Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and –

LAPLANTE WELDING OF CORNWALL INC.

Respondent

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

FACTUM & AUTHORITIES OF THE APPLICANT

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PART I – OVERVIEW

1. This Application is being brought by Royal Bank of Canada (the "**Bank**") on notice to the Respondent, Laplante Welding of Cornwall Inc. (the "**Company**"), for the appointment of Raymond Chabot Inc. ("**RCI**") as Court-Appointed Receiver and Receiver/Manager of the assets, properties and undertakings of the Company.

2. For the following reasons, which are outlined in detail below, the Bank submits that its Security (as defined below) is in jeopardy and the appointment of a Receiver is necessary to protect the Company's assets which are subject to the Bank's Security, *inter alia*:

(a) The Company is insolvent and cannot pay its liabilities as they become due, nor can it service its significant debts. In this regard, the Company suffered losses of $4.2 million in the 9 months ended June 30, 2018. Moreover, the Company's accounts payable exceed $5.6 million, 72% of which are payables over 60 days past due. By comparison, accounts receivable total only about $3.7 million and 52% of these receivable are 60 days past due. By the Company's own admission, most of these receivable are not currently safe and collectable since they are subject to holdback and lien claims. As a result, the Company reported a Borrowing Limit deficit (defined below) of -$1,778,365.82 as at June 30, 2018, which constitutes a significant breach of the Bank's loan and security instruments. Additionally, as at June 30, 2018, the Company had priority payables, including outstanding source deduction and WSIB remittances, in excess of $300,000, which imperils the Bank's Security since these payable are to be paid in priority to the Bank.

(b) As detailed in paragraph 16 below, the Bank is unable to support the Company's proposed restructuring plan because: the Company's proposal to self-liquidate certain assets to repay the Bank has not resulted in any sales as of yet and part of the proceeds of the sale of equipment subject to the Bank's Security would be

used to fund operational losses as opposed to reimbursing the Bank; similarly the collection of accounts receivable, which are also subject to the Bank's Security, would be used in part to fund operational losses; professional "consultant" and "restructuring" fees estimated to exceed $363,000 to the end of February 2019 would be paid in priority to the Bank; and priority claims will not be reduced over the next several months and are projected to increase from a low of approximately $307,000 to a high of $374,000.

(c) Most of the Company's accounts receivable are tied up in the Dymon construction projects (described below). The Bank therefore retained Altus Group Limited, a construction and project contract consultant, to review the Dymon contracts. As outlined in paragraph 18 below, Altus identified a number of significant concerns with respect to the Dymon projects, including: the Company significantly underestimating the time and costs required to complete the projects; the Company overestimating the net amount that might be paid to it as an account receivable in the event the projects are completed; and the Company's failure to provide Altus with various information and documentation requested by Altus in completing its review. The most troubling finding is that, according to the Company it will require approximately $400,000 to complete the work, whereas according to Altus, this amount will exceed $1.1 million. Regardless, even using the Company's own figure of $400,000, the Company does not currently have the liquidity to complete to projects and the Bank is not prepared to fund same. The Bank therefore has no confidence that the Company will achieve any meaningful recovery on the Dymon projects to repay the Bank.

(d) As outlined below, the Company has failed to provide the Bank with the financial reporting and documentation required pursuant to loan and security instruments. As a result, the Bank cannot adequately assess it risk and these ongoing failures by the Company constitute an event of default under the said instruments.

(e) As of October 9, 2018, the Company was indebted to the Bank in excess of $1.8 million. Additionally, the Bank's demands for payment and Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**") expired on August 13, 2018, such that the Bank is entitled to enforce its Security. Further, as outlined below, the Bank is contractually and statutorily entitled to the appointment of a Receiver pursuant to the Bank's loans and Security, and the BIA and *Personal Property Security Act* ("**PPSA**") given the Company's numerous defaults as outlined herein.

Affidavit of Wajahat Mahmood sworn October 16, 2018 *("Mahmood Affidavit")*, Application Record, Tab 2, paras. 12, 13, 15, 18, 20, 22, 23 and 29.

PART II – FACTS

The Parties

3. The Bank is a chartered bank and provides financing to business corporations. At all material times, the Bank had a banking relationship with the Company and was constituted as a secured creditor of the Company pursuant to the loan and security instruments described below.

***Mahmood Affidavit*, Application Record, Tab 2, para. 3.**

4. The Company is a corporation incorporated pursuant to the laws of Ontario, and operates as a steel structure contractor. At all material times, the Company was indebted to the Bank pursuant to the loan and security instruments described below.

***Mahmood Affidavit*, Application Record, Tab 2, para. 4.**

The Bank's Loans

5. Pursuant to a letter of offer of credit dated August 25, 2014, as thereafter amended from time to time, the Bank granted to the Company the following credit facilities (the "**Credit Facilities**"):

(a) A revolving demand facility in the amount of $1,950,000.00;

(b) A non-revolving term facility in the amount of $400,000.00;

(c) Various demand loans; and

(d) A Business Visa Facility in the maximum amount of $70,000.00.

***Mahmood Affidavit*, Application Record, Tab 2, para. 5.**

6. The Credit Facilities provide that, among other things:

(a) The revolving demand facility, the demand loans and the Business Visa Facility are repayable on demand;

(b) The term facility was repayable upon maturity;

(c) The Company must comply with certain covenants, including:

(i) Limiting borrowings under the revolving demand facility to less than the aggregate of 75% of good accounts receivable and 50% of the less of cost or net realizable value of unencumbered inventory (to a maximum of $300,000), less any potential prior-ranking claims (the **"Borrowing Limit"**);

(ii) Maintaining a debt-service coverage ratio of 1.25:1 (**"DSC Covenant"**); and

(iii) Maintaining a ratio of total liabilities to tangible net worth of no greater than 2.75:1 (**"Net Worth Covenant"**).

(d) The Company is required to comply with certain financial reporting requirements to the Bank;

(e) It is an event of default, entitling the Bank to cancel the Credit Facilities, demand repayment in full, and to realize on its security if, among other things:

(i) The Company fails to pay to the Bank any principal, interest or other amount as and when due;

(ii) The Company fails to observe any covenant, term or condition contained in the Credit Facilities or Security (as hereinafter defined);

(iii) There is a material deterioration in the financial condition of the Company.

***Mahmood Affidavit*, Application Record, Tab 2, para. 6.**

The Bank's Security

7. It was a condition of the granting of the Credit Facilities by the Bank to the Company that the Company grant, amongst other security (the "**Security**"), a General Security Agreement from the Company in favour of the Bank granting a security interest over the Company's assets (the "**GSA**"). The Bank's Security expressly provides that it is entitled to appoint a receiver in the event of default (see para. 13(a) of the GSA).

***Mahmood Affidavit*, Application Record, Tab 2, paras. 7-8.**

8. The Bank's security interest granted by the GSA was perfected by registration pursuant to the PPSA on September 15, 2006. In addition to the Bank, there are another 7 creditors that have registered security interests in respect of certain of the Company's personal property.

***Mahmood Affidavit*, Application Record, Tab 2, para. 9.**

Transfer to SLAS

9. Given excesses and delinquencies on the Credit Facilities, consistently high loan utilization and the Company's failure over two consecutive quarters to provide to the Bank required financial reporting in accordance with the terms of the Credit Facilities and the

Security, the Company's accounts were initially referred to the Bank's SLAS unit on or about July 26, 2018

***Mahmood Affidavit*, Application Record, Tab 2, para. 10.**

10. As a result, the Bank met with the Company's principal, Kevin Laplante and his advisors, Pierre Marchand of MNP Ltd. and Art Zentner of BGM Services on August 1, 2018. The Bank's concerns were discussed during this meeting and the Bank confirmed that the Bank would require various financial information and reporting, along with a detailed and specific restructuring plan.

***Mahmood Affidavit*, Application Record, Tab 2, para. 11.**

11. During this meeting, Mr. Marchand delivered to the Bank a "Preliminary Review of the Financial Situation and Restructuring Plan" of the Company. This report confirmed the following:

(a) As of June 30, 2018, the Company had experienced significant cost overruns on projects as a result of which the Company's losses of $4.2 million in the 9 months ended June 30, 2018 offset the 2016 and 2017 earnings for a cumulative loss in the preceding three years exceeding $3.7 million. These losses "wiped the equity of the Company". Once reported, this would have likely resulted in the Company being in breach of the DSC Covenant and the Net Worth Covenant.

(b) According to the Company, the cost overruns resulted in the Company reporting accounts payable and accrued liabilities as of June 30, 2018 totaling $5,899,000.

(c) By comparison, accounts receivable were then reported to total $3,731,000, of which $3,559,000 were deemed to be doubtful since they were subject to holdback and lien claims of various owners, contractors and subcontractors. According to the Company, the value of the accounts receivable, "net of the claims from suppliers is $1 million". As a result, the Company reported a

Borrowing Limit deficit of -$1,855,000, such that the company was in breach of that covenant.

(d) The value of the Company's inventory in this presentation was noted to be $942,000. However, a subsequent inventory count performed at the Bank's request during this August 1st meeting confirmed that the actual value of the inventory was $464,000.

(e) In addition to the foregoing, the Company reported potential priority claims, such as source deductions and WSIB remittances, totaling $270,000. This also constitutes a breach of the Credit Facilities and Security.

***Mahmood Affidavit*, Application Record, Tab 2, para. 12.**

12. Following this meeting, the Company proposed the following restructuring plan in its updated report dated August 14, 2018:

(a) It would change its business model to refocus its work from "project-based" work to "sub-fabrication" work in an effort to decrease risk.

(b) It would grant the Bank a second-ranking mortgage on a property owned by the Company's holding company, estimating that the equity in this property was $1 million. Since then, however, the Bank has confirmed that there is no equity in this property and no second-ranking mortgage has therefore been granted.

(c) The Bank's exposure would be reduced by: the sale of excess equipment estimated to be worth $750,000 within 1-3 months; the collection of the "Dymon" accounts receivable estimated to be $450,000 within 3-6 months (further explained below); and new financing with an asset based lender for $1,000,000 with 1-6 months.

(d) The Company also proposed selling certain excess equipment but that the "Company needs to use the proceed[s] of approximately $150K from the sale of

small equipment to finance the transitional period". This would mean that the sale of assets subject to the Bank's Security would be used by the Company to finance operational losses.

(e) The Company would also attempt to complete ongoing construction projects to have holdbacks and accounts receivable released to attempt to repay the Bank in part. Again, it was proposed that certain accounts receivable subject to the Bank's Security would be used to finance ongoing operational losses. The accounts receivable relating to the Dymon projects (the **"Dymon Projects"**) would be used to repay the Bank.

(f) The Company would need to restructure its affairs under the BIA as it was "unable to meet its obligations as they become due".

***Mahmood Affidavit,* Application Record, Tab 2, para. 13.**

The Company Provides Some Financial Information Confirming it is Insolvent

13. The financial information requested from the Company following the August 1, 2018 meeting included, amongst other things, the outstanding quarterly reporting for March and June 2018 under the Credit Facilities including Company prepared financial statements, aged accounts receivable listing, aged accounts payable listing, Borrowing Limit certificates required pursuant to the Credit Facilities, and statements of account in respect of priority payables.

***Mahmood Affidavit,* Application Record, Tab 2, para. 14.**

14. In response to the Bank's request for financial information and documentation, the Company and its advisors provided some financial reporting on August 10, 2018, which confirms the following:

(a) **Accounts Receivable**: As at June 30, 2018, the Company's accounts receivable were reported to total $3,645.736.44. Notably, $1,894,676.94 or 52% of these

accounts receivable were over 60 days past due or were subject to holdback claims.

(b) **Accounts Payable**: As at June 30, 2018, the Company's accounts payable totaled $5,672,816.81 and the aged reporting confirmed that $4,085,610.36 or 72% of the accounts payable were payables over 60 days past due or subject to holdback claims.

(c) **Borrowing Limit Certificate**: pursuant to this certificate Mr. Laplante, on behalf of the Company, certified and confirmed a Borrowing Limit deficit of -$1,778,365.82 thus confirming a significant breach of the Borrowing Limit covenant.

(d) **Priority Payables**: The Company's reporting as at June 30, 2018 confirmed priority claims, including source deduction, WSIB and other remittances, exceeded $300,000.

***Mahmood Affidavit*, Application Record, Tab 2, para. 15.**

Recent Developments

15. On August 20, 2018, the Company filed a Notice of Intention to Make a Proposal pursuant to ss. 50.4(1) of the BIA. To date, no proposal has been filed by the Company and on September 10, 2018, the Court issued an Order extending the deadline to file the proposal by 45 days to November 5, 2018.

***Mahmood Affidavit*, Application Record, Tab 2, paras. 16-17.**

16. In support of its proposal proceedings under the BIA and of its proposed restructuring plan with the Bank, the Company delivered to the Bank a cash flow statement ending March 1, 2019. For the following reason, the Bank is unable to support the cash flow statement and the Company's proposed restructuring plan supported by the said statement:

(a) The sale of equipment is projected to generate $856,553 by the end of October 2018, yet no equipment has been sold to date. Moreover, as noted above, the sale of equipment subject to the Bank's security would be used in part to fund operational losses.

(b) The collection of accounts receivable is projected to generate $3,165,518 by December 2018. However, this would require the Dymon Projects to be completed and the holdbacks with respect thereto released. For the reasons detailed below, the Bank has no confidence that this will materialize. Moreover, as noted above, the collection of certain accounts receivable subject to the Bank's Security would be used by the Company to fund operational losses.

(c) Professional "consultant" and "restructuring" fees totaling $363,000 would be paid to the Company's consultants in priority to the Bank, which is the Company's primary secured creditor.

(d) Priority claims are not reduced and projected to increase from a low of $307,826 in August 2018 to a high of $373,924 in December 2018.

***Mahmood Affidavit*, Application Record, Tab 2, para. 18.**

17. Given that the Company's restructuring plan contemplates the Bank being repaid in part following completion of the Dymon Projects, the Bank retained Altus Group Limited ("**Altus**"), a construction project and contract consultant, to review the Dymon contracts and confirm the costs and time to complete the Dymon Projects and the likelihood of the Bank recovering pursuant to those projects.

***Mahmood Affidavit*, Application Record, Tab 2, para. 19.**

18. Altus delivered a report to the Bank dated October 15, 2018. In its report, Altus raises several significant and troubling issues with respect to the Dymon Projects, including the following:

(a) Altus concludes that the Company is significantly underestimating the time required to complete the projects. It expresses these conclusions as follows (pp. 6 &9):

> With regards to Schedule, we are of the opinion Laplante will require several months to complete the outstanding works, and in particular the Block 7 works. The fabrication of most of the Block 7 area was not started, based on advice from Laplante, and a such it would appear unlikely works in this area could commence as we would anticipate a lag of weeks between the start of fabrication and the timing of the delivery of the materials to site. We are not sure whether or not Laplante have already procured the materials for fabrication. Leeswood (the Construction Manager on site) indicated they were awaiting a revised schedule from Laplante and Dymon, but based on our site visit the target date of late October 20189 for completion on the remaining scope of work under their contract is not achievable. [...]
>
> We have requested a copy of the Dymon/Laplante construction schedule. We were advised that a construction schedule would be provided today (not yet received) which would detail a 4 to 5 week schedule for the works to enclose the building envelope for weather related purposes. This schedule will not be sufficient as we need a construction schedule that will detail the milestones and durations for all remaining scope under the Laplante contract. In absence of this schedule we can confirm that the contract will not be completed over the next 4 to 5 weeks and may extend into 2019 based on current progress on-site and scope of works that are yet to be awarded or fabricated.

(b) Altus also concludes that the Company is significantly underestimating the costs required to complete the Dymon Projects. In this regard, Altus writes (p. 7):

> Based on our review of the available documentation we have established high level cost-to-complete amounts for the three sites summarized below. [...]
>
> The [Company's] summary details balance of work to be completed under the contracts and extras of $356,001. [...] Based on our site visits and estimated cost-to-complete we opine that this cost-to-complete appears to be understated. Our estimate above reflects an estimated cost-to-complete of $1,172,500, a variance of $816,499.

(c) Altus is also of the view that the Company is overestimating the net amount that might be paid to it in once the projects were completed. As stated by Altus (p. 7):

> BGM Services [the Company's restructuring advisor] provided a copy of the Dymon Contracts Reconciliation Summary dated October 10, 2018. This summary outlines contracts, extras, work completed to date, holdbacks, payments to date, lien claims cash secured by Dymon, Back charge claims by Dymon and summarized a net amount

payable to Laplante of $542,025. Our general observation is that we disagree with this amount payable to Laplante as the estimated cost-to-complete under the contract amount is significantly understated on the summary.

(d) Altus also confirmed that the Company failed to provide it with various information and documentation requested by it in completing its review. By way of examples, despite repeated and ongoing requests by Altus, the Company failed to deliver amongst other things: project contracts; details and documentation with respect to contract extras; progress billings information/documentation; details with respect to back charges; aged payables list; particulars of payments made to date; and a detailed construction schedule.

***Mahmood Affidavit,* Application Record, Tab 2, para. 20.**

19. In light of the foregoing, the Bank has no confidence that the Company will achieve any meaningful recovery on the Dymon Projects to repay the Bank and that in the interim the Bank's position will continue to further deteriorate.

***Mahmood Affidavit,* Application Record, Tab 2, para. 21.**

Defaults under the Credit Facilities and Security, and Demands for Payment

20. As a result of various ongoing defaults by the Company under the Credit Facilities, the Bank demanded payment of the Credit Facilities by letters dated August 3, 2018 for payment of the entire indebtedness owing by the Company and the guarantors to the Bank by August 13, 2018. The Bank further delivered to the Company a Notice of Intention to Enforce Security ("**NITES**") in accordance with section 244 of the BIA.

***Mahmood Affidavit,* Application Record, Tab 2, para. 22.**

21. As of October 9, 2018, the Company's aggregate indebtedness to the Bank pursuant to the Credit Facilities totals $1,880,895.84, exclusive of further accrued interest, fees, disbursements and costs.

***Mahmood Affidavit,* Application Record, Tab 2, para. 23.**

The Necessity for the Appointment of a Receiver

22. The Bank's original demand for payment and NITES expired approximately 2 months ago on August 13, 2018, such that the Bank is entitled to enforce the Security. Further, the Bank is contractually and statutorily entitled to the appointment of a Receiver pursuant to the Bank's Credit Facilities and Security, and the BIA and PPSA given the Company's numerous defaults as outlined herein.

***Mahmood Affidavit,* Application Record, Tab 2, paras. 24-25.**

23. The Company is significantly indebted to the Bank in the amount of $1,880,895.84 as of October 9, 2018. As outlined above, the Company has demonstrated that it has been unable to refinance or divest of its assets in order to repay the Bank. Moreover, the Company's restructuring plan is unsatisfactory to the Bank such that the Bank will not support it.

***Mahmood Affidavit,* Application Record, Tab 2, paras. 26-27.**

24. The Company has further demonstrated that it is unable to fulfill its financial and other obligations to the Bank and its numerous other creditors to which the Company is indebted in the approximate amount of $7,554,000. By way of specific examples:

(a) There are serious concerns about the Company's ability to complete the Dymon Projects without suffering further losses and the Bank's position will continue to deteriorate in the interim;

(b) The Company is unable to meet its source deduction obligations, along with other priority payables, which imperils the Bank's security since they would be paid in priority to the Bank;

(c) The Company is unable to generate sufficient revenue to service its significant debts, even under its proposal proceedings the Company cannot meet its liabilities as they become due and is insolvent.

***Mahmood Affidavit,* Application Record, Tab 2, para. 28.**

25. The Company has also failed to provide the Bank with the following financial reporting as is required pursuant to the express terms of the Credit Facilities and Security:

(a) Quarterly in-house financial statements for the Company for the period ending June 30, 2018, which were due within 45 days of the that date and which have been repeatedly requested by the Bank;

(b) Internal financial statements for the period ending July and August 2018 as requested by the Bank;

(c) Updated listing of all priority payable and aged accounts payable listing as requested by the Bank;

(d) As outlined above, the Company has also failed to provide various information and documentation required by Altus.

As a result, the Bank cannot adequately assess its risk and this failure to provide this financial information and disclosure constitutes an event of default pursuant to the Credit Facilities and Security.

***Mahmood Affidavit,* Application Record, Tab 2, para. 29.**

26. In the circumstances, the Bank has come to the conclusion that it can no longer hold-off on enforcing the Security as it has become apparent that no reasonable or realistic repayment or refinancing or restructuring scenario exists. Moreover in light of the foregoing, the Bank has lost confidence in the Company.

***Mahmood Affidavit,* Application Record, Tab 2, paras. 30-31.**

27. The foregoing confirms that the security held by the Bank is in jeopardy and it is necessary for a Receiver to take control of the assets, undertakings and property of the Company to ensure the Company's assets are dealt with in an orderly and proper manner. In

this regard, RCI, a duly qualified Receiver, has consented to act as Court-Appointed Receiver of the Company.

***Mahmood Affidavit*, Application Record, Tab 2, para. 32.**

PART II – ISSUE

28. The Bank submits that this Application raises the following issue which should be answered in the affirmative:

(i) Whether an Order in the form of the draft Order annexed as Schedule "A" to the Notice of Application herein, should be issued appointing RCI as Receiver and Receiver/Manager, without security, over the assets, undertakings and property of the Company.

PART III – LAW

The Jurisdiction of the Court to Appoint a Receiver

29. The statutory provisions relied upon by the Bank provide that a Receiver may be appointed by this Court where it is "just and convenient" to do so, and also provide that the Court may make any Order required to ensure the protection of the interests of any secured creditor, including binding declarations of right and injunctive relief.

30. Section 101 of the *Courts of Justice Act* ("CJA") provides:

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

31. Section 101 of the CJA employs language similar to that contained in s. 243(1) of the BIA:

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

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

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

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

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243(1)** **[Schedule B]**

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

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

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

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

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

Factors to Consider When Appointing a Receiver

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

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

(b) The security is in jeopardy; and,

(c) Whether it is in the interests of all concerned to have a receiver appointed by the Court. This analysis includes an examination of the potential costs, the relationship between the Company and the creditors, the likelihood of

maximizing the return on and preserving the subject property and the best way of facilitating the working duties of the receiver and manager.

Bank of Nova Scotia* v. *Freure Village on Clair Creek **(1996), 40 C.B.R. (3d) 274 at paras. 10-13 (Ont. Gen. Div.)** **[Tab 2]**

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

Canadian Commercial Bank* v. *Gemcraft **(1985), 3 C.P.C. (2d) 13 at para. 6 (Ont. Sup. Ct.)** **[Tab 3]**

Ontario Development Corporation* v. *Ralph Nicholas Enterprises Ltd. **(1985), 57 C.B.R. (N.S.) 186 at pages 3 and 4 (Ont. S.C.J. in bankruptcy)** **[Tab 4]**

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

Bank of Nova Scotia* v. *Freure Village on Clair Creek, supra **at para. 13** **[Tab 2]**

36. The fact that the Company has defaulted under its loan is sufficient justification for the appointment of a receiver. The creditor is not required to prove that irreparable harm would result from the failure to appoint a receiver.

Swiss Bank Corp. (Canada)* v. *Odyssey Industries Inc. **(1995), 30 C.B.R. (3d) 49 at paras. 28 and 38 (Ont. Gen. Div.) [Comm. List]** **[Tab 5]**

Royal Bank of Canada* v. *605298 Ontario Inc. **[1998] O.J. No. 4859 at para. 9 (Gen. Div.)** **[Tab 6]**

37. It is submitted that the present case is an appropriate case for the appointment of a Court-Appointed Receiver. In this regard, the Company has breached numerous provisions of the loan and security agreements, the Bank has issued demands, the ten-day notice period

provided for in the NITES expired some time ago and, for the reasons detailed above, the Bank's security is in jeopardy.

PART IV – ORDER REQUESTED

38. The Bank respectfully requests the following relief:

(a) an Order, if necessary, dispensing with service and filing of the within Application, declaring that service of this Application has been validly effected on all necessary parties and declaring that this Application is properly returnable on October 30, 2018 in Ottawa, Ontario, or as soon thereafter as this Application can be heard;

(b) an Order pursuant to s. 101 of the *Courts of Justice Act,* R.S.O. 1990, c. C-43, s. 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c.B-3 and/or ss. 67(1) (a) and (e) of the *Personal property Security Act* R.S.O. 1990 c.P.10 appointing RCI as Court-Appointed Receiver and Receiver/Manager, without security, over all of the assets, undertakings and property of the Company;

(c) an Order ancillary to the Receivership requested above in the form of the draft Order annexed as Schedule "A" to the Notice of Application herein, as a result of the circumstances described in the Affidavit filed in support of this Application;

(d) costs if the Application on a substantial indemnity basis; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19th day of October, 2018.

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SCHEDULE "A" – AUTHORITIES

1. *Bank of Nova Scotia* v. *Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.)

2. *Canadian Commercial Bank v. Gemcraft* (1985), 3 C.P.C. (2d) 13 (Ont. Sup. Ct.)

3. *Ontario Development Corporation* v. *Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.J. in bankruptcy)

4. *Swiss Bank Corp. (Canada)* v. *Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div.) [Comm. List]

5. *Royal Bank of Canada* v. *605298 Ontario Inc.* [1998] O.J. No. 4859 (Ont. Gen. Div.)

SCHEDULE "B" – STATUTES, REGULATIONS, BY-LAWS

***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101(1)**

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

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243(1)**

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

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

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

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

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

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

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

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

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

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

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

(f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the

Company or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and

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

Compensation for loss or damages

(2) Where a person fails to discharge any duties or obligations imposed upon the person by Part V, section 17 or subsection 34 (3) or 35 (4), the person to whom the duty or obligation is owed has a right to recover compensation for any loss or damage suffered because of the failure and which was reasonably foreseeable, and, where the collateral is consumer goods, the Company has a right to recover in any event an amount equal to the greater of $500 or the actual loss or damages.

Void provisions

(3) Except as otherwise provided in this Act, any provision in any security agreement which purports to exclude any duty or obligation imposed under this Act or to exclude or limit liability for failure to discharge duties or obligations imposed by this Act is void.

TAB 1

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote
Receivers — Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

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

s. 101 *referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01 *referred to*

r. 20.04 *referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

Blair J.:

1 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).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 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.

4 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.).

5 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).

6 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.

7 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.

8 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

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

10 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.

11 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]).

12 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.

13 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.

14 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 1 $^{1}/_{2}$ 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.

15 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.

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

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

Motions granted.

TAB 2

1985 CarswellOnt 404
Ontario Supreme Court High Court of Justice

Canadian Commercial Bank v. Gemcraft Ltd.

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

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

Montgomery J.

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

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

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Receivers — Appointment — Application for appointment — Grounds

Receivers — Appointment of receiver and manager — Default occurring under security agreements — Security in jeopardy — Application to appoint receiver and manager granted — Courts of Justice Act, S.O. 1984, c. 11, s. 114.

The applicant bank held various security over the assets of the respondent and alleged that because of deterioration of the financial condition of the respondent its security was in jeopardy. The bank sought appointment of a receiver and manager of the property, undertaking and assets of the respondent.

Held:

A receiver and manager was appointed.

Several events of default had occurred under the security held by the bank and the acceleration clause in one of the debentures had been triggered. The bank's security was in jeopardy and it was just and convenient that a receiver and manager be appointed.

Table of Authorities

Statutes considered:

Bank Act, S.C. 1980, c. 40, s. 178.

Courts of Justice Act, S.O. 1984, c. 11, s. 114.

Income Tax Act, S.C. 1970-71-72, c. 63.

APPLICATION to appoint receiver and manager.

Montgomery J. (orally):

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

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

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

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

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

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

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

Application granted.

End of Document

TAB 3

1985 CarswellOnt 206
Ontario Supreme Court, In Bankruptcy

Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.

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

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

Gray J.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote
Receivers — Appointment — Application for appointment — Grounds

Receivers — Grounds for appointment — Defendant hotel owners in default under debenture — Hotel business in desperate financial condition with no prospect for improvement — Defendant opposing debenture holder's application to appoint receiver-manager and close hotel — Secured creditor having no legal obligation to preserve intangible property such as goodwill by not going into possession and continuing to operate financially unsound business — Receiver-manager appointed.

After the defendant hotel owner repeatedly defaulted on its obligations to the plaintiff bank under a debenture, the bank appointed a receiver-manager and instructed him to enter and take possession of the hotel premises. The defendant then succeeded in obtaining an interim order permitting it to re-enter and operate the hotel, until the hearing of the present motion to set aside an earlier ex parte order in favour of the bank for interim possession and custody. The plaintiffs in turn applied to appoint a receiver-manager. The financial position of the defendant was desperate. It was clear that the business could not succeed at present. Revenues had been grossly overstated, and in fact the business had only been surviving by non-payment of current trade debts. The plaintiffs had financed the hotel twice before, and on both occasions the hotel had failed.

Held:

Receiver-manager appointed.

Although secured creditors may have an obligation under the Personal Property Security Act to use reasonable care in the custody and preservation of collateral property even when the debtor is in default, there is no obligation either at common law or under the Personal Property Security Act requiring a secured party's representative to refrain from going

into possession of real property and to continue to operate a financially unsound business, if such a course of action would simply add to the debt already owed to the secured creditor. In this case it was just and convenient to make an appointment of a receiver-manager as the principal owing under the debenture was in arrears and the security was in jeopardy. There was no remaining goodwill to preserve.

Table of Authorities

Cases considered:

Bank of Montreal v. Appcon Ltd. (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (S.C.) — *distinguished*

Johnson (B.) & Co. (Bldrs.) Ltd., Re, [1955] Ch. 634, [1955] 3 W.L.R. 269, [1955] 2 All E.R. 775 (C.A.) — *applied*

McMahon v. North Kent Ironworks Co., [1891] 2 Ch. 148 — *applied*

Statutes considered:

Courts of Justice Act, 1984 (Ont.), c. 11, s. 114.

Personal Property Security Act, R.S.O. 1980, c. 375, ss. 19, 56, 57, 59.

Authorities considered:

Kerr on Receivers, 16th ed. (1983), p. 52

Motion for order appointing receiver-manager.

Gray J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Order accordingly.

TAB 4

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

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

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

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

Ground J.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote
Banking and Banks — Loans and discounts — General

Creditors and Debtors — General — Loans

Receivers — Appointment — Application for appointment — Grounds

Secured creditors — Validity of loan — Where loan made by lending institution in contravention of statute or regulation, loan still enforceable.

Receivers — Application for appointment — Creditor under no obligation to prove that irreparable harm would result from failure to appoint receiver.

Two debtor companies were part of a group of companies carrying on a frozen food business. OI Inc. was a holding company and WR Co. was a limited partnership. The bank advanced a loan of $47.5 million to a partnership in which OI Inc. was a partner. In return it received assignments of mortgages and a fixed and floating charge on all of OI Inc.'s assets. The loan was payable on demand.

The bank also made a loan not to exceed $10,179,750 to WR Co. In return it received a collateral mortgage over two warehouses, a general security agreement over the assets and undertaking of WR Co. and guarantees by OI Inc. and JR, who controlled the group of companies.

The group of companies proposed a restructuring plan under which certain conveyances and transfers between the various companies were made. A master agreement provided that the restructuring plan would not be effected or would be reversed unless certain parts of the plan were settled to the satisfaction of the bank.

Both loans were in default. The bank brought a motion for the appointment of a receiver-manager of the property, undertaking and assets of OI Inc. and WR Co. The debtor companies argued that the bank was not entitled to the appointment of a receiver-manager because the loan to OI Inc. was illegal, having been made in breach of regulations under the *Bank Act*. They also argued that the bank was in breach of certain provisions of commitment letters related to both loans and in breach of its fiduciary duty to the companies as borrowers. Finally, they argued that, under s. 101 of the *Courts of Justice Act* (Ont.), a receiver-manager may be appointed by the court where it is just and convenient to do so. In the circumstances, they argued that it would be unjust and inequitable to make the appointment.

Held:

The motion was allowed.

There was no evidence to suggest that various transactions resulted in the security for the loans being in jeopardy or that the ability of the companies to repay the loans was materially affected in such a way as to require the appointment of a receiver-manager. However, defaults under both loans provided ample justification for the appointment of a receiver-manager. The bank was not required to establish that irreparable harm would result from the failure to appoint a receiver-manager. Further, under the master agreement the transfer of assets was reversed or deemed never to have taken place. Therefore, the bank would receive substantial benefit from the appointment of a receiver-manager.

There was no evidence to suggest that the companies would suffer undue or extreme hardship if a receiver-manager were appointed. The fact that a receiver-manager would not have the background and expertise of the companies' principal in running the business was not a reason to refuse the motion for appointment.

The loan to OI Inc. was not illegal because it was made by an institution that was not subject to the regulations under the *Bank Act*. Further, even if a loan is made in contravention of a statute or regulation governing the lending institution, the loan is still enforceable by the lending institution.

There was little evidence to establish a special relationship or exceptional circumstances such as would result in the bank owing the companies a fiduciary duty. The commercial transactions between the parties did not go beyond the normal relationship of lender and borrower. In any event, such allegations would have to be established in an action in damages against the bank. They did not constitute a reason to refuse to appoint a receiver-manager.

Table of Authorities

Cases considered:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (S.C.) — *referred to*

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (2d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 160, 49 B.C.A.C. 1, 40 W.A.C. 1 — *considered*

Sidmay Ltd. v. Wehttam Investments Ltd., [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (C.A.), affirmed [1968] S.C.R. 828, 69 D.L.R. (2d) 336 — *followed*

Statutes considered:

Bank Act (being Pt. 1 of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40) [R.S.C. 1985, c. B-1].

Bankruptcy Code, 11 U.S.C.

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

s. 101

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) —

s. 88

Motion by secured creditor for appointment of receiver-manager.

Ground J.:

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

Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of

October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

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

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

Submissions

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

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

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of $1,100,000; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of $2,500,000; that there are principal payments of $600,000 in arrears on the Weston Loan, and that the annual payments of $350,000 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of $203,000; that there are municipal tax arrears on the Weston properties in amounts in excess of $1,000,000; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey Debenture has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion

of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

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

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

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

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

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to have taken place. Section 5.4 of the Master Agreement provides:

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

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

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

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

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

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

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

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

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

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

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could

reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...

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

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

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

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

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

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

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

Motion allowed.

End of Document

TAB 5

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

Royal Bank v. 605298 Ontario Inc.

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

Royal Bank of Canada, Plaintiff and 605298 Ontario Inc.

Greer J.

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

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

Subject: Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Receivers — Appointment — Application for appointment — Grounds

Creditor moved for appointment of receiver pursuant to provisions of debentures offered by debtor as security for various loans and letters of credit — Debentures registered against all property owned by debtor — Debtor failed to make payments on first due debenture for over a year and arrears in interest on various loans were unpaid for more than a year — Matured loans for total of over four million dollars — Creditor exercised great patience with debtor — Appointment of receiver is equitable remedy and such appointment must be just and convenient — No other acceptable means to protect interests of parties other than appointment of receiver.

Table of Authorities

Cases considered by *Greer J.*:

Confederation Life Insurance Co. v. Double Y Holdings Inc. (September 3, 1991), Doc. 91-CQ-72 (Ont. Gen. Div.) — considered

Royal Bank v. Chongsim Investments Ltd. (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — considered

MOTION for order appointing receiver and manager of property, assets and undertaking of debtor.

Greer J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

End of Document

ROYAL BANK OF CANADA
Applicant

- and -

LAPLANTE WELDING OF CORNWALL INC.
Respondent

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

Court File No. CV18000781760000

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Ottawa

FACTUM & AUTHORITIES OF THE APPLICANT

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