

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

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

**2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP,
1000162801 ONTARIO CORP., AMERICAN CORPORATION
and 1000199992 ONTARIO CORP.**

Respondents

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

BOOK OF AUTHORITIES OF THE RECEIVER

May 22, 2024

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TO: Service List

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TAB 1

2024 ONSC 1680

Ontario Superior Court of Justice [Commercial List]

Royal Bank of Canada v. 2668144 Ontario Inc. et al.

2024 CarswellOnt 4990, 2024 ONSC 1680

Royal Bank of Canada (Plaintiff) and 2668144 Ontario Inc. et al., Asminur Rahaman and Shakive Rahaman (Defendants)

Peter J. Osborne J.

Heard: March 20, 2024

Judgment: March 20, 2024

Docket: CV-23-00702043-00CL

Counsel: Melinda Vine, for Receiver, Msi Spergel Inc.

Subject: Environmental; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

IV Receivers

IV.4 Miscellaneous

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Property did not meet environmental standards given its prior use as gas station — Environmental report recommended remediation to reduce environmental contamination — Debtor was indebted to bank under several credit facilities — Receiver proposed increase in borrowings charge given additional funds required to deal with estate, including completion of proposed environmental remedial work — Bank supported proposed increase — Proposed SISF contemplated commissioning of appraisals, sales and marketing proposals, and listing property for sale, with sale proposed to occur after completion of environmental remedial work — Receiver, supported by bank, was content that motion be granted without release and discharge related to environmental remediation work — Receiver brought motion for approval of increase in borrowing charge and other relief — Motion granted in part — Proposed increase in borrowings charge was appropriate given anticipated remedial work — Proposed SISF was appropriate — Remedial work was necessary and would increase value of estate for benefit of all stakeholders — It was not appropriate at this stage to grant release and discharge of receiver in respect of liability arising out of proposed environmental remediation work — There was already statutory protections — Fees of receiver and its counsel were approved as was statement of receipts and disbursements.

Table of Authorities

Cases considered by Peter J. Osborne J.:

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — referred to

Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc. (2023), 2023 ONCA 363, 2023 CarswellOnt 7509, 8 C.B.R. (7th) 22 (Ont. C.A.) — considered

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

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

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

S.A. v. Metro Vancouver Housing Corp. (2019), 2019 SCC 4, 2019 CSC 4, 2019 CarswellBC 98, 2019 CarswellBC 99, 19 B.C.L.R. (6th) 1, [2019] 4 W.W.R. 1, 430 D.L.R. (4th) 621, [2019] 1 S.C.R. 99, [2019] 1 R.C.S. 99 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — referred to

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — considered

s. 1(1) "secured creditor" — referred to

s. 168.17 [en. 2001, c. 17, s. 2(39)] — referred to

s. 168.17(2) ¶ 1 [en. 2001, c. 17, s. 2(39)] — referred to

s. 168.17(2) ¶ 2 [en. 2001, c. 17, s. 2(39)] — referred to

s. 168.17(2) ¶ 3 [en. 2001, c. 17, s. 2(39)] — referred to

s. 168.26 [en. 2001, c. 17, s. 2(39)] — referred to

MOTION by receiver for approval of increase in borrowing charge and other relief.

Peter J. Osborne J.:

ENDORSEMENT

1 Msi Spergel Inc., in its capacity as Receiver, seeks an order:

a. approving the First Report of the Receiver dated February 26, 2024 and the activities of the Receiver described therein;

b. increasing the Receiver's Borrowings Charge from \$200,000 to \$500,000;

c. approving the sales and marketing process in respect of the Property at 989 Ward Street, Bridgenorth Ontario (the "SISP") as fully described in the First Report;

d. releasing and discharging the Receiver from any and all liability arising out of the proposed Environmental Remedial Work proposed to be completed at the Property, save for gross negligence or wilful misconduct;

e. approving the Statement of Receipts and Disbursements; and

f. approving of the fees of the Receiver and its counsel.

2 Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding or in the motion materials including the First Report, unless otherwise stated.

3 RBC is the senior secured creditor. The Debtor is indebted to the bank in the approximate amount of \$1,536,844.49 advanced under several credit facilities.

4 The relief sought today is unopposed, and is strongly supported by RBC.

Borrowings Charge

5 The proposed increase in the Borrowings Charge results from the anticipated additional funds required to deal with the estate, including in significant part the completion of the proposed Environmental Remedial Work. RBC supports the proposed increase.

6 I have reviewed the First Report and the Appendices thereto and in particular the proposed Environmental Remedial Work as reflected in the Phase II Environmental Report dated October 23, 2023, the Delineation Report dated January 9, 2024 and the Remediation Proposal dated January 16, 2024.

7 I am satisfied that the proposed increase in the Borrowings Charge is appropriate given the anticipated remedial work to be done which is supported as to both scope and estimated price by the Receiver and RBC as senior secured creditor.

SISP

8 The proposed SISP contemplates the commissioning of appraisals, sales and marketing proposals, and listing the Property for sale on MLS, together with related matters, all leading to a sale proposed to occur after completion of the proposed Environmental Remedial Work.

9 This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

- a. the fairness, transparency and integrity of the proposed process;
- b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

10 These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

- a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- b. the interests of all parties;
- c. the efficacy and integrity of the process by which the party obtained offers; and
- d. whether the working out of the process was unfair.

11 In *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC), Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including the following. While that was a CCAA proceeding, the same factors apply to a sale in the context of a receivership:

- a. is a sale transaction warranted at this time?
- b. will it benefit the whole economic community?
- c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
- d. is there a better viable alternative?

12 For the reasons set out in the First Report, I am satisfied that the proposed SISP is appropriate here since the above factors have been satisfied, and the SISP should be approved.

Environmental Remediation Work and Release and Discharge of the Receiver

13 The proposed Environmental Remediation Work is set out in the environmental consultant reports appended to the Third Report referenced above. As set out in the Environmental Report of A&A Environmental Consultants Inc. dated October 30, 2023, the Property does not meet certain environmental standards. This is not surprising, given its prior use as a gas station. The Environmental Report recommends that a remediation cleanup program be undertaken to reduce the environmental contamination of the Property to within acceptable guidelines.

14 I defer to the judgment of the Receiver, supported by the environmental consultant it has engaged, that the work is appropriate, necessary and will be accretive to the value of the estate for the benefit of all stakeholders. I am reinforced in this deference by the fact that the senior secured creditor fully supports the expenditure for the proposed work, and by the fact that no other party opposes it.

15 However, in my view it is not appropriate to grant at this time a release and discharge of the Receiver in respect of any liability arising out of the proposed Environmental Remediation Work, (recognizing that the proposed release would exclude gross negligence or wilful misconduct).

16 Having heard my concerns, both the Receiver and RBC as senior secured creditor are content to proceed with the proposed work absent that release and are therefore content with a form of order that does not include that relief. It follows that the proposed increase in the Borrowings Charge remains appropriate as it is the intention of the Receiver to proceed with those remediation efforts in any event.

17 However, in the circumstances, it is appropriate that I explain, at least in brief, the basis for my concerns.

18 Parliament and the Ontario legislature have already provided certain relevant statutory protections.

19 A trustee or a receiver is not personally liable as such for any environmental condition that arose or environmental damage that occurred before or after its appointment unless it is established that the condition arose or the damage occurred as a result of the receiver's gross negligence: [Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3](#) (the "*BIA*"), s.14.06(2).

20 Protection is afforded to secured creditors and secured creditor representatives from orders that are issued by the Ministry of the Environment, Conservation Parks in certain specific circumstances set out in the [Environmental Protection Act, R.S.O. 1990, c.E.19](#) (the "*EPA*") and particularly s. 168.17 thereof.

21 A "secured creditor" is defined in the *EPA* as:

a person who holds a mortgage, hypothec, pledge, charge, lien, security interest, encumbrance or privilege on or against property, but does not include a person who has taken possession or control of the property.

22 The actions that may be taken by secured creditors and which attract the statutory protection include, as provided for in ss. 168.17(2) 2 and 3:

- a. any action taken for the purpose of conducting, complete or confirming an investigation relating to the secured property;
- b. any action taken for the purpose of preserving or protecting the secured property including action to:
 - i. ensure the supply of water, sewage services, electricity, artificial or natural gas, steam, hot water, heat or maintenance;
 - ii. secure the property by means of locks, gates, fences, security guards or other means;
 - iii. ensure that the property is insured under a contract of insurance; or

- iv. pay taxes due or collect rents owing with respect to the property;
- c. any action taken on the secured property for the purpose of responding to:
 - i. any danger to the health or safety of any person that results from the presence or discharge of a contaminant on, in or under the property;
 - ii. any impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it that results from the presence or discharge of a contaminant on, in or under the property; or
 - iii. any injury or damage or serious risk of injury or damage to any property or to any plant or animal life that results from the presence or discharge of a contaminant on, in or under the property.

23 In addition, s. 168.26 of the *EPA* creates a category of exemptions for a person who conducts, completes or confirms an investigation or who takes any action to reduce the concentration of contaminants in, on or under a property from being categorized as in occupation of the source of contaminant or a person in charge, management or control of a source of contaminant.

24 The release and discharge language sought by the Receiver is based on its position that the proposed Environmental Remedial Work is an action taken by the Receiver to respond to damage at the Property, with the result that the Receiver is entitled to the statutory protection against any order that may be made in relation to the Environmental Remedial Work undertaken.

25 Counsel for the Receiver submitted that there appears to be no guidance one way or the other in the jurisprudence as to that interpretation of the *EPA*, with the result that it requested the release and discharge language.

26 The Receiver submits that the proposed Environmental Remedial Work is for the benefit of the estate and will improve the Property, and further that it has taken all necessary care in identifying and reporting on the environmental issues, with the result that it should be released and discharged from any liability it now has or may hereafter have arising out of the proposed Environmental Remedial Work, save and except for gross negligence or wilful misconduct, all in accordance with the *BIA* and the *EPA*.

27 In my view, such a prophylactic or anticipatory release and discharge should not be granted at this time.

28 To be clear, I accept the submissions of the Receiver summarized above that it has acted appropriately. I also accept that completion of the proposed work will add value to the Property. The fact that a property without environmental contaminants in the soil would have a greater value than property with contaminants present, seems self-evident.

29 The question of whether the expected increase in the value of a property exceeds the cost of the remediation is another issue. Should the property be sold "as is" at a reduced price, or remediated and sold at what would presumably be a higher price?

30 I defer to the judgment of the Receiver in that regard, consistent with the well-established reluctance on the part of courts to second-guess the expertise and considered business decisions of their receivers in arriving at their recommendations: see *Regal Constellation Hotel Ltd.*, Re2004 CanLII 206(ONCA) at para. 23.

31 However, in my view it is not appropriate for the court to grant at this stage what is effectively declaratory relief and moreover is declaratory relief that is anticipatory in nature since the proposed remediation work has not yet been undertaken.

32 The statutory protections afforded to receivers and secured creditors (such as the secured creditor here who is funding and supporting the proposed Environmental Remediation Work) are as set out in the statutory provisions summarized above. Those protections have been crafted and framed by Parliament and the legislature.

33 In my view, the issue of whether those protections apply to any remediation efforts is best determined on the basis of a full record and not in a factual vacuum. I appreciate that this means that the work would have to be undertaken before the

issue arises, but a court would then have the factual matrix within which to determine the issue and evaluate the conduct as against the statutory protection provisions.

34 I also appreciate that this means that in some circumstances, a receiver or a secured creditor may decline to undertake the work in the first place. However, this risk does not provide a sufficient basis here for what amounts to a "pre-determination" of the issue of whether conduct that has not yet occurred falls within the sphere of statutory protection or not.

35 There is a general reluctance on the part of the courts to grant declaratory relief and determine issues in the absence of a full evidentiary record. In *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc*(2023), 2023 CarswellOnt 7509, 2023 ONCA 363 (Ont. C.A.), the Ontario Court of Appeal upheld the decision of Cavanagh, J. declining to grant declaratory relief that would have extinguished certain potential claims or insulated potential challenges to rights that were being granted.

36 The Court of Appeal concluded that the proposed declaratory relief was anticipatory in nature and went beyond the normal scope of declaratory relief as recently described by the Supreme Court of Canada in *S.A. v. Metro Vancouver Housing Corp.*, 2019 CarswellBC 98, 2019 CarswellBC 99, 2019 SCC 4, 2019 CSC 4, 19 B.C.L.R. (6th) 1, 430 D.L.R. (4th) 621, [2019] 4 W.W.R. 1, [2019] 1 S.C.R. 99 (S.C.C.), at para. 60:

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

37 In my view, the same analysis applies here, with the result that the proposed release and discharge language amounts effectively to a declaration in advance that the proposed Environmental Remediation Work falls within the scope of the statutory protections provided for in the *BIA* and/or the *EPA*, and should not be granted at this time.

38 Finally, such relief should be sought on notice to the environmental regulator in any event.

Approval of the Receiver's Conduct and Fees

39 I have reviewed fee affidavits of the Receiver and its counsel respectively, together with the copies of the accounts appended as Exhibits to those affidavits. In my view, the fees are reasonable, appropriate and are reflective of work properly undertaken by the Receiver and its counsel that was appropriate, reasonable and in accordance with the mandate given to the Receiver in the original Appointment Order: see *Bank of Nova Scotia v. Diemer* 2014 ONCA 851 (CanLII), at paras. 33 and 45.

40 The fees of the Receiver and its counsel are approved. The Statement of Receipts and Disbursements is also appropriate and is approved.

Result and Disposition

41 As stated above, the Receiver, supported by RBC, was content that its motion be granted without the release and discharge language related to the Environmental Remediation Work.

42 The balance of the relief sought is appropriate and is granted.

43 Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.
Motion granted in part.

**CAMERON STEPHENS MORTGAGE
CAPITAL LTD.**

Applicant

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and

Respondents

Court File No. CV-23-00710795-00CL

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