. While it does appear that both Ontario Addiction Treatment Centers and the Receiver have an interest in a successful negotiation, it is impossible to conclude that the assignment agreements will be successfully negotiated.

[11] The status of counsel for Public Access Defibrillation Inc. requires a short comment. Counsel for Public Access Defibrillation Inc. cannot continue to act; counsel would have withdrawn before today were it not for the necessity to consider without delay approval of the asset purchase. Public Access Defibrillation Inc. is concerned about the decision of the Receiver to reject one of the asset purchase offers obtained during the sale process. It wants the opportunity to meet with the rejected Offeror before taking a position on the Receiver's motion to approve its activities and the payment of fees. It cannot meet with the rejected Offeror because all of the offering documents are sealed and because it entered into a confidentiality agreement concerning, amongst other things, those same documents. Once the asset purchase agreement closes, discussions between Public Access Defibrillation Inc. and the rejected Offeror may be possible. A short delay will ensure that Public Access Defibrillation Inc. is not disadvantaged because its counsel cannot continue to act.

[12] If Public Access Defibrillation Inc., or any other party, is concerned that the sealing orders or confidentiality agreements will continue after the closing of the asset purchase to prevent a discussion with any rejected Offeror, then an application should be made to the court for relief from the order and the agreement. I decline to make such an order at this time because the asset purchase with Centric Health Corporation has not closed. In this regard, I wish to remind all the parties that Centric Health Corporation is a publicly-traded corporation and that the disclosure of any information to any third party should take place in a way which ensures that Centric Health Corporation complies with the applicable disclosure and other securities regulations and that the parties, having such discussions, do not inadvertently disclose information which has not been made available to the market.

[13] Counsel for Public Access Defibrillation Inc. expressed concern about the treatment of the non-tangible assets of Methadrug Clinic Limited.

[14] Home Street and Union 55 operate pharmacies. As a result of regulatory considerations, Home Street Pharmacy's and Union 55 Pharmacy's Ontario College of Pharmacists accreditations are being held by Dedicated National Pharmacies Inc. The Receiver has taken the view that the operating non-intangible assets of Home Street Pharmacy and Union 55, which include leases and accreditations, are the property of the debtor companies.

[15] Apparently, the accreditation for Methadrug Clinic Limited is also held by Dedicated National Pharmacies Inc. It was counsel's view that the operating non-tangible assets of Methadrug Clinic Limited should also be regarded as assets of Dedicated National Pharmacies Inc. It was counsel's submission that the same process of allocation be used for Home Street, Union 55 and Methadrug Clinic Limited. It was counsel's view that this would become important upon distribution because certain creditors of Methadrug Clinic Limited are not creditors of Dedicated National Pharmacies Inc. The responsibility for the treatment of the non-tangible assets of Methadrug Clinic Limited at this point rests with the Receiver. I have chosen to incorporate counsel's view into my endorsement because counsel for Public Access Defibrillation Inc. will be withdrawing from this matter and the position of Public Access Defibrillation Inc. at the hearing before me was clear on this issue.



MARROCCO J.

**Date:** 20110117

TAB 4

**Ontario Supreme Court**
**Bank of Nova Scotia v. Freure Village of Clair Creek**
**Date: 1996-05-31**



Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

*John J. Chapman and John R. Varley, for Bank of Nova Scotia.*

*J. Gregory Murdoch, for Freure Group (all defendants).*

*John Lancaster, for Boehmers, a Division of St. Lawrence Cement.*

*Robb English, for Toronto-Dominion Bank.*

*William T. Houston, for Canada Trust.*

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

*The Motion for Summary Judgment*

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

[4] On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

[5] As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

[6] No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor – Mr. Freure – are the same. Finally, the evidence which is relied upon for the change in the Bank's position – an internal Bank memo from the local branch to the credit committee of the Bank in Toronto – is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

[7] Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

*Receiver/Manager*

[8] The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

[9] It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement – which they are, and are not, respectively – the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants – supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) – urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

[10] The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act,* R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

[12] While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplates, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

*Motions granted.*

TAB 5

## SUPREME COURT OF NOVA SCOTIA

**Citation:** *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235

**Date:** 20180511
**Docket:** Hfx No. 474742
**Registry:** Halifax

**Between:**

First National Financial GP Corporation and
First National Financial LP

Applicants

v.

3291735 Nova Scotia Limited

Respondent

**RECEIVERSHIP AND SALES PROCESS**

**Judge:** The Honourable Justice Christa M. Brothers

**Heard:** May 11, 2018, in Halifax, Nova Scotia

**Oral Decision:** May 11, 2018

**Written Decision:** September 27, 2018

**Counsel:** D. Bruce Clarke, Q.C. for the Applicants
Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver for the Respondent, 3291735 Nova Scotia Limited)
Brian W. Stilwell, Watching Brief

**By the Court:**

**Overview**

[1] This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

[2] The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

**The Application for a Receivership Order**

[3] The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the

affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

[4] The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

[5] The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

[6] I have reviewed all the materials with regard to the proposed Receivership Order.

[7] I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

[8] I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

[9] Section 243(1) of the BIA provides:

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

[10] In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

[11] The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

[12] In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;
2. The Company is in default of its obligations to First National;
3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
4. Both the Demand Letter and the Notice have expired, without payment being made;
5. First National is in a position to enforce its security as against the Company should it choose to do so;
6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and
7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the

> property is handled expeditiously and in a commercially reasonable manner.

[13] I have reviewed the case law and, in particular, ***Bank of Montreal v. Carnival National Leasing Limited et al.***, 2011 ONSC 1007. In that case, the Court noted that under section 243 of the *BIA* and section 101 of the ***Courts of Justice Act***, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

> 23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[14] In ***Bank of Nova Scotia v. Freure Village on Clair Creek*** (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v.

> Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[15] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007, spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

> 25. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[16] I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

[17] Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

**Sale Process Order**

[18] Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

[19] The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

[20] First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

[21] KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

[22] KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

[23] On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order

to maximize the value for creditors and to minimize the risk of losing this offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

[24] The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **<u>Purchaser:</u>** 3308
- **<u>Purchased Assets:</u>**
  - (i) The Real Property
  - (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property
  - (iii) plans
  - (iv) contracts
  - (v) permits in connection with the Real Property, to the extent transferable
  - (vi) all intellectual property, if any, owned by the Company with respect to the project
- **<u>Purchase Price:</u>** $3,708,750, including HST
- **<u>Deposit:</u>** $322,500 being 10% of the purchase price (before HST)
- **<u>Excluded Assets:</u>** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds
- **<u>Representations and Warranties:</u>** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.
- **<u>Closing:</u>** first business day which is five business days after receipt of Sale Approval Order
- **<u>Material Conditions:</u>**
  - (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;
  - (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to

the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

. **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

[25] 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the “stalking horse” sales process.

[26] A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in ***CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.***, 2012 ONSC 1750. While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies’ Creditors

Arrangement Act proceeding: ***Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited,*** Hfx. No. 454744.

[27] Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

[28] D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd*., at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

*[29]* I must consider the following factors as set forth in ***CCM Master Qualified Fund, Ltd., supra*:**

1. The fairness, transparency and integrity of the proposed process;
2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[30] In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding

procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

[31] The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

[32] First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

[33] I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

[34] In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

[35] I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

[36] I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Brothers, J.

TAB 6

2015 QCCS 1920
Cour supérieure du Québec

Bloom Lake, g.p.l., Re

2015 CarswellQue 4072, 2015 QCCS 1920, 27 C.B.R. (6th) 1, J.E. 2015-830, EYB 2015-251727

# In the matter of the companies' creditors arrangement act, r.s.c. 1985, c. C-36, as amended: Bloom lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited and Cliffs Québec Iron mining ULC, Petitioners, and The bloom lake iron ore mine limited partnership and Bloom lake railway company limited, Mises en cause, and FTI Consulting Cananda Inc., Monitor, and 9201955 Canada inc., Mise en cause, and Eabametoong first nation, Ginoogaming first nation, Constance Lake first nation and Long Lake # 58 first nation, Aroland first nation and Marten Falls first nation, Objectors, and 8901341 Canada inc. and Canadian Development And Marketing Corporation, Interveners

Hamilton J.C.S.

Heard: 24 april 2015
Judgment: 27 april 2015
Docket: C.S. Qué. Montréal 500-11-048114-157

Counsel: Me Bernard Boucher, Me Sébastien Guy, Me Steven J. Weisz for Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited
Me Sylvain Rigaud, Me Chrystal Ashby for FTI Consulting Canada Inc.
Me Jean-Yves Simard, Me Sean Zweig for 9201955 Canada Inc.
Me Stéphane Hébert, Me Maurice Fleming for Eabametoong First Nation Ginoogaming First Nation, Constance Lake First Nation and Long Lake # 58 First Nation, Aroland First Nation, Marten Falls First Nation
Me Sandra Abitan, Me Éric Préfontaine, Me Julien Morissette for 8901341 Canada inc. Canadian Development and Marketing Corporation

Subject: Civil Practice and Procedure; Insolvency; Public

RULING on petitioners' amended motion for issuance of approval and vesting order with respect to revised share purchase agreement.

***Hamilton J.C.S.:***

1 The Petitioners have made an Amended Motion for the Issuance of an Approval and Vesting Order with respect to the Sale of the Chromite Shares (#82 on the plumitif; the original motion was #65). Objections were filed by (1) six First Nation bands (#85, as amended at the hearing) and (2) 8901341 Canada Inc. and Canadian Development and Marketing Corporation (together, CDM) (#87).

## CONTEXT

2 On January 27, 2015, Mr. Justice Castonguay issued an Initial Order placing the Petitioners and the Mises-en-cause under the protection of the *Companies' Creditors Arrangement Act.* [1] The ultimate parent of the Petitioners and the Mises-en-cause is Cliffs Natural Resources Inc. (Cliffs), which is neither a Petitioner nor a Mise-en-cause.

  

3 The Petitioner Cliffs Québec Iron Mining ULC (CQIM) owns, through two subsidiaries, a 100% interest in the Black Thor and Black Label chromite mining projects and a 70% interest in the Big Daddy chromite mining project. All three projects form part of the Ring of Fire, a mining district in northern Ontario.

4 Other entities related to Cliffs but which are not parties to the CCAA proceedings own other mining interests in the Ring of Fire.

5 The proposed transaction with respect to which the Petitioners are seeking an approval and vesting order involves the sale of those various interests, including in particular the sale of CQIM's shares in the subsidiaries described above.

6 Cliffs and its affiliates paid approximately US$350 million to acquire their interests in the Ring of Fire projects, and invested a further US$200 million in developing these projects.

7 By 2013, Cliffs had suspended all activities related to the Ring of Fire and began making general inquiries with potential interested parties with a view to selling its interests in the Ring of Fire. No material interest resulted from these efforts.

8 By September 2014, Cliffs's desire to sell its interests in the Ring of Fire was publicly known. [2] It hired Moelis & Company LLC to assist with the sale process for various assets including the Ring of Fire in October 2014. [3]

9 The sale process will be described in greater detail below. It resulted in the execution of a letter of intent with Noront on February 13, 2015. [4]

10 While the sellers were negotiating the Share Purchase Agreement with Noront, CDM sent an unsolicited letter of intent to acquire the Ring of Fire interests on March 14, 2015. [5] That letter of intent was analyzed by the sellers, Moelis and the Monitor and was rejected. [6] Two revised letters of intent followed and were also rejected. [7]

11 The sellers executed the initial Share Purchase Agreement with Noront on March 22, 2015, which provided for a price of US $20 million. [8] Noront issued a press release describing the transaction on March 23, 2015. [9]

12 The initial SPA provided in Section 7.1 a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party.

13 On April 2, 2015, the Petitioners made a motion for the issuance of an approval and vesting order with respect to the initial SPA. Four First Nations bands who live and exercise their Aboriginal and treaty rights in and on the land and territories surrounding the Ring of Fire filed an objection to the motion. CDM did not. Instead, on April 13, 2015, CDM made an unsolicited offer for the interests in the Ring of Fire which included a purchase price of US $23 million. [10]

14 CDM's offer was considered by the sellers, Moelis and the Monitor to be a "Superior Proposal" as defined in Section 7.1 of the initial SPA. As a result, they advised Noront, [11] which expressed an interest in making a new offer.

15 The sellers, after consulting Moelis and the Monitor, developed the Supplemental Bid Process to give each party the chance to submit its best and final offer. [12]

16 Both Noront and CDM participated in the Supplemental Bid Process and submitted new offers, with Noront's offer at US $27.5 million and CDM's at US $25.275 million. [13]

17 The sellers accepted the Noront offer and entered into a revised SPA with Noront on April 17, 2015. [14] The Petitioners then amended their motion to allege the additional facts since April 2, 2015 and to seek the issuance of an approval and vesting order with respect to the revised SPA.

 

18 The First Nation bands maintained their objection (#85) [15] and CDM filed a Declaration of Intervention and Contestation with respect to the amended motion (#87).

**POSITION OF THE PARTIES**

19 The Petitioners argue that the revised SPA should be approved because:

1. the marketing and sales process was fair, reasonable, transparent and efficient;

2. the price offered by Noront was the highest binding offer received in the process;

3. CQIM exercised its commercial and business judgment with assistance from Moelis;

4. the Monitor assisted and advised CQIM throughout the process and recommends the approval of the motion.

20 Moreover, they argue that no creditor has opposed the motion, and that the First Nations bands and CDM do not have legal standing to oppose the motion.

21 The Monitor and Noront supported the position put forward by the Petitioners.

22 The First Nations bands argued the following points:

1. they have a legitimate interest and standing to contest the motion as an "other interested party" under Section 36 of the CCAA, because they have Aboriginal and treaty rights that are affected by the change in control of the Ring of Fire interests;

2. there was a duty on the part of the sellers and their advisers to consult with and advise the First Nations bands about the sale process. Instead, the First Nations bands were ignored and did not even learn of the existence of the sale process until March 23, 2015;

3. the sale process was not open, fair or transparent and did not recognize the rights of the First Nations bands;

4. there was no sales process order; and

5. there is no urgency and they should be given the opportunity to present an offer.

23 Finally, CDM argued as follows:

1. the sellers were required to accept the "Superior Proposal" made by CDM on April 13, 2015;

2. the Supplemental Bid Process did not treat the two parties fairly;

3. the Monitor's support of the process is not determinative;

4. it had the necessary interest to intervene in the CCAA proceedings and contest the motion.

**ISSUES**

24 The Court will analyze the following issues:

1. Was the sale process "fair, reasonable, transparent and efficient"?

In the context of the analysis of this issue, the Court will consider various sub-issues, including the business judgement rule, the importance of the Monitor's recommendation, and the interpretation of Section 7.1 of the initial SPA.

  

2. Do the First Nations bands have other grounds on which to object to the proposed transaction?

3. Do the First Nations bands and CDM have legal standing to raise there issues?

**ANALYSIS**

***Was the sale process "fair, reasonable, transparent and efficient"?***

25 Section 36 of the CCAA provides in part as follows:

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

. . .

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

. . .

26 The criteria in Section 36(3) of the CCAA have been held not to be cumulative or exhaustive. The Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

[48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

[49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA. [16]

27 Further, in the context of one of the asset sales in *AbitibiBowater*, Mr. Justice Gascon, then of this Court, adopted the following list of relevant factors:

 

> [36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally.
>
> [37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:
>
> - have sufficient efforts to get the best price been made and have the parties acted providently;
> - the efficacy and integrity of the process followed;
> - the interests of the parties; and
> - whether any unfairness resulted from the working out process.
>
> [38] These principles were enunciated in *Royal Bank v. Soundair Corp.* They are equally applicable in a CCAA sale situation. [17]

28 The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36 CCAA:

> 1. the business judgment rule:
>
> [70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.
>
> [71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should. [18]
>
> 2. the weight to be given to the recommendation of the Monitor:
>
> The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders. [19]

29 Debtors often ask the Court to authorize the sale process in advance. This has the advantage of ensuring that the process is clear and of reducing the likelihood of a subsequent challenge. In the present matter, the Petitioners did seek the Court's authorization with respect to a sale process for their other assets, but they did not seek the Court's authorization with respect to the sale process for the Ring of Fire interests because that sale process was already well under way before the CCAA filing. There is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case.

30 The Court will therefore review the sale process in light of these factors.

*(1) From October 2014 to the execution of the Noront letter of intent on February 13, 2015*

31 The sale process began in earnest in October 2014 when Cliffs engaged Moelis.

32 Moelis identified a group of eighteen potential buyers and strategic partners, with the assistance of CQIM and Cliffs. The group included traders, resource buyers, financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

  

33 Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

34 Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

35 By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

36 The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

37 Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015.[20]

38 With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

39 The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers, with Moelis and the Monitor, took reasonable steps.[21] The Court is satisfied that this test was met.

*(2) From letter of intent to initial SPA*

40 Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

41 CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

*(3) The initial SPA and the "Superior Proposal"*

42 The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

43 Section 7.1 of the initial SPA allowed the sellers to pursue a "Superior Proposal", defined as an unsolicited offer from a third party which appeared to be more favourable to the sellers. In that eventuality, the sellers had the right to terminate the initial SPA upon reimbursing Noront's expenses up to $250,000.

44 CDM made a new offer on April 13, 2015.[22] The sellers, in consultation with their advisers and the Monitor, concluded that it was a Superior Proposal.

45 CDM argues that in those circumstances, the sellers had the obligation to terminate the initial SPA and to accept the CDM offer.

46 The Court does not agree.

47 On its face, the language in Section 7.1 is permissive and not mandatory. It says that the sellers "may" terminate the initial SPA and enter into an agreement with the new offeror. It does not require them to do so.

 

48 CDM argued that Section 7.1 does not provide for a right to match, which is found in other agreements of this nature. That may be true, but a right to match is different. Specific language would be necessary to contractually require the sellers to accept an offer from Noront that matched the new offer. No language was required to give Noront the right to make a new offer. Further, specific language would be required to remove the possibility of Noront making a new offer. There is no such language. It would be surprising to find such language: why would Noront give up the right to make another offer, and why would the sellers prevent Noront from making another offer? Any such language would be to the detriment of the two contracting parties and for the exclusive benefit of an unknown third party. As the Monitor pointed out, Section 12.2 of the initial SPA specifies that the SPA is for the sole benefit of the parties and is not intended to give any rights, benefits or remedies to a third party.

49 As a result, the sellers had no obligation to accept the April 13 offer from CDM.

*(4) The Supplemental Bid Process*

50 Once the sellers, their advisers and the Monitor determined that the April 13 offer from CDM was a Superior Proposal, they had to decide how to manage the process. They had two interested parties and they decided to give them both the chance to make their best and final offer through a process that they created for the purpose, which is referred to as the Supplemental Bid Process. This was a very reasonable decision, in the best interests of the creditors, although probably not one that either offeror was very happy with.

51 The sellers, their advisers and the Monitor established a series of rules, and they sent the rules to the two offerors at the same time:

> 1. Each of the Bidders' best and final offer is to be delivered in the form of an executed Share Purchase Agreement (the "Final Bid"), together with a blackline mark-up against the March 22 SPA to show proposed changes.
>
> 2. Final Bids can remove section 7.1(d) and the related provisions of the March 22 SPA.
>
> 3. Final bids are to be received by Moelis by no later than 5:00 p.m. (Toronto time) on Wednesday, April 15, 2015 in accordance with paragraph 7 below.
>
> 4. Final Bids may be accompanied by a cover letter setting any additional considerations that the Bidder wishes to be considered in connection with its Final Bid but such cover letter should not amend or modify any of the terms and conditions contained in the executed SPA.
>
> 5. Final Bids will be reviewed by the Sellers in consultation with moelis and the Monitor. A determination of the Superior Proposal will be made as soon as practicable and communicated to the Bidders.
>
> 6. Any clarifications or other communications with respect to this process should be made in writing to the Sale Advisor, with a copy to the Monitor.
>
> 7. Final Bids are to be submitted to the Sale Advisor c/o Carlo De Giroloamo by email at **carlo.degirolamo@moelis.com**.
>
> 8. All initially capitalized terms used herein unless otherwise defined shall have the meanings given to them in the March 22 SPA. [23]

52 They declined a request from Noront to modify the rules. [24]

53 Both Noront and CDM decided to participate in the Supplemental Bid Process and both submitted offers.

  

54 All parties agree that the CDM offer was in compliance with the rules of the Supplemental Bid Process.

55 Noront's offer was received at 5:00 p.m. on April 15.[25] CDM argues that the offer was not in compliance with the rules:

- The cover email states that final approvals are still required (presumably from Franco-Nevada which was advancing the funds for the transaction and Resource Capital Fund (RCF) which was the principal lender to Noront) and that Noront expected to receive them within the next hour;

- The cover letter was not signed;

- The cover letter stated that the revised offer was effective only if the sellers received another offer; and

- The email did not include an executed SPA, but only a blackline mark-up of the SPA.

56 Subsequent to 5:00 p.m., Noront completed the requirements:

- At 5:34 p.m., Noront sent a signed cover letter. A paragraph was added to explain that "certain representations and warranties and conditions to the advance of the loan with Franco-Nevada have been reduced in order to provide certainty on Noront's financing" and that the signature pages for the SPA and the fully executed loan agreement would be sent separately;[26]

- At 8:50 p.m., Noront's counsel sent the executed SPA and the amended and restated loan agreement. The executed SPA included some changes described as "cleanup" and "not substantive" since 5:00 p.m. Among those changes, Noront deleted RCF from Exhibit C (Required Consents), suggesting that it had obtained that consent;[27]

- At 10:00 p.m., Moelis asked Noront for confirmation of the RCF consent and an executed copy of it, an explanation for the source of the additional funds, and clarification of the deadline for the vesting order;[28]

- At 10:35 p.m., Noront provided the executed RCF consent and an explanation of the funding;[29] and

- At 1:25 p.m. on April 16, Noront agreed to extend the date for the vesting order from April 20 to April 27.[30]

57 The Noront offer was the higher of the two offers in terms of the purchase price. The issue is whether these issues are such as to invalidate the process such that the Court should require the sellers to start over.

58 The Court considers that these issues are relatively minor and that they do not invalidate the process:

- Noront submitted its offer on time;

- The offer was not amended in any substantive way after 5:00 p.m. In particular, the purchase price was not amended;

- The lack of a signature on the cover letter was irrelevant;

- The condition that the revised offer was effective only if the sellers received another offer had already been fulfilled before Noront submitted its offer. Noront did not know this, but the sellers, Moelis and the Monitor did;

- The missing third party consents were not within Noront's control. Noront said at 5:00 p.m. that it expected to receive them within the next hour. In fact, it provided the consents to Moelis at 8:50 p.m.;

  

• The executed SPA was provided at 8:50 p.m. The delay appears to be related to the missing consents. There is no evidence that Noront was using this as a means to preserve an out from the offer; and

• The questions with respect to the source of the funding and the date were clarifications requested by Moelis for its evaluation of the offer and were not elements missing from the offer.

59 This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection.

*(5) Conclusion*

60 As a result, the Court concludes that the sale process was reasonable within Section 36(3)(a) of the CCAA. Moreover, the other factors in Section 36(3) favour the approval of the sale:

• The monitor approved the process and was involved throughout;

• The monitor filed a report with the Court in which he recommends the approval of the sale;

• The creditors were not consulted, but the motion and amended motion were served on the service list and no creditor has objected to the sale;

• The consideration appears to be fair, given that it is the result of a reasonable process. The Court gives weight to the business judgment of the sellers and their advisers.

61 For all of these reasons, the Court dismisses CDM's contestation of the motion.

62 There remain the issues raised by the First Nations bands.

***2. Do the First Nations bands have other grounds on which to object to the transaction?***

63 The First Nations bands raise issues of two natures.

64 First, they argue that they were denied the opportunity to participate in the sale process and they ask for time to examine the possibility of presenting an offer for the Ring of Fire interests.

65 Second, they argue that the transaction has an impact on their Aboriginal and treaty rights protected under Section 35 of the *Constitution Act, 1982*.

66 The Court has already concluded that the process of identifying potential buyers and strategic partners was reasonable.

67 Further, it is not clear to what extent the First Nations bands had knowledge of the sale process and could have participated. The September 17, 2014 newspaper article says that Cliffs is exploring alternatives including the possibility of selling its Ring of Fire interests. [31] That article refers to a letter which was sent to the First Nations bands in the area which again would have referred to a possible sale.

68 At the very latest, they knew about the potential sale when a press release was published on March 23, 2015.

69 Moreover, in its materials, CDM alleged that its final offer on April 15 "had the support of two of the most impacted First Nations communities", [32] which suggests that the First Nations bands had at lest some involvement in the sale process.

 

70 Nevertheless, the interest of the First Nations bands remains at a very preliminary level. Although the First Nations bands say that they have hired a financial adviser and that they want a delay to analyze the possibility of making an offer for the Ring of Fire interests, whether on their own or with a partner, there is no evidence to suggest that the bands on their own would make a serious offer, or that they would partner with a party that was not already identified by Moelis and included in the process. It is pure speculation as to whether they will ever present an offer in excess of the Noront offer. The Courts have rejected firm offers for greater amounts received after the sale process has concluded. [33] The Courts should also refuse to stop the sale process because a party arriving late might be interested in presenting an offer which might be better than the offer on the table.

71 The First Nations bands also plead that they have a special interest in this transaction because they live and exercise their Aboriginal and treaty rights guaranteed by the Constitution on the land and territories surrounding the Ring of Fire.

72 For the purposes of this motion, the Court will assume that to be true. It is nevertheless unclear to what extent a change of control of the corporations which own the interests in the Ring of Fire project impacts on those rights. The identity of the shareholders of the corporations does not change the rights of the First Nations bands or the obligations of the corporations in relation to the development of the project.

73 The First Nations bands pointed to two specific issues.

74 First, they argued that there was a duty to consult which was not respected. It is clear that as a matter of constitutional law, there is a duty to consult. It is equally clear that this duty lies on the Crown, not on private parties. [34] As a result, the Crown has a duty to consult when it acts, including when it sells shares in a corporation with interests that impact on the rights of the First Nations. [35] However, a sale of shares from one private party to another does not trigger the duty to consult. The First Nations bands also produced the Regional Framework Agreement between nine First Nation bands in the Ring of Fire area, including the six objectors, and the Ontario Crown. [36] Cliffs was not a party to this agreement, and the sale of the sellers' interests in the Ring of Fire project does not affect any party's rights and obligations under the agreement. It is indeed unfortunate that the First Nations bands were not included in the sale process, because they will have an important role to play in the development of the Ring of Fire. But the failure to include them was not a breach of the duty to consult or of the Regional Framework Agreement.

75 Second, the First Nations bands gave as an example of how the proposed transaction might prejudice their rights a royalty arrangement which Noront appears to have entered into with Franco-Nevada as part of the financing for the proposed transaction. The press release announcing the initial transaction on March 23, 2015 provided:

> Franco-Nevada will receive a 3% royalty over the Black Thor chromite deposit and a 2% royalty over all of Noront's property in the region with the exception of Eagle's Nest, which is excluded. [37]

76 Assuming that the financing arrangements for the final transaction include a similar provision, which seems likely, the Court is unconvinced that it should refuse the approval of the transaction for this reason.

77 It is difficult to see how granting a 2 or 3% royalty impacts the rights of the First Nations bands, unless it is their position that they are entitled to a royalty of more than 97%. They did not advance such an argument during the hearing.

78 Further, the Court is not being asked to approve the financing arrangements between Noront and Franco-Nevada. If there is something in those financing arrangements that infringes on the rights of the First Nations bands, their rights and their remedies are not affected by the order that the Court is being asked to issue today.

79 For all of these reasons, the Court dismisses the objection made by the First Nations bands.

 

*3. Interest or Standing*

80 For the reasons set out above, the Court will dismiss CDM's contestation and the objection made by the First Nations bands. In principle, it is not necessary to deal with the issue of interest or standing. Also, given that the Court was given only a short delay to draft this judgment, it might not be wise to get too far into the issue.

81 However, all parties pleaded the question at length and the Court will therefore deal with it.

82 The Ontario authorities supporting the position that the "bitter bidder" has no interest or standing to challenge the approval motion are clear [38] and they have been followed in Québec. [39]

83 However, the issues which the Court must consider before approving a sale include the reasonableness of the sale process, which involves questions of the fairness and the integrity of the process.

84 A losing bidder is not seeking to promote the best interests of the creditors, but is looking to promote its own interest. It will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can. The narrow technical ground on which the losing bidder is found to have no interest is that it has no legal or proprietary right in the property being sold. [40] The underlying policy reason is that the losing bidder is a distraction, with the potential for delay and additional expense.

85 However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process.

86 Perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections. In this case, the Monitor's Fourth Report deals with the objection of the First Nations bands in fair and objective manner. However, because CDM filed its intervention after the Monitor filed his report, the Monitor's Fourth Report does not deal with the issues raised by CDM. In that sense, the CDM intervention was useful to the Court in exercising its jurisdiction under Section 36 of the CCAA.

87 The objection of the First Nations bands went beyond their status as losing bidders or excluded bidders, and included issues related to their Aboriginal and treaty rights guaranteed by the Constitution.

88 The case law on the interest or standing of the "bitter bidder" and the policy considerations underlying that case law have no application to these issues. The interest of the First Nations bands is closer to the interest of "social stakeholders" that have been recognized in a number of cases. [41]

89 Although the Court will dismiss the objections raised by the First Nations bands and CDM, it will not do so on grounds of a lack of interest or standing.

**FOR THESE REASONS, THE COURT HEREBY:**

90 *GRANTS* the Petitioners' Amended Motion for the Issuance of an Approval and Vesting Order (#82).

91 *ORDERS* that all capitalized terms in this Order shall have the meaning given to them in the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*") by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers, as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*"), a redacted copy of which was filed as Exhibit R-11 to the Motion, unless otherwise indicated herein.

*SERVICE*

 

92 *ORDERS* that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

93 *PERMITS* service of this Order at any time and place and by any means whatsoever.

*SALE APPROVAL*

94 *ORDERS and DECLARES* that the transaction (the "*Transaction*") contemplated by the Share Purchase Agreement is hereby approved, and the execution of the Share Purchase Agreement by CQIM is hereby authorized and approved, *nunc pro tunc,* with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Monitor.

95 *AUTHORIZES and DIRECTS* the Monitor to hold the Deposit, *nunc pro tunc*, and to apply, disburse and/or deliver the Deposit or the applicable portions thereof in accordance with the provisions of the Share Purchase Agreement.

*EXECUTION OF DOCUMENTATION*

96 *AUTHORIZES and DIRECTS* CQIM and the Monitor to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in or contemplated by the Share Purchase Agreement (Exhibit R-12) and any other ancillary document which could be required or useful to give full and complete effect thereto.

*AUTHORIZATION*

97 *ORDERS and DECLARES* that this Order shall constitute the only authorization required by CQIM to proceed with the Transaction and that no shareholder approval, if applicable, shall be required in connection therewith.

*VESTING OF THE AMALCO SHARES*

98 *ORDERS and DECLARES* that upon the issuance of a Monitor's certificate substantially in the form appended as *Schedule "A"* hereto (the "*Certificate*"), all of CQIM's right, title and interest in and to the Amalco Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all right, title, benefits, priorities, claims (including claims provable in bankruptcy in the event that CQIM should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*Encumbrances*") by or of any and all persons or entities of any kind whatsoever, including without limiting the generality of the foregoing (i) any Encumbrances created by the Initial Order of this Court dated January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time), and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Civil Code of Québec, the Ontario Personal Property Security Act, the British Columbia Personal Property Security Act or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, *ORDERS* that all of the Encumbrances affecting or relating to the Amalco Shares be expunged and discharged as against the Amalco Shares, in each case effective as of the applicable time and date of the Certificate.

99 *ORDERS and DIRECTS* the Monitor to file with the Court a copy of the Certificate, forthwith after issuance thereof.

100 *DECLARES* that the Monitor shall be at liberty to rely exclusively on the Conditions Certificates in issuing the Certificate, without any obligation to independently confirm or verify the waiver or satisfaction of the applicable conditions.

101 *AUTHORIZES and DIRECTS* the Monitor to receive and hold the Purchase Price and to remit the Purchase Price in accordance with the provisions of this Order.

102 *AUTHORIZES and DIRECTS* the Monitor to remit, following closing of the Transaction, that portion of the Purchase Price payable to the Non-Filing Sellers, to the Non-Filing Sellers in accordance with the Purchase Price Allocation described under Exhibit D of the Share Purchase Agreement (Exhibit R-12), as it may be amended by the Non-Filing Sellers, or as the Non-Filing Sellers may otherwise direct.

*CANCELLATION OF SECURITY REGISTRATIONS*

103 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of or strike the registrations in connection with the Amalco Shares, listed in *Schedule "B"* hereto, in order to allow the transfer to the Purchaser of the Amalco Shares free and clear of such registrations.

104 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the Ontario Personal Property Registry ("*OPPR*") as may be necessary, from any registration filed against CQIM in the OPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

105 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the British Columbia Personal Property Security Registry (the "*BCPPR*") as may be necessary, from any registration filed against CQIM in the BCPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

*CQIM NET PROCEEDS*

106 *ORDERS* that the proportion of the Purchase Price payable to CQIM in accordance with the Share Purchase Agreement (the "*CQIM Net Proceeds*") shall be remitted to the Monitor and shall be held by the Monitor pending further order of the Court.

107 *ORDERS* that for the purposes of determining the nature and priority of the Encumbrances, the CQIM Net Proceeds shall stand in the place and stead of the Amalco Shares, and that upon payment of the Purchase Price by the Purchaser, all Encumbrances shall attach to the CQIM Net Proceeds with the same priority as they had with respect to the Amalco Shares immediately prior to the sale, as if the Amalco 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.

*VALIDITY OF THE TRANSACTION*

108 *ORDERS* that notwithstanding:

a) the pendency of these proceedings;

 

b) any petition for a receiving order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") and any order issued pursuant to any such petition; or

c) the provisions of any federal or provincial legislation;

the vesting of the Amalco Shares contemplated in this Order, as well as the execution of the Share Purchase Agreement pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against CQIM, the Purchaser or the Monitor, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

*LIMITATION OF LIABILITY*

109 *DECLARES* that, subject to other orders of this Court, nothing herein contained shall require the Monitor to take control, or to otherwise manage all or any part of the Purchased Shares. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Purchased Shares within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

110 *DECLARES* that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

*CONFIDENTIALITY*

111 *ORDERS* that the unredacted Initial Purchase Agreement filed with the Court as Exhibit R-3, the summary of the two LOIs filed with the Court as Exhibit R-8, the unredacted Share Purchase Agreeement filed with the Court as Exhibit R-12 and the unredacted blackline of the Share Purchase Agreement showing changes from the Initial Purchase Agreement filed with the Court as Exhibit R-16 shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

*GENERAL*

112 *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

113 *DECLARES* that the Monitor shall be authorized to apply as it 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 Petitioners and Mises-en-cause. 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.

114 *REQUESTS* the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

115 *ORDERS* the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

 

116 *THE WHOLE WITHOUT COSTS.*

*Order accordingly.*

**APPENDIX**

*SCHEDULE "A"*

*FORM OF CERTIFICATE OF THE MONITOR*

*SUPERIOR COURT* (Commercial Division)

*C A N A D A*

*PROVINCE OF QUÉBEC*

*DISTRICT OF MONTRÉAL*

*File: No:*

500-11-048114-157

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

*BLOOM LAKE GENERAL PARTNER LIMITED*

*QUINTO MINING CORPORATION*

*8568391 CANADA LIMITED*

*CLIFFS QUEBEC IRON MINING ULC*

Petitioners

-and-

*THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP*

*BLOOM LAKE RAILWAY COMPANY LIMITED*

Mises-en-cause

-and-

*9201955 CANADA INC.*

Mise-en-cause

-and-

*THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS*

Mise-en-cause

-and-

 

*FTI CONSULTING CANADA INC.*

Monitor

**CERTIFICATE OF THE MONITOR**

**RECITALS**

A. Pursuant to an initial order rendered by the Honourable Mr. Justice Martin Catonguay, J.S.C., of the Superior Court of Québec, [Commercial Division] (the "*Court*") on January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time, the "*Initial Order*"), FTI Consulting Canada Inc. (the "*Monitor*") was appointed to monitor the business and financial affairs of the Petitioners and the Mises-en-cause (together with the Petitioners, the "*CCAA Parties*").

B. Pursuant to an order (the "*Approval and Vesting Order*") rendered by the Court on <*>, 2015, the transaction contemplated by the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*") by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers (as defined therein), as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*") was authorized and approved, with a view, *inter alia*, to vest in and to the Purchaser, all of CQIM's right, title and interest in and to the Amalco Shares.

C. Each capitalized term used and not defined herein has the meaning given to such term in the Share Purchase Agreement.

D. The Approval and Vesting Order provides for the vesting of all of CQIM's right, title and interest in and to the Amalco Shares in the Purchaser, in accordance with the terms of the Approval and Vesting Order and upon the delivery of a certificate (the "*Certificate*") issued by the Monitor confirming that the Sellers and the Purchaser have each delivered Conditions Certificates to the Monitor.

E. In accordance with the Approval and Vesting Order, the Monitor has the power to authorize, execute and deliver this Certificate.

F. The Approval and Vesting Order also directed the Monitor to file with the Court, a copy of this Certificate forthwith after issuance thereof.

**THEREFORE, THE MONITOR CERTIFIES THE FOLLOWING:**

A. The Sellers and the Purchaser have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions under the Share Purchase Agreement have been satisfied and/or waived, as applicable.

B. The Closing Time is deemed to have occurred on at <TIME> on <*>, 2015.

*THIS CERTIFICATE* was issued by the Monitor at <TIME> on <*>, 2015.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity.

By:

Name:

Nigel Meakin

*SCHEDULE "B"*

 

*REGISTRATIONS TO BE REDUCED OR STRICKEN*

Nil.

[NTD: Updated searches will be run before motion is heard to confirm no registrations in Quebec.]

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Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 An article from the Globe & Mail dated September 17, 2014 was produced as Exhibit R-7.

3 The CCAA Parties formally engaged Moelis by engagement letter dated March 23, 2015, and the Court approved the engagement of Moelis by order dated April 17, 2015.

4 Exhibit R-9.

5 Exhibit R-17.

6 Exhibit R-18.

7 Exhibits R-19 to R-22.

8 Exhibit R-3 (redacted) and R-4 (unredacted).

9 The press release was provided to the Court during argument and was not given an exhibit number.

10 Exhibit R-23.

11 Exhibit R-24.

12 Exhibits R-25 and R-26.

13 Exhibits R-29 and R-30.

14 Exhibit R-11 (redacted) and R-12 (unredacted).

15 It was amended at the hearing to add two First Nations bands as objectors.

16 *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) (leave to appeal refused: 2010 QCCA 1950 (C.A. Que.), par. 48-49.

17 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc./Aveos performance aéronautique inc., Re*, 2012 QCCS 4074 (C.S. Que.), par. 50.

18 *AbitibiBowater Inc., Re*, 2010 QCCS 1742 (C.S. Que.), par. 70-71. See also *White Birch Paper Holding Co., Re*, 2011 QCCS 7304 (C.S. Que.), par. 68-70.

19 *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

20 Exhibit R-9.

21 *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]), par. 48.

 

22 Exhibit R-23.

23 Exhibits R-25 and R-26.

24 Exhibit CDM-1.

25 Exhibit R-30A.

26 Exhibit CDM-3.

27 Exhibit CDM-4.

28 Exhibit CDM-4.

29 Exhibit CDM-4.

30 Exhibit CDM-4.

31 Exhibit R-7.

32 Declaration of Intervention and Contestation (#87), par. 30.

33 See, for example, *Boutiques San Francisco Inc., Re*, [2004] R.J.Q. 965 (C.S. Que.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

34 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), par. 35, 56; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43 (S.C.C.), par. 79.

35 *Skeena Cellulose Inc., Re*, 2002 BCSC 597 (B.C. S.C. [In Chambers]), par. 14.

36 Exhibit O-1.

37 *Supra*, note 9.

38 *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], 1986 CanLII 2760, p. 43; *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), par. 24-26, 30; *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], 2001 CanLII 6708, par. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), par. 7-8.

39 *AbitibiBowater*, *supra* note 18, par. 81-88; *White Birch*, *supra* note 16, par. 55-56.

40 Purchasers generally do not have a proprietary interest in the property they are buying.

41 *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), par. 95; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* [1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])], 1998 CanLII 14907, par. 50; *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), par. 9; *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]), par. 6-7.

**End of Document**

TEMISKAMING DEVELOPMENT FUND CORPORATION v. 1793082 ONTARIO LTD

Applicant | Respondent

Court File No.:

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
(Commercial List)

PROCEEDING COMMENCED AT TORONTO

**APPLICANT'S BOOK OF AUTHORITIES**

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