Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC

BOOK OF AUTHORITIES OF RIOCAN AND KINGSETT

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TAB 1

2010 QCCS 2643

Cour supérieure du Québec

Chantiers Davie Inc., Re

2010 CarswellQue 6188, 2010 QCCS 2643, 191 A.C.W.S. (3d) 713, EYB 2010-175668

In the matter of the Plan of Arrangement of: Chantiers Davie Inc., The Debtor, vs. Samson Bélair/Deloitte & Touche Inc., the Monitor

Parent J.C.S.

Hearing: May 21, 2010

Judgment: May 25, 2010

File: C.S. Qué. Québec 200-11-019127-102

Martin Desrosiers, Sandra Abitan for the Debtor

Sandra Abitan for the Monitor

Marie-Paule Gagnon for Investissement Québec

Frédéric Desgagnés for Ocean Hotels PLC

Guy De Blois for Export Development Canada

Alain Riendeau for Cecon ASA and Upper Lakes Groupe Inc

In the matter of Insolvency

Parent J.C.S.:

1 The Debtor Davie Yards Inc. presents a motion for an Extension of the Stay (the "Motion") under the Companies' Creditors Arrangement Act[1] (CCAA).

2 This is the second request for an extension of the initial Order, with the first extension of 60 days ending on May 25, 2010.

3 The Debtor requests an extension until September 15, 2010. They submit that this extension is necessary in order to allow them, with the help of their advisors, to take the necessary steps to present a plan of arrangement to their creditors.

4 The creditors and other interested parties appear to have consented to the request for an extension. However, Cecon ASA (Cecon), one of the Debtor's two clients, opposes the extension. Cecon argues that the period need not exceed five weeks in order to satisfy the Court's obligations under the CCAA.

5 Investissement Quebec (IQ) is opposed to an incidental finding of the motion, which asks the Court to approve the activities of the Monitor enumerated in its fourth report[2].

5 *Analysis*

6 Unlike the initial Order that cannot exceed 30 days[3], the CCAA does not set out a time limit for extensions. Section 11.02(2) of the CCAA simply states that the Court may order an extension "on any terms that it may impose." It is completely dependent on the circumstances.

7 Section 11.02(3) of the CCAA specifies the conditions imposed for granting an initial order or an extension:

> (3) The court shall not make the order unless:
>
> a) the applicant satisfies the court that the measure is appropriate;
>
> b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

8 The burden of proof is on the applicant at each stage.

Extension of Time Limit

9 As previously mentioned, the appearing parties do not contest the Debtor's good faith or the diligence. Furthermore, they believe that the request for an extension would facilitate the creation of a plan of arrangement which would be to the creditors' and other interested parties' advantage.

10 The Monitor's testimony confirms that the Debtor, despite the difficult position it is in, is doing everything possible to create a satisfactory plan of arrangement for all interested parties.

11 On May 12, 2010, the Court approved an employment contract with the financial advising firm Rothschild. The goal of this firm's engagement was to enable the Debtor to identify and attract potential investors. This approach was endorsed by major creditors and the Debtor's two clients, Cecon and Ocean Hotels.

12 In this context, the Monitor considers that it would be unrealistic to believe that a period of five weeks would allow the Debtor to carry out these steps, especially considering that the summer season is approaching.

13 The Monitor also argues that potential investors may hesitate to respond to requests in a climate of uncertainty caused by the imminent approach of a new application for a time extension. Under these circumstances, third parties may refuse to engage in costly and potentially futile conduct.

14 Recognizing the importance of keeping open communication with the creditors and the other interested parties, the Monitor proposes the creation of progress reports every 30 days over the course of the time extension.

15 Cecon argues that the requested period of 3½ months is inappropriate and excessive. Several events could arise during this long period of time without the Court or the parties being informed.

16 Cecon puts forward as evidence the Debtor's decision at the end of April 2010, to cease its construction of ship #717, which led to the firing of approximately 100 employees. This decision was made without prior consultation with the Court or Cecon. Cecon was directly affected by this decision since the Debtor was supposed to build three ships for Cecon, with the work on ship #717 being the furthest along of those three.

17 Cecon reminds the court that at the time of the request for the time extension in March 2010, there was no question that the work on ship #717 would continue.

18 The Monitor recognizes that this was not contemplated at the time. The Monitor explains the evolution of the situation. Following the order for an extension granted on March 26, 2010, it appeared that none of the creditors or interested parties intended to invest in the Debtor's business, unless new investors intervened.

19 The Monitor adds that this constitutes a long process which requires not only several months of effort, but also the engagement of specialized professionals.

20 Confronted with this reality, and conscious of its liquidity, the Debtor concluded, in agreement with the Monitor, that the only way to accomplish these steps, along with the associated costs, was to suspend all construction on ship #717.

21 The Monitor emphasizes that this possibility was discussed with the creditors and the interested parties, including Cecon. However, the Monitor admits that the decision was made by the Debtor's board of directors without any prior notification to Cecon.

22 The Monitor maintains that this was the only course of action possible under the circumstances.

23 The Debtor's and Monitor's counsel argue that this type of decision did not require prior authorization from the Court or from Cecon. They rely on the following conclusion in the initial Order:

24. DECLARES that, to facilitate the orderly restructuring of its business and financial affairs (the "Restructuring") but subject to such requirements as are imposed by the CCAA, the Petitioner shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of its operations or locations as it deems appropriate and make provision for the consequences thereof in the Plan;

(Emphasis by the Court)

24 Under the particular circumstances of this case, the Debtor had the right to act as it did, without prior authorization. Cecon, like all other interested parties, could have raised the matter with the Court if it had deemed it necessary, by relying on Section 11 of the CCAA as well as on the initial Order, which states:

51 DECLARES that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon seven days notice to the Petitioner, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order: [...]

25 Cecon chose not to apply to the Court, and did not contest the recent motion to approve the contract to employ Rothschild.

26 The Court concludes that Cecon's request to limit the time extension to five weeks is not justified on these grounds.

27 Cecon argues that it has not yet received the investigation report concerning the transactions completed by the Debtor between January 1, 2007 and February 28, 2010, the date of the initial Order[4]. According to Cecon, this constitutes a further reason to limit the time extension period since the analysis of the report could call into question the Debtor's good faith.

28 The Monitor explains the monumental task that was required to produce the investigation report, the preliminary version of which was signed two days prior to the hearing, on May 9, 2010.

29 More than 17,000 bank transactions representing cash receipts of approximately $619,000,000 and disbursements of approximately $592,000,000 were examined.

30 Of these, the Monitor states that approximately $43,000,000 in disbursements still need to be identified, which are made up of transactions less than $100,000 each.

31 To this date, the Monitor has found no questionable payments, but recognized that approximately $11,000,000 of the payments were made to related persons in satisfaction of debts owed to them by the Debtor. The Monitor has not yet analyzed the circumstances of these payments.

32 The Monitor is prepared to submit the investigation report to the interested parties. The Monitor undertakes to keep the parties informed of the results of the continued analysis. At the request of Ocean Hotels, the Court will take note of this undertaking at the conclusion of this judgment.

33 Despite this, Cecon insists that they have not yet read the report. Their analysis could lead to a modification of their position regarding the Debtor's good faith. They therefore believe that this serves as an argument in favor of the shortened time extension period that they request.

34 The Debtor retorts that the good faith described in Section 11.02(3) of the CCAA is analyzed only from the date of the initial Order. Therefore, the investigation report encompasses transactions that predate this. This would render Cecon's argument irrelevant. The Debtor adds that if necessary, the plan of arrangement could provide for the review of the suspicious transactions.

35 With respect, the Court does not believe that the analysis of the Debtor's good faith must be limited to the period following the initial Order. It is true that Section 11.02(3)(b) of the CCAA makes reference to this criteria at the time of a motion for extension. However, the applicant must demonstrate that is "has acted, and is acting, in good faith."

36 This wording imposes no restriction on the analysis of good faith. This interpretation respects the spirit of the CCAA. The privileges conferred on the Debtor by the CCAA require that they act in good faith.

37 This being so, Cecon, and any other interested party, can apply to the Court following their analysis of the Monitor's investigation report if they believe that it contains important elements relating to the Debtor's good faith. It is not necessary to limit the requested period of extension for this reason.

Transmission of Information

38 As the Court stated at the hearing, it appears important to formally set out a procedure for the transmission of information during the period of the extension. The fashioning of these guidelines is within the Court's powers when an extension is granted.

39 The Monitor has already undertaken to produce reports at 30-day intervals following this judgment.

40 Each report should be transmitted to the Court as well as to the appearing parties and must also be made available on the Monitor's website.

41 All interested parties can send written requests to the Monitor for clarifications and requesting documents relating to the report. The Monitor must respond to these requests at the earliest opportunity, and at the latest within 10 days of receiving the request. All difficulties arising from these requests can be submitted to the Court following seven days notice to all appearing parties.

42 Furthermore, all interested parties can submit a request in compliance with the guidelines set out in Paragraph 51 of the initial Order, following the Monitor's submission of the report.

43 Finally, if there is an adverse material change in the Debtor's circumstances, the Monitor must advise the Court without delay. Since Section 23(1)(d)(i) of the CCAA already imposes this obligation on the Monitor, it is unnecessary to repeat it in the conclusion of this judgment.

Approval of the Monitor's Activities

44 The Debtor asks the Court to approve the activities of the Monitor described in its fourth report.

45 Investissement Québec emphasizes that this type of finding has no place within the framework of a request for an extension of the initial Order.

> 46 When asked to clarify the purpose of this request, the Debtor's and Monitor's counsel indicated that this approval does not seek to free the Monitor from all liability resulting from the execution of its functions. Rather, it would take the form of a common practice whereby the Court would take note of the Monitor's actions as being in compliance with its mandate

47 With respect, the Court finds that this type of finding is unnecessary, and in fact, can become a source of confusion regarding its scope. The legislator has already set out the conditions under which a Monitor will not be held liable in Sections 23(2) and 25 of the CCAA.

48 Although none of the parties raised it at the hearing, the Court recalls a similar request that was formulated regarding the Monitor's second report, at the time of the first request for an extension. Despite a lack of opposition at that time, the Court did not comply with the request, and instead took note of the activities. The utility of this practice is perhaps debatable, but it prevents ambiguity regarding the approval of the Monitor's activities.

FOR THESE REASONS, THE COURT:

49 *ALLOWS* the second Motion for extension of the initial Order.

50 *DECLARES* that the Motion is duly served, the notices of presentations of the Motion are satisfactory, and *EXEMPTS* the Debtor from any additional notices.

51 *EXTENDS* the suspension of the procedures (as defined in the initial Order) until September 15, 2010, all subject to the terms of the initial Order, except the following.

52 *ORDERS* the Monitor to file with the Court a report on the state of the Debtor's financial and other affairs, in conformity with sub-paragraph 23(1)(d)(iii) of the *Companies' Creditors Arrangement Act*, at 30-day intervals following the present judgment, namely: June 25, 2010, July 25, 2010, August 24, 2010, and a final report on September 15, 2010. These reports must be transmitted to all appearing parties and made available on the Monitor's *website*.

53 *ALLOWS* all interested parties to request in writing further details and documents related to the reports from the Monitor, who must respond to these requests at the earliest opportunity, and at most within 10 days from receiving the request.

54 *DECLARES* that any difficulties arising from these requests can be submitted to the Court following seven days notice to all appearing parties.

55 *DECLARES* that all interested parties can submit a request in compliance with the guidelines set out in Paragraph 51 of the initial Order, following the Monitor's submission of the report outline in Paragraph 52 of the present judgment.

56 *TAKES NOTE* of the Monitor's activities described in its 4th report, exhibit R-1.

57 *TAKES NOTE* of the Monitor's undertaking to provide the interested parties with the investigation report (*Forensic Review*) mentioned in its 4th report.

58 *ORDERS* the provisional execution of this order pending appeal and without security.

59 *THE WHOLE* without costs.

Footnotes[1]

1 R.S.C., chapter C-36

2 Exhibit R-1.

3 Section 11.02(1) of the CCAA.

4 This report is described as the *Forensic Review* in the Monitor's report, Exhibit R-1.

End of document

[1] Translator's note: The first three footnotes do not appear anywhere in the main text, either in the French or English version.

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AFFIDAVIT

I, Beau Brock, translator for ALL LANGUAGES LTD, of Toronto, in the Province of Ontario, make oath and say:

1. I understand both the French and the English languages;

2. I have carefully compared the annexed translation from French into English with the Plan of Arrangement for Chantiers Davie, Inc., dated May 25, 2010; and

3. The said translation, done by me, is, to the best of my knowledge and ability, a true and correct translation of the said document in every respect.

SWORN before me at the City)
of Toronto, this 12th day of)
August 2015.)
)
)
A Notary Public in and for)
the Province of Ontario.)
Bradley Robert Pearson)

Beau Brock

2010 QCCS 2643
Cour supérieure du Québec

Chantiers Davie inc., Re

2010 CarswellQue 6188, 2010 QCCS 2643, 191 A.C.W.S. (3d) 713, EYB 2010-175668

Dans l'affaire du plan d'arrangement de: Chantiers Davie inc., Débitrice, c. Samson Bélair/Deloitte & Touche inc., Contrôleur

Parent J.C.S.

Audience: 21 mai 2010
Jugement: 25 mai 2010
Dossier: C.S. Qué. Québec 200-11-019127-102

Avocat: *Me Martin Desrosiers, Me Sandra Abitan*, pour la débitrice
Me Sandra Abitan, pour le contrôleur
Me Marie-Paule Gagnon, pour Investissement Québec
Me Frédéric Desgagnés, pour Ocean Hotels PLC
Me Guy De Blois, pour Exportation et développement Canada
Me Alain Riendeau, pour Cecon ASA et de Upper Lakes Group inc.

Sujet: Insolvency

Parent J.C.S.:

1 La Débitrice Chantiers Davie Inc. présente une *Requête en prorogation de délai* (la « *Requête* ») en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*[1] (LACC).

2 Il s'agit de la deuxième demande en prorogation de l'Ordonnance initiale, la première période de prorogation de 60 jours se terminant le 25 mai 2010.

3 La Débitrice demande une prorogation jusqu'au 15 septembre 2010. Elle allègue que ce délai est nécessaire afin de lui permettre, avec l'aide de ses conseillers, de compléter les démarches devant mener à la présentation d'un plan d'arrangement aux créanciers.

4 Les créanciers et les autres parties intéressées ayant comparu consentent à la demande de prorogation. Toutefois, Cecon ASA (Cecon), l'un des deux clients de la Débitrice, s'oppose au délai requis. Cecon estime que la période de prorogation ne devrait pas excéder cinq semaines, afin de permettre au Tribunal d'exercer les responsabilités que lui impose la LACC.

5 Investissement Québec s'oppose à une conclusion accessoire de la requête, laquelle demande l'approbation par le Tribunal des activités du Contrôleur énoncées à son quatrième rapport[2].

5 *Analyse*

6 Contrairement à l'Ordonnance initiale qui ne peut excéder trente jours[3], la LACC ne prévoit pas de délai pour les prorogations de cette dernière. L'article 11.02(2) LACC indique simplement que le Tribunal ordonne la prorogation « aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire ». Tout est question de circonstances.

7 L'article 11.02(3) LACC précise les conditions imposées pour l'émission d'une ordonnance initiale ou en prorogation :

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

8 Le fardeau de preuve incombe au demandeur à chacune des étapes.

Délai de prorogation

9 Comme déjà mentionné, les parties ayant comparu ne mettent pas en doute la bonne foi ni la diligence de la Débitrice. Elles estiment également que la demande de prorogation pourrait favoriser la présentation d'un plan arrangement à l'avantage des créanciers ainsi que des autres parties intéressées.

10 Le témoignage du Contrôleur confirme que la Débitrice, malgré sa situation difficile, déploie tous les efforts possibles pour tenter de présenter un plan d'arrangement satisfaisant pour toutes les parties intéressées.

11 Le 12 mai 2010, le Tribunal approuvait le contrat d'embauche du conseiller financier Rostchild. L'intervention de cette firme a pour but de permettre à la Débitrice d'identifier et d'intéresser d'éventuels investisseurs. Cette démarche de la Débitrice a reçu l'aval des principaux créanciers et des deux clients de la Débitrice, Cecon et Ocean Hotels.

12 Dans ce contexte, le Contrôleur estime irréaliste de croire qu'un délai de cinq semaines permettra à la Débitrice d'effectuer ces démarches, la période estivale étant à nos portes.

13 Le Contrôleur fait aussi valoir que les éventuels investisseurs pourraient hésiter à donner suite à des sollicitations, dans un climat d'incertitude causé par l'approche imminente d'une nouvelle demande en prorogation. Dans ces conditions, des tiers pourraient refuser de s'engager dans des démarches coûteuses et possiblement inutiles.

14 Reconnaissant l'importance de garder des communications fluides avec les créanciers et les autres parties intéressées, le Contrôleur propose la production de rapports d'étape tous les trente jours pendant la période de prorogation.

15 De son côté, Cecon plaide que la période de 3 1/2 mois demandée est inappropriée et excessive. Plusieurs événements pourraient survenir pendant cette longue période sans que le Tribunal ni les parties en soient informés.

16 Cecon en veut pour preuve la décision de la Débitrice, à la fin d'avril 2010, de cesser les opérations de construction du navire # 717, entraînant la mise à pied d'une centaine d'employés. Cette décision n'a pas été préalablement soumise au Tribunal ni à Cecon. Cette dernière est directement affectée par cette décision, la Débitrice devant construire trois navires pour Cecon, l'unité # 717 étant celle dont les travaux sont les plus avancés.

17 Cecon rappelle qu'au moment de la demande de prorogation présentée en mars 2010, il n'était nullement question de la cessation des opérations sur le chantier naval pour les travaux touchant l'unité # 717.

18 Le Contrôleur reconnaît que cela n'était pas envisagé à ce moment. Il explique l'évolution de la situation. À la suite de l'ordonnance de prorogation du 26 mars 2010, il est apparu qu'aucun des créanciers ou des parties intéressées n'entendait réinvestir dans les affaires de la Débitrice à moins de l'intervention de nouveaux investisseurs.

19 Or, le Contrôleur ajoute qu'il s'agit d'une démarche de longue haleine, qui nécessite non seulement plusieurs mois d'efforts, mais également l'intervention de professionnels en démarchage.

20 Confrontée à cette réalité, et en tenant compte de ses liquidités, la Débitrice a conclu, de concert avec le Contrôleur, que la seule façon de franchir ces étapes, avec les coûts qui s'y rattachent, nécessitait la suspension de toutes les opérations de construction du navire # 717.

21 Le Contrôleur souligne que cette hypothèse fut discutée avec les créanciers et les parties intéressées, dont Cecon. Il admet que la décision fut prise par le conseil d'administration de la Débitrice sans qu'en soit préalablement avisée Cecon.

22 Le Contrôleur fait valoir que cette décision était la seule possible dans les circonstances.

23 Les procureurs de la Débitrice et du Contrôleur plaident que ce type de décision ne nécessitait pas l'autorisation préalable du Tribunal, ni celle de Cecon. Ils s'appuient sur la conclusion suivante de l'Ordonnance initiale :

> 24. **DECLARES** that, to facilitate the orderly restructuring of its business and financial affairs (the « Restructuring ») but subject to such requirements as are imposed by the CCAA, the Petitioner shall have the right, subject to approval of the Monitor or further order of the Court, to:
>
> (a) permanently or temporarily cease, downsize or shut down any of its operations or locations as it deems appropriate and make provision for the consequences thereof in the Plan;
>
> (Soulignement du Tribunal)

24 Dans les circonstances particulières de la présente affaire, la Débitrice pouvait agir comme elle l'a fait, sans autorisation préalable. Cecon, comme toute autre partie intéressée, aurait pu saisir le Tribunal de la situation si elle l'avait jugé nécessaire, tant en vertu de l'article 11 LACC que de la clause de retour prévue à l'Ordonnance initiale :

> 51 **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon seven days notice to the Petitioner, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order: [. . .]

25 Cecon a choisi de ne pas présenter de demande, ne contestant pas davantage la récente requête en approbation du contrat d'embauche de Rothschild.

26 Le Tribunal conclut que ce motif ne justifie pas la suggestion de Cecon de limiter à cinq semaines la période de prorogation.

27 Cecon plaide qu'elle n'a pas encore reçu le rapport d'enquête concernant les transactions effectuées par la Débitrice entre le 1 er janvier 2007 et le 28 février 2010, date de l'Ordonnance initiale [4]. Il s'agit selon Cecon d'un motif supplémentaire pour prévoir une courte période de prorogation, l'analyse du rapport pouvant éventuellement remettre en cause la bonne foi de la Débitrice.

28 Le Contrôleur explique la tâche colossale abattue pour la production du rapport d'enquête, la version préliminaire ayant été signée deux jours avant l'audition, soit le mercredi 19 mai 2010.

29 Plus de 17 000 transactions bancaires représentant des encaissements d'environ 619 000 000 $ et des déboursés d'environ 592 000 000 $ ont été examinées.

30 De ce lot, le Contrôleur précise qu'environ 43 000 000 $ de déboursés doivent encore être identifiés, étant composés de transactions inférieures à 100 000 $ chacune.

31 Le Contrôleur n'a constaté aucun paiement douteux à ce jour, reconnaissant cependant qu'environ 11 000 000 $ ont été versés à des personnes liées, éteignant les dettes de la Débitrice envers elles. Le Contrôleur n'a pas encore analysé les circonstances de ces paiements.

32 Le Contrôleur est disposé à transmettre aux parties intéressées le rapport d'enquête. Il s'engage à tenir les parties informées des résultats des analyses à venir. À la demande de Ocean Hotels, le Tribunal prendra acte de cet engagement aux conclusions du présent jugement.

33 Malgré cela, Cecon insiste sur le fait qu'elle n'a pas encore pris connaissance du rapport. Son analyse pourrait conduire à modifier sa position sur la bonne foi de la Débitrice. Elle croit donc qu'il s'agit d'un motif qui milite en faveur de la période de prorogation qu'elle propose.

34 La Débitrice rétorque que la bonne foi visée à l'article 11.02(3) LACC ne s'analyse qu'à partir de la date de l'Ordonnance initiale. Or, le rapport d'enquête vise les transactions antérieures à cette date. L'argument de Cecon serait donc sans pertinence. La Débitrice ajoute qu'un plan d'arrangement pourrait prévoir la révision des transactions irrégulières, si cela s'avérait nécessaire.

35 Avec égards, le Tribunal ne croit pas que l'analyse de la bonne foi d'un débiteur doive se limiter à la période postérieure à l'Ordonnance initiale. Il est vrai que l'article 11.02(3)b) LACC fait référence à ce critère lors de la demande de prorogation. Cependant, le demandeur doit démontrer « qu'il a agi et continue d'agir de bonne foi ».

36 Cette formulation n'impose aucune restriction dans l'analyse de la bonne foi. Cela respecte l'esprit de la LACC. Les privilèges conférés à un débiteur en vertu de la LACC exigent sa bonne foi.

37 Cela étant, Cecon, au même titre que toute autre partie intéressée, pourra s'adresser au Tribunal à la suite de l'analyse du rapport d'enquête du Contrôleur si elle estime qu'il comporte des éléments importants remettant en cause la bonne foi de la Débitrice. Il n'est pas nécessaire de limiter la période de prorogation demandée pour ce motif.

Transmission d'informations

38 Comme le Tribunal l'a mentionné à l'audience, il apparaît important de prévoir formellement une procédure de transmission d'informations pendant la période de prorogation. La mise en place de ces modalités s'inscrit dans l'exercice des pouvoirs du Tribunal au moment de la prorogation du délai.

39 Le Contrôleur a déjà pris l'engagement de produire des rapports à des intervalles de trente jours suivant le présent jugement.

40 Chaque rapport devra être transmis au Tribunal ainsi qu'aux parties ayant comparu, en plus d'être rendu disponible sur le site *web* du Contrôleur.

41 Toute partie intéressée pourra formuler par écrit au Contrôleur des demandes de précisions et de transmission de documents en regard du rapport. Le Contrôleur devra répondre aux demandes dans les meilleurs délais, et au plus tard dix jours après réception de celles-ci. Toutes difficultés découlant de ces demandes pourront être soumises au Tribunal suivant un préavis de sept jours donné aux parties ayant comparu.

42 De plus, toute partie intéressée pourra formuler une demande selon les modalités prévues au paragraphe 51 de l'Ordonnance initiale à la suite du dépôt par le Contrôleur d'un rapport.

43 Finalement, s'il survenait un changement défavorable important dans la situation de la Débitrice, le Contrôleur devrait en aviser sans délai le Tribunal. Comme l'article 23(1)d)(i) LACC impose déjà cette obligation au Contrôleur, il est inutile de la répéter aux conclusions du présent jugement.

Approbation des activités du Contrôleur

44 La Débitrice demande au Tribunal d'approuver les activités du Contrôleur décrites à son quatrième rapport.

45 Investissement Québec souligne que ce type de conclusion n'a pas sa raison d'être dans le cadre de la demande en prorogation de l'Ordonnance initiale.

46 Appelés à préciser l'objet de cette conclusion, les procureurs de la Débitrice et du Contrôleur indiquent que cette approbation n'a pas pour objet de libérer le Contrôleur de toute responsabilité pouvant découler de l'exécution de ses fonctions. Il s'agirait davantage d'une pratique courante par laquelle le Tribunal prendrait acte de la conformité des activités du Contrôleur en regard de son mandat.

47 Avec égards, le Tribunal estime que cette conclusion est inutile et, à la rigueur, peut devenir source de confusion concernant sa portée. Le législateur a déjà prévu, notamment aux article 23(2) et 25 LACC, les conditions de non-responsabilité du Contrôleur.

48 Bien qu'aucune des parties ne l'ait soulevé à l'audience, le Tribunal rappelle qu'une conclusion semblable était formulée concernant le deuxième rapport du Contrôleur, lors de la première demande de prorogation de délai. Or, malgré l'absence d'opposition à cette occasion, le Tribunal n'a pas donné suite à cette demande, prenant plutôt acte de ces activités. L'utilité de cette formulation peut être discutable, mais elle évite l'ambiguïté de l'approbation des activités du Contrôleur.

POUR CES MOTIFS, LE TRIBUNAL:

49 *ACCUEILLE* la deuxième Requête en prorogation de l'Ordonnance initiale.

50 *DÉCLARE* que la Requête a été dûment signifiée, que les avis de présentation de la Requête sont suffisants et *DISPENSE* la Débitrice de tout avis supplémentaire.

51 *PROROGE* la date de suspension des procédures (telle que définie dans l'Ordonnance Initiale) jusqu'au 15 septembre 2010, le tout sujet aux termes de l'Ordonnance Initiale, sauf pour ce qui suit.

52 *ORDONNE* au Contrôleur de déposer auprès du Tribunal un rapport portant sur l'état des affaires financières et autres de la Débitrice conformément au sous alinéa 23(1)(d)(iii) de la *Loi sur les arrangements avec les créanciers des compagnies* à des intervalles de trente (30) jours suivant le présent jugement, soit les 25 juin 2010, 25 juillet 2010, 24 août 2010 et un dernier rapport le 15 septembre 2010, ces rapports devant être transmis aux parties ayant comparu et rendu disponibles sur le site *web* du Contrôleur.

53 *PERMET* à toute partie intéressée de demander par écrit au Contrôleur des précisions et des documents en regard de tels rapports, le Contrôleur devant répondre par écrit aux demandes dans les meilleurs délais, et au plus tard dix jours après réception de celles-ci.

54 *DÉCLARE* que toutes difficultés découlant de ces demandes pourront être soumises au Tribunal suivant un préavis de sept jours donné aux parties ayant comparu.

55 *DÉCLARE* que toute partie intéressée peut formuler une demande selon les modalités prévues au paragraphe 51 de l'Ordonnance initiale à la suite du dépôt par le Contrôleur d'un rapport visé au paragraphe 52 du présent jugement.

56 *PREND ACTE* des activités du Contrôleur décrites dans son 4 ième rapport, pièce R-1.

57 *PREND ACTE* de l'engagement du Contrôleur de transmettre aux parties intéressées qui en font la demande le rapport d'enquête (*Forensic Review*) auquel fait référence son 4 ième rapport.

58 *ORDONNE* l'exécution provisoire de cette ordonnance malgré appel et sans caution.

59 *LE TOUT* sans frais.

Notes de bas de page

1 L.R.C., chap. C-36.

2 Pièce R-1.

3 Article 11.02(1) LACC.

4 Ce rapport est décrit comme le *Forensic review* au rapport du Contrôleur, pièce R-1.

Fin du document

TAB 2

2006 CarswellOnt 2835
Ontario Superior Court of Justice [Commercial List]

Toronto Dominion Bank v. Preston Springs Gardens Inc.

2006 CarswellOnt 2835, [2006] O.J. No. 1834, 19 C.B.R. (5th) 165

The Toronto Dominion Bank (Plaintiff) and Preston Springs Gardens Inc., Benchmark Equity Corporation, Peter B. Moffat, Melvyn A. Dancy and Dondeb Inc. (Defendants)

Morawetz J.

Heard: January 12, 2006
Judgment: March 17, 2006
Docket: 04-CL-5579

Counsel: Thomas J. Corbett for Moving Parties, Benchmark Equity Corporation, Peter B. Moffat
Evert Van Woundenberg, James Cook for Responding Party, BDO Dunwoody Limited

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

Headnote

Debtors and creditors --- Receivers — Discharge of receiver — Practice and procedure

Defendant company was shareholder of bankrupt corporation — Plaintiff bank held first mortgage from bankrupt — Defendant was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed — Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property — Motion dismissed — Defendant's claims were frivolous and vexatious and had no valid foundation — Defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Court had already decided receiver discharged responsibilities in proper manner and acted in good faith, and dealt with property of bankrupt in commercially reasonable manner — Previous order's statement merely granted defendant right to bring motion, not to re-argue stale issues — Motion was properly dismissed on account of res judicata or issue estoppel.

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — followed

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2001), 2001 CarswellOnt 3773 (Ont. Div. Ct.) — referred to

MOTION by defendants for leave to bring counterclaim against receiver.

Morawetz J.:

1 This is a motion by the defendants, Benchmark Equity Corporation ("Benchmark") and Peter B. Moffat ("Moffat"), for leave to sue BDO Dunwoody Limited ("BDO"), as Receiver, by way of counterclaim in this proceeding. Leave is necessary because paragraph 12 of the Order dated April 20, 2001, appointing BDO as Receiver and Manager of the assets, property and undertaking of the defendant Preston Springs Gardens Inc. ("PSGI") provides that no person may institute any action against the Receiver without first obtaining leave of this Court.

2 Benchmark is one of the shareholders of PSGI, and Moffat is the president of Benchmark.

3 The shareholders of PSGI also hold a third mortgage from PSGI. In addition, Moffat is one of the guarantors of the indebtedness of PSGI to the first mortgagee, The Toronto Dominion Bank ("TD Bank").

4 BDO filed its First Report in support of the motion to seek the court's approval of its actions to date as well as an order approving its decision to market and sell the property of PSGI on an "as is" basis. The motion was originally returnable on June 20, 2001. However, it did not proceed as scheduled. Moffat filed an affidavit sworn June 19, 2001, in response to the motion. The Receiver then submitted the Second Report, sworn July 4, 2001, which responded to some of the issues raised in the affidavit of Moffat. The motion was heard by Pepall J. on July 6, 2001. The resulting Court Order granted the relief requested by the Receiver.

5 Benchmark and Moffat sought leave to appeal the decision of Pepall J. before the Divisional Court. Leave was denied by Then J. in an endorsement dated October 30, 2001.

6 BDO subsequently brought a motion to seek approval of the court of the Receiver's actions to date and the accounts of the Receiver to November 15, 2001, and an order approving an Agreement of Purchase and Sale between the Receiver, as vendor, and Guelph Financial Corporation ("GFC"), as purchaser, and authorizing the Receiver to complete the transaction. The motion also sought a vesting order and other related relief.

7 BDO filed its Third Report in support of this motion and Benchmark and Moffat responded by filing a factum.

8 C. Campbell J. made an Order on December 10, 2001 which granted the relief requested by the Receiver.

9 BDO brought a further motion to seek the court's approval of its actions to date and its final accounts, as well as an order discharging BDO as Receiver.

10 On May 7, 2002, Spence J. made an Order, which granted the relief requested by the Receiver. The final paragraph of the Discharge Order reads as follows:

> **THIS COURT ORDERS** that the correctness of the decision of Pepall J. of July 6, 2001 was not considered at this hearing for discharge and Benchmark Equity Corporation and Peter B. Moffat are not limited by the making of this Order through the principles of *res judicata* or *estoppel* in any future motion seeking leave to sue the Receiver.

11 Leave is now sought to sue the Receiver for damages for negligence or breach of duty or damages in equity for breach of fiduciary duty in the amount of $8 million. The particulars of the allegations sought to be made are set out in the draft Amended Amended Statement of Claim, Counterclaim and Cross-Claim, and repeated in the affidavit of Moffat, sworn in support of this motion.

12 The granting of leave is opposed by BDO on the basis that the issues have already been determined by the Court in these proceedings, in both the approval of the Receiver's decision to market and sell the property, as well as authorizing the Receiver to enter into the Agreement of Purchase and Sale with GFC. There are also three Court Orders approving the activities of the Receiver. It is the position of BDO that the proposed action against BDO is without foundation, is frivolous and vexatious, and is barred by the doctrine of *res judicata*.

13 In his affidavit sworn July 4, 2001, Moffat raised the issue as to whether the Receiver should sell the property or, alternatively, whether the Receiver should borrow monies and complete the construction of the project. Moffat took the position that the completion of the construction of the project would be the most financially advantageous approach. Moffat challenged the analysis of the Receiver as contained in the First Report. Suffice to say, the affidavit was extremely critical of the Receiver's First Report. As a result, the Receiver filed the Second Report, in which it addressed the issues raised by Moffat in his affidavit and provided the Court with the results of a more detailed analysis of the financial projections surrounding the disposition alternatives for the assets of PSGI.

14 The endorsement of Pepall J. reflects that the opposition of Moffat against the sale of the property was considered by the Court.

15 At page 3 of her endorsement, Pepall J. stated:

> Benchmark and Mr. Moffat argue that the basis for the Receiver's recommendation is flawed and that the Receiver should take an additional period of time — 6 weeks was the suggestion — to analyze the situation. They did not seek an adjournment of the motion before me. They resist the "as is" alternative and submit that if the Receiver wishes to proceed on this basis he should do so by private appointment and be discharged as a court appointed receiver. There was no motion brought requesting such relief.
>
> While it is true that there were some errors in the 1st Receiver's report filed, these have now been addressed. The facts strongly support the Receiver's recommendation and decision. All other parties with any interest including the first and second mortgagees have either consented or are unopposed to the proposed course of action. The Receiver has concluded that the risks and variables associated with completing construction of the subject property result in an "as is" sale being the preferred course of action. I agree with this assessment.

16 Benchmark and Moffat sought leave to appeal the decision of Pepall J. A twenty-page factum was filed in support of the motion before the Divisional Court. The factum covered in detail issues that had been raised before Pepall J. concerning the recommendation of the Receiver to proceed with the sale of the property as opposed to completing the construction of the project.

17 In his endorsement dated October 30, 2001, Then J. dismissed the motion for leave [*Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2001 CarswellOnt 3773 (Ont. Div. Ct.)].

18 The points raised by Benchmark and Moffat were addressed by Then J. in his endorsement.

19 In its motion to approve the sale of the property to GFC, BDO filed the Third Report which provided the Court with a summary of the Receiver's marketing efforts in connection with the sale of the property, and a summary of the tender process.

20 Benchmark and Moffat opposed the motion and filed a factum in response, which incorporated the factum that was used at the hearing before the Divisional Court.

21 The responding factum on the sale approval motion took issue with the sales process. It complained that two of the three offers received were "low ball" offers, and the offer for which approval is sought is in some way associated with Mr. Melvyn Dancy, part owner of PSGI and the protagonist, as described in the factum of Moffat.

22 The factum provides a summary of the history of the exposure of the property to the market by the Receiver and concludes that the sale should not be approved on two grounds, firstly, that the timing of the marketing process and lack of any reasonable "third party" offers indicated that the property had not been sufficiently marketed, and secondly, that the marketing results of the property "as is" should have caused the Receiver to reconsider its decision regarding completion of construction of the project.

23 The factum also indicated that counsel for Moffat and Benchmark would not be appearing on the return of the motion.

24 The Order, as requested by BDO, was made by C. Campbell J. and no appeal was taken from this hearing.

25 The Receiver then proceeded to close the sale transaction and subsequently made a motion to the court to seek approval of final accounts and to seek its discharge. The Receiver filed the Fourth Report in support of this motion. Spence J. made the Order which has been described above, after hearing submissions of counsel for the Receiver, Benchmark and Moffat.

26 At all times it should be noted that the first mortgagee, TD Bank, and the second mortgagee, Cosbild Investment Corporation, did not oppose the relief being brought by the Receiver.

27 The endorsements of Pepall J. and Then J. indicate that the submissions of Benchmark and Moffat were fully considered. Pepall J. decided, on the evidence before her, notwithstanding some errors in the Receiver's First Report, that those matters had been addressed and that the facts strongly supported the Receiver's recommendation and decision. Then J. also had the benefit of a very detailed factum from Benchmark and Moffat when he dismissed the application for leave. C. Campbell J. had the benefit not only of the factum that was submitted to the Divisional Court, but also the factum in response to the Receiver's application for approval of the Agreement of Purchase and Sale with GFC.

28 I now consider the affidavit of Moffat filed in support of this motion. The first twenty paragraphs deal with the period prior to the receivership application. Paragraphs 21 to 36 deal with proceedings during the receivership and a summary of the orders, motions and endorsements made in the proceedings. Commencing at paragraph 37 is a section entitled, "The Motions Associated with the Sale of the Property", which continues up to paragraph 50. It then concludes with a section which addresses procedural matters surrounding a discharge application.

29 The draft counterclaim attached to the Notice of Motion details the allegations of negligence and breach of fiduciary duty.

30 Paragraph 68 of the draft pleading deserves specific mention. Benchmark and Moffat acknowledge that the actions of the Receiver they complain of have been the subject of a previous hearing. Paragraph 68 reads as follows:

> The Receiver in pursuing its decision to sell the lands 'as is' failed to meet the standard of care required of it in order to meet its duty of care to Benchmark Equity Corporation and Peter B. Moffat. ***Particulars of the breaches of the standard of care have previously been provided to the Receiver and are detailed in the factum provided by Benchmark Equity Corporation and Peter B. Moffat to the Receiver for the purposes of the motion seeking leave to appeal*** [emphasis added].

31 The pleading goes on to allege that as a result of the Receiver's conduct in the sale process, the Agreement of Purchase and Sale was completed with GFC, which is related to the defendants to the cross-claim, in particular Melvyn A. Dancy, and that the involvement of Mr. Dancy was known to the Receiver.

32 The complaints recited in the draft pleading have already been the subject of Court Orders made by Pepall J., Then J. and C. Campbell J. These Orders approve the activities of the Receiver. In my view the record clearly indicates that the activities of the Receiver were detailed in the reports filed by the Receiver, and complaints about the activities of the Receiver were detailed in two affidavits and two facta submitted by Benchmark and Moffat. The activities of the Receiver could scarcely have been approved if the courts hearing these previous motions had been of the view that there was substance in the complaints raised by either Benchmark or Moffat in the evidence and on the arguments submitted by them.

33 The approach of Benchmark and Moffat is very similar to the approach that was taken by the objecting parties in *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.). The words of Blair J. (as he then was) in disposing of the matter are equally applicable to this case. In paragraph 18 he said the following:

> In short, the disposition of these questions was "fundamental to the decision arrived at" by Farley J. because the Receiver's activities could scarcely have been approved if he had been of the view that there was substance in the complaints raised by the Crown in the evidence and on the argument before him. The very same issues regarding which the Crown now seeks leave to pursue the Receiver were raised in the proceedings before Mr. Justice Farley, and Mr. Justice Montgomery, or could have been raised, through reasonable diligence. They were decided. The decisions are final and binding, subject to the results of the appeals. The parties are the same. The doctrines of *res judicata* or of issue *estoppel* apply. See: *Angle*

v. Minister of National Revenue (1974), 47 D.L.R. (3d) 544 (S.C.C.), particularly per Laskin J. at p. 551, and per Dickson J. at pp.555-556; *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 H.L., per Lord Guest at pp.564-565.

34 The situation in the case at bar is even more clear than that in *Bank of America Canada*, due to the fact that there are no outstanding appeals. The previous Court Orders in these proceedings are final and binding.

35 The language in paragraph 3 of the Order of Spence J. does not operate so as to permit the moving parties to re-argue these issues. Rather, that paragraph merely provides that the defendants are free to bring this motion. Having done so, the motion, in my view, is properly dismissed on account of *res judicata* or issue *estoppel*.

36 Furthermore, in the event that the matter had not been disposed of in this manner and it was necessary to consider whether leave should be granted, I am in agreement with the reasoning of Blair J. in *Bank of America Canada* in circumstances such as this, where there have been a number of orders approving the conduct and activities of the Receiver, the more stringent "strong *prima facie* case" test would have to be met by any party seeking leave to sue the Receiver.

37 The allegations of gross negligence and breach of fiduciary duty have been considered and rejected at various court hearings in this proceeding. In so doing, this Court has already decided that the Receiver discharged its responsibilities in a proper manner and acted honestly and in good faith, and dealt with the property of PSGI in a commercially reasonable manner. Having reviewed the record and heard the submissions of the parties, I see no reason to question any of the decisions previously made in this matter. Consequently, I am of the view that the moving party has not demonstrated that it has a strong *prima facie* case against BDO on the matters at issue. The proceeding is, in my view, nothing more than an attempt by Moffat and Benchmark to re-litigate past issues by involving a court-appointed Receiver whose conduct was both authorized and approved by previous Court Orders.

38 I have also considered the issues that Moffat raised in his affidavit sworn April 20, 2005, which alleged a conflict of interest on the part of BDO insofar as BDO was the auditor of a corporation, Vital Retirement Living Inc., which was controlled by Mr. Dancy. I have also considered the response of Mr. Clarkson in his affidavit sworn July 12, 2005. I am satisfied that the parties involved at BDO in its capacity as Receiver of PSGI had no knowledge of the audit engagement that BDO's Calgary office had with Vital Retirement Living Inc. In my view BDO's activities were not in any way affected by the engagement of BDO as auditor of Vital Retirement Living Inc.

Disposition

39 It follows that to grant leave to Benchmark or Moffat to proceed would be to allow them to pursue a claim that no longer has any foundation, is frivolous and vexatious. An order will go dismissing the motion of Benchmark and Moffat.

40 If the parties are unable to agree on costs within 15 days of the date of release of this endorsement, I invite them to make written submissions (maximum three pages each) within a further period of 15 days.

Motion dismissed.

2007 ONCA 145
Ontario Court of Appeal

Toronto Dominion Bank v. Preston Springs Gardens Inc.

2007 CarswellOnt 1182, 2007 ONCA 145, [2007] O.J. No. 801, 155 A.C.W.S. (3d) 840, 31 C.B.R. (5th) 167

The Toronto Dominion Bank (Plaintiff) and Preston Springs Gardens Inc., Benchmark Equity Corporation, Peter B. Moffat, Melvyn A. Dancy and Dondeb Inc. (Defendants / Appellants) and BDO Dunwoody Limited (Proposed Defendant to the Counterclaim / Respondent)

S.T. Goudge, E.E. Gillese, S.E. Lang JJ.A.

Heard: February 26, 2007
Judgment: February 26, 2007
Docket: CA C45181

Proceedings: affirming *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List])

Counsel: Thomas J. Corbett for Appellants
Evert Van Woudenberg, James R.G. Cook for Responding Party, BDO Dunwoody Limited

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

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

Headnote

Debtors and creditors --- Receivers — Discharge of receiver — Practice and procedure

Plaintiff bank held first mortgage from bankrupt — Defendant company was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed — Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property, and motion was dismissed — Motions judge held that defendant's claims were frivolous and vexatious and had no valid foundation — Motions judge held that defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Motions judge held that previous order merely granted defendant right to bring motion, not to re-argue stale issues — Defendant appealed — Appeal dismissed — Issue estoppel dictated that defendant could not try issues for fourth time, and it would be abuse of process to allow it to do so — Allegations of negligence and breach of fiduciary duty in appeal at bar were made in previous proceedings — Defendant had litigated same facts and arguments to final disposition three times — Essentially all facts concerning receiver's conduct were known throughout.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Allegations of breach of fiduciary against receiver — Plaintiff bank held first mortgage from bankrupt — Defendant company was one guarantor of indebtedness of bankrupt to plaintiff — Bankrupt made filing and receiver was appointed

— Receiver was granted approval to market and sell property of bankrupt — Receiver reached agreement to sell property to third party and was granted approval to proceed against objections of defendant — Receiver's motion for discharge and approval of actions and final accounts was granted — Order specifically stated that defendant was not limited by principles of res judicata or estoppel in any future motion seeking leave to sue receiver — Defendant brought motion for leave to bring counterclaim against receiver for damages for negligence or breach of fiduciary duty related to sale of property, and motion was dismissed — Motions judge held that defendant's claims were frivolous and vexatious and had no valid foundation — Motions judge held that defendant's allegations of gross negligence and breach of fiduciary duty had already been considered and rejected at various court hearings in proceeding — Motions judge held that previous order merely granted defendant right to bring motion, not to re-argue stale issues — Defendant appealed — Appeal dismissed — Issue estoppel dictated that defendant could not try issues for fourth time, and it would be abuse of process to allow it to do so — Allegations of negligence and breach of fiduciary duty in appeal at bar were made in previous proceedings — Defendant had litigated same facts and arguments to final disposition three times — Essentially all facts concerning receiver's conduct were known throughout.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Alleged dereliction of duty by receiver.

APPEAL by guarantor from judgment reported at *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2006), 19 C.B.R. (5th) 165, 2006 CarswellOnt 2835 (Ont. S.C.J. [Commercial List]) dismissing guarantor's motion for leave to bring claim against receiver in relation to sale of debtor's property.

***Per curiam*:**

Endorsement

1 The appellants raise two arguments in their main appeal.

2 First, they argue that neither all the facts nor the legal characterization that they seek to put on them in their proposed action have been litigated before, and that the motion judge erred in finding otherwise.

3 We disagree. The appellants acknowledge that essentially all the facts concerning the Receiver's conduct have been known throughout, with the exception of the details that now may be available from the Receiver's notes of a meeting on May 7, and a possible further cross-examination on those notes. However from the beginning, the Receiver disclosed the meeting and who was present. It would have been possible to obtain the notes through cross-examination in the prior proceedings but the appellants chose not to do so. Moreover, it is hard to see what value would be added to the appellant's proposed allegations by those notes. Thus, with this minor exception all the facts have been previously scrutinized by the court and the Receiver's conduct has been found entirely proper.

4 As to the proposed legal characterization of those facts, counsel told us that the allegations of negligence and breach of fiduciary duty have not been made in previous proceedings. A perusal of the facta filed by counsel in those proceedings makes it obvious that that representation is not so. The very allegations were indeed made in those terms, and, like the facts, have been scrutinized in previous proceedings.

5 Two judges have expressly found that, given the facts and in spite of the arguments of the Receiver's negligence and breach of fiduciary duty, the Receiver was throughout seeking to deal with the property prudently and fairly, and in a commercially reasonable manner. The appellants' arguments were obviously rejected. The same facts and arguments were put before a third judge in opposing the order approving the sale, and while he gave no reasons, that judge also clearly rejected them because he granted the order.

6 The appellants have therefore litigated the same facts and arguments to final disposition against the Receiver not once but three times. We agree with the motion judge that since the appellants, having previously chosen to put in issue before three courts the facts, and the arguments that the Receiver breached its duty of care and its fiduciary obligation, and having had those issues determined against them to the point of finality, issue estoppel dictates that they not be permitted to try a fourth time. At the very least it would be an abuse of process to permit them to do so.

7 In light of this conclusion, we need not deal with the appellants' second argument, namely that if issue estoppel does not apply, the motion judge erred in the test he applied to determine whether leave to commence the proposed action should be granted.

8 Finally, the appellants also seek leave to appeal the costs order below. We see no reason to interfere with the discretion of the motion judge to award costs on a substantial indemnity scale. While the allegations made against the Receiver do not extend to fraud, they are allegations of a serious dereliction of duty by the Receiver. Particularly in light of the fact that the appellants have sought unsuccessfully to raise these allegations again, and again, we see no error in the scale ordered.

9 The appeal must be therefore dismissed.

10 The appeal is dismissed with costs in the amount of $15,000.00 inclusive of disbursements and G.S.T.

Appeal dismissed.

End of Document

TAB 3

1993 CarswellOnt 249
Ontario Court of Justice (General Division)

Bank of America Canada v. Willann Investments Ltd.

1993 CarswellOnt 249, [1993] O.J. No. 3039, 23 C.B.R. (3d) 98, 44 A.C.W.S. (3d) 437, 5 W.D.C.P. (2d) 26

BANK OF AMERICA CANADA v. WILLANN INVESTMENTS LIMITED and CRANBERRY VILLAGE, COLLINGWOOD INC.

R.A. Blair J.

Judgment: December 14, 1993
Docket: Docs. 76984/91Q, Commercial List B22/91

Counsel: *Frank Bennett* and *E.O. Peterson*, for Attorney General of Canada.
William E. Pepall and *Angus McKinnon*, for Coopers & Lybrand Limited, receiver and manager.
Stephen Schwartz, for Prenor Trust Company of Canada.
E.J.C. Newbould, Q.C., for Bank of America Canada.

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

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

Headnote

Receivers --- Actions by and against — Actions against receiver

Receivers --- Actions by and against — Practice and procedure — General

Receivers — Actions — Against court-appointed receiver — Threshold test for leave to commence proceedings against receiver being "strong prima facie case" — No reason existing for receiver to seek court approval of its activities if less stringent test for leave used.

The Crown, in its provincial and federal capacities, was a secured creditor of the debtor company. It was second in priority behind the bank, whose rights had been assigned to the trust company, and ahead of the trust company in its own right. The bank and the trust company held security over all of the debtor's assets; the Crown did not. The court appointed a receiver of the debtor.

In preparing to sell the assets of the debtor, the receiver divided the assets into "core assets" and "non-core assets". The Crown did not have security over the non-core assets. The sale was approved by court order, over the adamant objections of the Crown. An appeal from that order was unsuccessful, and an appeal from that decision was dismissed. The activities of the receiver were approved by the court.

The Crown sought leave to sue the receiver for negligence and breach of fiduciary duty in its realization of the debtor's assets. The receiver opposed the granting of leave, arguing that as the issues had already been determined against the Crown in the proceedings with respect to the approval of the sale and the passing of the receiver's accounts, the Crown was estopped from asserting them again.

Held:

The motion was dismissed.

Leave to commence proceedings against a court-appointed receiver will normally be granted, unless there is no foundation for the claim or it is frivolous or vexatious. That usual test set a threshold that was too low for cases in which the activities of the receiver, including the conduct sought to be impugned by the creditor seeking leave, have already been approved by the court. Circumstances such as those in this case demanded the more stringent "strong prima facie case" test. If that more stringent test is not used, there would be no reason for the receiver to seek court approval of its activities.

The same issues that led the Crown to bring the present motion had been raised and dealt with, or could have been raised through reasonable diligence, in the prior proceedings. The issues were decided, and the decisions were final. The parties were the same as those in the prior proceedings. The doctrines of res judicata and issue estoppel applied.

Table of Authorities

Cases considered:

Angle v. Minister of National Revenue (1974), 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397 (S.C.C.) — *referred to*

Bayhold Financial Corp. v. Clarkson Co. (1985), 70 N.S.R. (2d) 70, 166 A.P.R. 70 (C.A.) — *referred to*

Canada Deposit Insurance Corp. v. Greymac Mortgage Corp. (1991), 2 O.R. (3d) 446 (Gen. Div.), affirmed (1991), 4 O.R. (3d) 608 (C.A.) — *applied*

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853, [1967] R.P.C. 497, [1966] 2 All E.R. 536 (H.L.) — *referred to*

Diehl v. Carritt (1907), 15 O.L.R. 202 (K.B.) — *referred to*

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of), (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245, 61 Alta. L.R. (2d) 165, [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173 (Q.B.) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.) — *referred to*

Motion by Attorney General of Canada for leave to bring proceedings on behalf of federal and provincial Crown against receiver/manager.

***R.A. Blair J.*:**

Background

1 This is a motion by the Attorney General of Canada, on behalf of both the federal and provincial Crown, for leave to commence an action against Coopers & Lybrand Limited ("Coopers") in its professional capacity as receiver and manager of Willann Investments Limited and Cranberry Village, Collingwood Inc. Leave is necessary because paragraph 8 of the original Court Order of July 11, 1991, appointing Coopers as receiver and manager so stipulates.

2 The Crown, in its federal and provincial capacities, is a secured creditor of the Defendants in an amount of approximately $3 million. It stands in second position, behind the Plaintiff (whose rights have been assigned to Prenor Trust) and ahead of Prenor Trust in Prenor's own right. The Crown, however, does not have security over all of the defendants' assets, whereas Bank of America Canada and Prenor Trust do; and therein lies the rub.

3 For the purposes of sale by Coopers (whom I shall sometimes refer to as "the Receiver") the assets of the defendants were divided into "core assets" and "non-core assets". The Crown does not have security over the latter. In the sale of Cranberry Village by the Receiver, which took place earlier this year, the purchase price was allocated in a fashion that split the values of the assets and attributed them to non-core assets in a way which benefited the Plaintiff and Prenor Trust, but which left the Crown empty handed. One can readily understand why the Crown is out of sorts over this development. However, the sale was approved by Farley J. on December 23, 1992, after a hotly contested hearing in which the Crown vigorously objected to the sale. Moreover, the Order of Farley J. was approved by the Court of Appeal, and the appeal therefrom dismissed, on April 23rd of this year.

4 Shortly thereafter, on April 30, and again on June 28, 1993, Mr. Justice Farley was called upon to deal with matters pertaining to this troubled receivership anew. On April 30th he was asked to approve the activities of the Receiver, as set out in its Second, Third and Fourth Reports (dealing with the period September 1991 to September 1992), and to pass the Receiver's accounts. On June 28th, he was asked to approve the Receiver's activities as set out in its Sixth and Seventh Reports. Farley J. approved the Receiver's activities as requested in both instances, and approved the passing of accounts [reported at 20 C.B.R. (3d) 223 (Ont. Gen. Div.)]. The Receiver's activities for the earliest period of the receivership, that prior to September 27, 1991, were approved by Order of Montgomery J. dated November 21, 1991.

5 Leave is sought, as Mr. Bennett put it on behalf of the Crown, to sue the Receiver for negligence and breach of fiduciary duty "in the method and manner of realization" of the defendants' assets. The particulars of the allegations sought to be made are set out in the draft statement of claim and repeated in the affidavit of Christine Zuk, sworn in support of this motion. The granting of leave is opposed by the Respondents on the basis, essentially, that the issues have already been determined against the Crown in the proceedings respecting the approval of the sale and the approval of the Receiver's activities, and, accordingly, that the Crown is estopped from asserting them again, with the result that no action can lie. The Respondents also argue that the Crown has failed to put forward any evidence to support its position.

Law and Analysis

The Test

6 I do not find it necessary to deal with the law or the facts in these Reasons at great length, although I have given very careful consideration to both, and to the careful and able arguments presented by counsel. In my view this is not a proper case for the granting of leave to proceed.

7 A number of authorities stand for the proposition that leave to commence proceedings against a court-appointed receiver will normally be granted, unless it is perfectly clear that there is no foundation for the claim or the action is frivolous or vexatious: see, *Diehl v. Carritt* (1907), 15 O.L.R. 202 (K.B.); *Roynat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 69 C.B.R. (N.S.) 245 (Alta. Q.B.); *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.). In the latter case, however, Mr. Justice Farley pointed out that the application for leave should not be dealt with on a perfunctory basis, but that there should be a very careful examination of both the factual and legal issues, and that leave should not be given in a blanket or carte blanche manner (see p. 391).

8 In none of the cases which were referred to me could it be said — as I am satisfied it can be said here — that the very complaints with respect to which it is sought to obtain leave to sue the receiver were, in substance, dealt with and determined as part of vigorously opposed proceedings, involving the same parties, leading to Court approval of that very conduct. I shall return to a more detailed examination of those circumstances later in these Reasons.

9 In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court. In such circumstances, I prefer the analogy to the test for the granting of an interlocutory injunction adopted by Mr. Justice Chadwick in *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.), at pp. 455-456, appeal dismissed (1991), 4 O.R. (3d) 608 (C.A.). Whether that test is described as that of establishing "a reasonable cause of action", as Chadwick J. described it, or in the more traditional terms of "a strong *prima facie* case" or the lesser "sufficient case to be tried", I am satisfied on the materials before me that the Crown has not met the test in this case. In circumstances such as these, I would endorse the more stringent "strong *prima facie* case" test.

10 Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

Res Judicata or Issue Estoppel

11 In the proceedings respecting the approval of the sale of the assets by the Receiver, the allocation of amounts to the non-core lands in a fashion which, as Farley J. noted, would mean "the Crown would go begging", was very much an issue. Mr. Justice Farley carefully examined the justification put forward by the Receiver and Prenor Trust for "this seeming hocus-pocus" and concluded, after doing so, that the combination of various factors "washed away" the hocus pocus. He found that the Receiver "had made a sufficient effort to get the best price and it [had] not acted improvidently." His Order "authorized, empowered *and directed*" the Receiver "to perform its obligations under the Purchase Agreement".

12 The grounds of appeal from this decision included an attack on the allocation of the purchase price, as outlined above, and the assertion that Farley J. had erred "in finding that all avenues for marketing the Purchased Assets were exhausted by the Receiver and that the Receiver had made a sufficient effort to get the best price *and had not acted improvidently*". In its factum on the appeal, the Crown submitted that the learned Motions Court Judge had erred "in not scrutinizing with greater care the procedure followed by the Receiver" and that he "should have examined the Receiver's conduct in light of the information if [sic] had when it agreed to accept the Offer". As already noted, the Court of Appeal dismissed the appeal. It found the submissions of the Crown to be "without merit".

13 In the later Hearings, *which related specifically to the approval of the Receiver's activities*, as well as to the passing of the Receiver's accounts, the conduct of the Receiver was placed even more directly in issue by the Crown. See the affidavit of Christine Zuk, sworn April 23, 1993, "in support of the Crown's *objection to the approval of the Receiver's activities*" (Receiver's Compendium, Tab 14). Indeed, the Crown was candid on the April 30 Hearing in asserting that it was not interested in the passing of accounts, "but only wished to participate ... for the purpose of protecting its interests vis-à-vis a lawsuit it was threatening against the Receiver" (Reasons of Farley J., Compendium p. 119). The Crown also indicated "that its concerns lay not with the Receiver's 'managerial' functions *but with its 'realization' duties*" (p. 119, emphasis added). Farley J. then went on to outline three specific areas in which the Crown faulted the Receiver, namely,

> (i) its failure to obtain an appropriate and an independent appraisal in time for the October 15, 1991 tender (it is the gravamen of the Crown's case that the Receiver should not have rejected a $20 million tender by Prenor Trust (which amount would have yielded a return for the Crown) and later sold the assets for $17 million (which did not));
>
> (ii) its provision of a copy of a second appraisal report to Prenor Trust, while not providing the Crown with a copy of the report until sometime later; and,
>
> (iii) its delay and mishandling of the listing arrangements once the tender process had failed to generate a buyer for the project.

14 Farley J. dealt with each of the Crown's submission carefully and fully. He decided, on all of the evidence before him, that, while there may have been "various slips and embarrassments" by the Receiver, the Receiver had satisfied the test of showing that it had acted as a prudent business person would have acted, and that no harm had been occasioned to the Crown by its conduct. Farley J. also had the benefit of *viva voce* evidence from the president of Prenor Trust with regard to the $20 million Prenor bid, which the Crown asserts the Receiver should have taken. He accepted the Prenor Trust evidence on this point, and concluded that the first mortgagee did not find the terms of the Prenor Trust bid acceptable "with the result that any negotiation on terms with it were preempted" (Reasons, Compendium, p. 126). In other words, there was no reasonable likelihood that the Prenor deal would have been completed.

15 The Orders of Mr. Justice Farley approving the activities of the Receiver are presently under appeal. The appeals, I am advised, have not yet been perfected.

16 An examination of the grounds of appeal, in conjunction with the allegations raised in the proposed statement of claim, as set out in the Christine Zuk affidavit of September 14, 1993, is instructive. I will refer only to the grounds of appeal from the Order of Farley J. dated May 2, 1993 (respecting the April 30 Hearing), rather than what is set out in both sources. The grounds of appeal assert that Farley J. erred in reviewing the Receiver's conduct and activities at all, "to the detriment of the Crown's position", and further, that he erred in failing to conclude that the Receiver owed a fiduciary duty and breached that duty "amongst other areas" in,

> a) failing to consult the secured creditors *on the method and manner of realization* with respect to the first tender offering (i.e., the October 1991 tenders);
>
> b) failing to consult the secured creditors on rejecting the tenders that had been submitted;
>
> c)failing to apply to the Court, pursuant to the July 11, 1991 Order, for directions with respect the sale or rejection of tenders; and,
>
> d)failing to request new tenders or re-negotiate existing tenders when if found out that it had rejected the tenders on an inadequate appraisal.

17 These grounds recite complaints which are identical to those set out in subparagraphs 5(a), (d), (e) and (f) of Ms. Zuk's affidavit as allegations of negligence and breach of fiduciary duty. A review of the materials and evidence before Mr. Justice Farley on the Hearings, and of his Reasons, indicates that the "other areas" referred to above undoubtedly include most, if not all, of the other particulars of negligence listed in Ms. Zuk's affidavit and the proposed statement of claim. They all reveal that the Crown's complaints about the appraisal process and the general marketing and realization strategies of the Receiver were front and centre in the proceedings and in their disposition.

18 In short, the disposition of these questions was "fundamental to the decision arrived at" by Farley J. because the Receiver's activities could scarcely have been approved if he had been of the view that there was substance in the complaints raised by the Crown in the evidence and on the argument before him. The very same issues regarding which the Crown now seeks leave to pursue the Receiver were raised in the proceedings before Mr. Justice Farley, and Mr. Justice Montgomery, or could have been raised, through reasonable diligence. They were decided. The decisions are final and binding, subject to the results of the appeals. The parties are the same. The doctrines of *res judicata* or of issue estoppel apply. See: *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.), particularly per Laskin J. at p. 551 and per Dickson J. at pp. 555-556; *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), per Lord Guest at pp. 564-565.

19 It may be that a Court should be cautious about giving effect to an argument of *res judicata* on a motion of this sort on the premise that such an allegation "can only be properly canvassed after evidence has been taken": see, *Bayhold Financial Corp. v. Clarkson Co.* (1985), 70 N.S.R. (2d) 70, 166 A.P.R. 70 (C.A.). However, there is no particular magic in, or need for, *viva voce* evidence at a trial if the evidence before the Court is adequate to enable the Court to determine whether the tests for the application of *res judicata* have been met. That is the case, in my view, here.

20 It follows that to grant leave to the Crown to proceed would be to allow it to pursue a claim that no longer has any foundation or is frivolous or vexatious — at least, pending the determination of the outstanding appeals.

Conclusion

21 Accordingly, an Order will go dismissing the Crown's motion for leave to commence an action against Coopers & Lybrand Limited in its professional capacity as receiver and manager of the Defendants, subject to the caveat that the Crown may renew its Motion in this respect in the event that it is successful on its appeals from the Orders of Farley J. dated May 2 and June 28, 1993.

22 I may be spoken to with respect to the issue of costs, if counsel so desire.

Motion dismissed.

End of Document

TAB 4

Indexed as:

Bayhold Financial Corp. v. Clarkson Co.

Between
The Clarkson Company Limited and Daniel Scouler,
appellants, and
Bayhold Financial Corp. Limited, respondent

[1985] N.S.J. No. 296

70 N.S.R. (2d) 70

S.C.A. No. 01433

Nova Scotia Supreme Court - Appeal Division
Halifax, Nova Scotia

Hart A/C.J.N.S., Jones and Matthews JJ.A.

Oral judgment: June 13, 1985.

(8 paras.)

Striking out statements of claim -- Estoppel -- Res judicata -- Application to strike out claim dismissed -- Court reluctant to strike claim on basis of res judicata before evidence canvassed -- Receivers -- Court-appointed receivers -- Actions against -- Secured creditor otherwise exempt from order requiring leave to commence action against court-appointed receiver.

This was an appeal from a refusal to strike out the statement of claim. The plaintiff mortgagee had commenced an action against the court-appointed receiver alleging negligence. The receiver argued that the issues raised were res judicata and that leave to bring the action was required.

HELD: The appeal was allowed in part. It could not be said that the issue of negligence had been determined between the parties. A court was always reluctant to deprive a litigant of his right to trial, particularly where the allegation was one of res judicata which could only be canvassed after the evidence had been taken. Leave was necessary to commence the action even though it was brought by a secured creditor otherwise exempt from the receivership order. However, in the circumstances leave was to be granted and the action joined with the receivership proceedings.

Counsel:

Thomas P. Donovan and Robert G. MacKeigan, for the appellants.
Joel E. Fichaud, for the respondent.

THE COURT: Leave to appeal granted and part of the trial judge's order, dated April 3, 1985 be set aside per reasons for judgment by Hart A/C.J.N.S.; Jones and Matthews JJ.A., concurring.

1 **HART A/C.J.N.S.** (orally):-- This is an application for leave to appeal an interlocutory order of Mr. Justice Nathanson dated March 19, 1985, by which he refused to strike out the statement of claim in an action commenced by a mortgagee against the receiver appointed by the court upon the application of a creditor of the mortgagor.

2 The application alleged that the issues raised in the action were res judicata in that all matters relating to the realization of the plaintiff's security by foreclosure proceeding had been determined.

3 A review of the statement of claim reveals that the present action alleges negligence on the part of the receiver which caused the diminution of the value of the plaintiff's security.

4 We cannot say that this issue has as yet been determined between the parties. A court should always be reluctant to deprive a litigant of his right to a trial, particularly where the allegation is one of res judicata which can only be properly canvassed after evidence has been taken.

5 We would therefore confirm the finding of the trial judge on this issue.

6 At the time of the application, although it was not referred to in the notice of application, the issue of whether the leave of the court should be obtained before such an action could proceed was raised. The trial judge felt it was unnecessary because the action was brought by a secured creditor who was exempted from the terms of the receivership order. We are of opinion, however, that a negligence claim was not so exempted and would hold that such an application for leave should have been made.

7 Under all of the circumstances, we would, however, do what the trial judge could have done and treat the matter as if leave had been applied for.

8 We would grant such leave and direct that the action be joined with the receivership proceeding for the determination of all issues outstanding between the parties. The costs of this appeal should be costs in the cause.

HART A/C.J.N.S.
Concurred in:
JONES J.A.
MATTHEWS J.A.

qp/s/qlmwm

TAB 5

1998 CarswellOnt 4981
Ontario Court of Appeal

Gallo v. Beber

1998 CarswellOnt 4981, [1998] O.J. No. 5357, 116 O.A.C. 340, 31 C.P.C. (4th) 60, 73 O.T.C. 240, 7 C.B.R. (4th) 170, 84 A.C.W.S. (3d) 891

Ivan Gallo, Plaintiff/Appellant and Monty Beber, in Trust and Doane Raymond Limited, Defendants/Respondents

Osborne, Goudge, Feldman JJ.A.

Heard: December 3, 1998
Judgment: December 22, 1998
Docket: CA C28790

Proceedings: reversing (1997), 49 C.B.R. (3d) 172 (Ont. Gen. Div.)

Counsel: *David Decker*, for the plaintiff/appellant.
Robert Muir, for the defendants/respondents.

Subject: Insolvency

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

Headnote

Receivers --- Actions by and against — Practice and procedure — General

Appointment order prohibited action against receiver/manager without leave — Receiver/manager took possession of demised premises and detained property owned by tenant plaintiff — Eighteen months after taking of possession and eight months after receiver/manager discharged, plaintiff, without leave, issued statement of claim including claims for accounting and damages in relation to property — Three months later, receiver/manager consented to return of property on plaintiff's motion — More than three years later, plaintiff moved for leave to issue statement of claim against receiver/manager on nunc pro tunc basis — Motion dismissed — Plaintiff failed to show absence of prejudice/justness of circumstances requiring nunc pro tunc relief — Plaintiff appealed — If receiver did take over and administer property which was not subject to security under which it was operating, then claim of owner of that property can certainly not be said to be frivolous or vexatious — Appeal allowed.

Table of Authorities

Cases considered by *Feldman J.A.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.) — considered

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of), (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245, (sub nom. *Roynat Inc. v. Allan)* 61 Alta. L.R. (2d) 165, (sub nom. *Roynat Inc. v. Allan)* [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173 (Alta. Q.B.) — applied

APPEAL by plaintiff of judgment reported at (1997), 49 C.B.R. (3d) 172 (Ont. Gen. Div.).

The judgment of the court was delivered by *Feldman J.A.*:

1 The appellant plaintiff required leave of the court to commence an action against the receiver. The original order made June 23, 1992 when the receiver was appointed so provided. This action was commenced without leave June 23, 1994, some months after October 22, 1993 when an order had been made discharging the receiver and approving its actions.

2 The plaintiff's allegation is that in administering the security which consisted of a mortgage over real property, the receiver also took over the plaintiff's chattels and proceeded to run the restaurant operated by his numbered company under lease within the mortgaged premises without any right to do so and using his chattels.

3 In the fall of 1994, the defendants had consented to an order in the action whereunder the chattels claimed by the plaintiff were returned to him. The action proceeded through pleadings, production and the discussion of dates for examination at which point the receiver first took the position that it would not proceed further with the action until an order had been obtained by the plaintiff granting leave to proceed. This was in the spring of 1996. For reasons not explained, the motion was only brought in the fall of 1997.

4 Neither the plaintiff nor his company were given notice of any of the court proceedings brought by the receiver or by the secured creditor, Mr. Beber, either to obtain the appointment of the receiver, to take over and operate the restaurant, or to discharge the receiver. The motions judge points out that the plaintiff did, however, become aware of the action of the receiver taking over his restaurant in the fall of 1992, and took no steps in response until the summer of 1993. Nor did he seek the leave of the court to commence an action against the receiver before the final order was made in the fall of 1993 discharging the receiver. However, the appellant explains this failure in his material. He apparently approached two lawyers to assist him but was not able to pay a retainer until he retained his current solicitors in July, 1993.

5 At that time his lawyer wrote to counsel for the creditor Mr. Beber, who is also counsel to the receiver, raising the issues with respect to his chattels and some correspondence ensued. However, the receiver proceeded to bring on its motion for discharge without giving notice to the plaintiff or his lawyer.

6 In his reasons, one of the issues on which the motions judge focuses is the fact that this motion was not brought before the discharge order was made. However, since that order was sought and made without notice to the plaintiff, in our view the plaintiff cannot be faulted on that score.

7 The test for a court to apply in determining whether to grant leave to sue a receiver *nunc pro tunc* is concisely set out in the headnote to *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 69 C.B.R. (N.S.) 245 (Alta. Q.B.):

> An application for leave to commence an action nunc pro tunc should be granted if to do so does not cause prejudice or any substantial injustice, and if leave would have been granted if it had been sought at the appropriate time. In the absence of prejudice, leave will generally be granted unless it is clear that there is no foundation for the claim or the action is frivolous or vexatious.

In certain circumstances, a stricter test for leave may be appropriate, such as in the case of *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.), where the same issues raised in the action had been raised or could have been raised in the discharge proceeding. In that case the court held that the applicant must show a strong *prima facie* case in order to meet the test for leave.

8 That is not the case here, as the issue of the receiver administering assets which may not have been the subject of the creditor's security does not appear to have been the subject of the discharge proceeding. Had the issue in that form been brought to the attention of the judge hearing the discharge application, notice would most certainly have been required for the plaintiff, the potentially affected party.

9 In this case the prejudice to the receiver is the fact that before the litigation commenced it had already obtained a discharge order upon which it should normally be able to rely. However this case is unusual in that the discharge order was made without

notice to the plaintiff and after the receiver had been notified through its counsel of the plaintiff's claims concerning the chattels, as discussed above. On its face, the order purports to discharge the receiver in respect of the mortgaged property, as one would expect, and not in respect of any other property. However, the effect of that order in the context of this litigation should be determined at the trial.

10 The other normal indicia of prejudice from the passage of time such as lost or destroyed documents or unavailable witnesses are not raised in this case. Furthermore the receiver has been able to deal with the litigation requirements and has already produced its affidavit of documents. There is no element of surprise here.

11 On the issue of the potential merits of the claim, the motions judge applied the more stringent "strong *prima facie* case" test. He found that the plaintiff had not satisfied that test, and further, that he had concerns even on the lower test. With respect, I disagree. If the receiver did take over and administer property which was not subject to the security under which it was operating, then the claim of the owner of that property can certainly not be said to be frivolous or vexatious. Given that that issue was not raised before the judge who granted the discharge and that the plaintiff was not notified of the hearing, this is not a case for the stricter test.

12 For the above reasons the appeal is allowed and an order will go *nunc pro tunc* allowing the plaintiff to proceed with this litigation. We accept the submission of the respondent that because the applicant was seeking an indulgence from the court, there should be no costs of the motion, but the costs of the appeal are to the appellant.

Appeal allowed.

TAB 6

Case Name:

1117387 Ontario Inc. v. National Trust Co.

Between
1117387 Ontario Inc. and Antonios ("Tony") Ishac, Applicants (Appellants/Respondents by way of cross-appeal), and National Trust Company, Respondent (Respondent/Appellant by way of cross-appeal)
And between
National Trust Company, Applicant (Respondent/Appellant by way of cross-appeal), and 1117387 Ontario Inc. and Antonios ("Tony") Ishac, Respondents (Appellants/Respondents by way of cross-appeal)

[2010] O.J. No. 1908

2010 ONCA 340

52 C.E.L.R. (3d) 163

262 O.A.C. 118

67 C.B.R. (5th) 204

2010 CarswellOnt 2869

188 A.C.W.S. (3d) 332

Dockets: C49609, C50315, C49609, C50315

Ontario Court of Appeal
Toronto, Ontario

M.J. Moldaver, R.G. Juriansz and G.J. Epstein JJ.A.

Heard: November 30, 2009.
Judgment: May 10, 2010.

(99 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Receivers --

Duties and powers -- Acting fairly -- Sale of assets -- Approval -- Appeal by company from motion judge's approval of receiver's report, sale of property to, and settlement of damage claim with, Petro-Canada dismissed -- Cross-appeal by receiver from order granting appellants leave to sue receiver based on its handling of sale and settlement allowed -- Process leading up to request for approval of sale and settlement was reasonable and prudent, and materials provided were sufficient to determine that settlement was reasonable -- Contradictory to grant order approving receiver's recommendations and to simultaneously grant leave to bring action for negligence in arriving at recommendations.

Appeal by the company, 1117387 Ontario, and its chief executive officer, Ishac, from a motion judge's approval of a receiver's report, the sale of the property to, and the settlement of a damage claim with, Petro-Canada. Cross-appeal by the receiver from part of the order granting the appellants leave to commence an action against the receiver based on its handling of the sale and settlement. The company owned property which contained a 12,000 square foot building divided into two restaurant facilities. Ishac personally guaranteed a portion of the first mortgage on the property given by National Trust. In 2001, contamination was discovered on the property. Petro-Canada, the owner of the adjoining land, admitted responsibility for the contamination. Ultimately the parties entered into a remediation agreement under which Petro-Canada was to pay for the remediation of the property and for other losses the company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce Petro-Canada's obligations under the remediation agreement and for damages. By this time, the mortgage had fallen into arrears and National Trust obtained a court order appointing Deloitte & Touche as receiver and manager. Eventually, the receiver was given authority over the claim against Petro-Canada and gave National Trust permission to try to resolve the matter directly with Petro-Canada. In September 2005, these two parties negotiated a settlement agreement whereby the damage claim would be settled, the property sold to Petro-Canada, and the company's mortgage debt partially recovered and partially forgiven. The receiver issued a report recommending the sale and settlement and moved for court approval. On appeal, the company and Ishac argued that the property would be sold for less than the best price that could have been obtained, and that the settlement was improvident because it would settle the company's claims for a fraction of its actual entitlement under the remediation agreement.

HELD: Appeal dismissed and cross-appeal allowed. The order granting leave to sue the receiver was set aside. The motions judge did not err in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement. The motions judge's conclusion that the receiver met its obligations, both in terms of the value of both components of the proposed settlement and in terms of the process by which it was reached, was amply supported by the application of the relevant legal principles to the findings of fact. The motions judge's decision to approve the sale to Petro-Canada for $1,187,500, on the basis of the receiver's recommendation was unassailable. The receiver made appropriate efforts to obtain reliable information as to the value of the property. It secured an agreement with Petro-Canada based on this value that was provident and advantageous to the creditors and the appellants. The fact that this agreement was with the polluter of the property was of no relevance. The receiver's appraisal and the motions judge's review of the receiver's recommendations based on that appraisal were perfectly sound. In considering the interests of those involved, and especially the receiver's primary duty to recover the mortgage debt from the appellants, the balance was clearly in favour of endorsing the settlement. The motions judge properly held that the process of arriving at the settlement was reasonable and prudent. There was nothing in the evidence that supported a conclusion that there was any unfairness in the judicial process. However, the motions judge used the wrong test in granting leave to commence an action against the receiver. It was contradictory and provided meaningless protection to a receiver to grant an order approving its recommendations and to simultaneously grant leave to bring an action for negligence or breach of fiduciary duty in arriving at these recommendations.

Appeal From:

On appeal from the order of Justice W.J.L. Brennan of the Superior Court of Justice dated October 10, 2008.

Counsel:

Earl A. Cherniak, Q.C. and Jeffrey A. Radnoff, for the appellants, 1117387 Ontario Inc. and Antonios Ishac.

John P. O'Toole, for the respondent, National Trust Company.

R. Aaron Rubinoff and Joël M. Dubois, for the respondent, Deloitte & Touche Inc.

[Editor's note: A correction was released by the Court May 13, 2010; the correction has been made to the text and the correction is appended to this document.]

The judgment of the Court was delivered by

G.J. EPSTEIN J.A.:--

OVERVIEW

1 In this action, the mortgagor and guarantor of the mortgage debt challenge the fairness of the conduct of the court-appointed receiver appointed by the mortgagee under the terms of the mortgage in relation to its actions pertaining to the mortgaged property.

2 The appellant, 1117387 Ontario Inc. (the "company"), owns property (the "property") in Bells Corners, Ottawa. The property contains a 12,000 square foot building divided into two restaurant facilities. The appellant, Antonios Ishac, is the chief executive officer of the company. He personally guaranteed a portion of the first mortgage on the property given by the respondent, the National Trust Company.

3 In 2001, contamination was discovered on the property. Petro-Canada, the owner of the adjoining land, admitted responsibility for the contamination. Ultimately the parties entered into an agreement (the "remediation agreement") under which Petro-Canada would pay for the remediation of the property and for other losses the company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce Petro-Canada's obligations under the remediation agreement and for damages.

4 By this time, the mortgage had fallen into arrears and National Trust obtained a court order appointing Deloitte & Touche as receiver and manager. Eventually, the receiver was given authority over the claim against Petro-Canada and gave National Trust permission to try to resolve the matter directly with Petro-Canada. In September 2005, these two parties negotiated an agreement (the "settlement agreement") whereby the damage claim would be settled, the property sold to Petro-Canada, and the company's mortgage debt partially recovered and partially forgiven. The receiver issued a report recommending the sale and settlement and moved for court approval.

5 The appellants appeal the motions judge's order of October 10, 2008, in which, among other things, he approved the report and thereby the sale of the property to, and the settlement of the damage claim with, Petro-Canada. The appellants' primary contentions are that the property will be sold for less than the "best price" that could have been obtained, and that the settlement is improvident because it would settle the company's claims for a fraction of its actual entitlement under the remediation agreement. The receiver cross-appeals that part of the order granting the appellants leave to commence an action against the receiver based on its handling of the sale and settlement. National Trust adopts and supports the receiver's position in the appeal from the judicial approval of the sale and settlement.

6 The appellants are clearly unhappy with how matters pertaining to the property have played out. However, the issues raised on appeal involve an analysis of the motions judge's findings of fact applied to well-established legal principles applicable to the exercise of his discretion. In my view, this analysis discloses no reviewable error on the part

of the motions judge. Accordingly, I would dismiss the appeal. For the reasons set out in paras. 93 and 94, I would allow the cross-appeal.

7 The appellants also move to introduce fresh evidence concerning events that took place during the period that the decision was under reserve by the motions judge. While, in the particular circumstances of this case, I would admit the fresh evidence, in my view, it does not assist the appellants.

FACTS

8 The company purchased the property in 1995, in part with money borrowed from National Trust. The loan was secured by a first mortgage in the amount of $650,000, registered against the property. In 1997, additional funds were advanced for renovations and the mortgage was increased to $905,000. This work was necessary as deficiencies in the building and equipment were interfering with the company's ability to attract sufficient rental income to keep the mortgage in good standing.

9 The mortgage fell into arrears in 1999 after the renovations were completed. As a result of these difficulties, National Trust exercised rights under the mortgage that allowed it to appoint an agent to collect and remit rents. At that time, the approximate principal balance of the mortgage was $884,000.

10 In February 2001, National Trust served a notice of intention to enforce security. On October 30, 2001, the parties entered into a six-month forbearance agreement, crystallizing the obligations of the mortgagor and mortgagee as of that date. By agreement, for the purposes of the forbearance agreement, the debt was fixed at $1,095,909.89, with the mortgage maturing on April 30, 2002.

11 The property had not been properly maintained and the company was having difficulty attracting sufficient rent to meet expenses. As a result, the company decided to sell the property. The company received a conditional offer of $1,450,000 with a closing date of February 1, 2002. The offer was conditional, in part, on a satisfactory environmental assessment. This assessment, completed in December 2001, demonstrated that the property was contaminated by petroleum hydrocarbons that had escaped from a neighbouring property owned by Petro-Canada. When the purchaser learned of the contamination, the sale was lost.

12 For some time after the contamination was found, commercial tenants continued to lease the property. Under the terms of the forbearance agreement the company agreed to lease the property to Vox Lounge. In March 2002, Vox renewed its lease for five years but only for part of the premises. In April 2002, the remainder of the building was leased to Dianne Dang, carrying on business as Buffet Place. Vox vacated in October 2003 and Ms. Dang, despite having been granted several reductions in rent, left in March 2004. Since then, the building has been empty and has fallen into disrepair.

13 The parties agreed to arbitrate the company's claims arising from Petro-Canada's acceptance of responsibility for the contamination. On February 3, 2003, just prior to the arbitration, the parties entered into the remediation agreement, the terms of which are as follows:

> 1. [Petro-Canada] will proceed with the remediation action plan set out in its report at a time convenient to both [the company] and [Petro-Canada's] consultants, but in any event not later than June, 2003, for the commencement of such work;
> 2. All work and investigations will be carried out in a manner so as to minimize to the greatest extent possible any interference with [the company's] lands and the ongoing operations by its tenants thereon;
> 3. The remediation of [the company's] lands is to be at no cost whatsoever to [the company] and all reasonable costs incurred by [the company] in the context of, or as a result of, the clean-up will be paid by [Petro-Canada];
> 4. Where the remediation interferes with the ongoing tenant businesses such that the tenant is

required to either vacate the premises or is justified in not paying full rental during such remediation operations, then [Petro-Canada] will reimburse [the company] for any reasonable loss of tenant revenue including all costs incurred in obtaining alternative tenants, if a tenant is lost as a result of ongoing remediation operations;

5. [Petro-Canada] will pay [the company's] reasonable consultant costs incurred by its consultants in supervising the remediation and testing to determine that appropriate remediation levels have been reached;
6. All work forces and equipment will be employed in such a manner and in such a way as to minimize the visual impact of the ongoing clean-up operation to the greatest extent possible.

14 For the purposes of the arbitration, the parties agreed that the fair value of the property was $1,735,000 based on a compromise between appraisals prepared by the appellants' valuator, Ron Juteau, and the receiver's valuator, David Atlin.

15 The arbitration continued on issues unresolved in the remediation agreement. On March 10, 2003, the arbitrator, the Honourable Mr. Rosenberg, awarded the company $208,200 to compensate for potential devaluation of the property due to stigma and $100,000 for future development costs. Petro-Canada paid the total award of $308,200 to the company.

16 On June 19, 2003, Mackinnon J., on consent of all parties, appointed Deloitte & Touche as the receiver over all matters relating to the property except for Petro-Canada's remediation obligations. These were left to the company.

17 In August 2003, because Petro-Canada had not started remediation in accordance with the agreed-upon schedule, the company sued Petro-Canada for breach of the remediation agreement. This claim was dismissed for want of prosecution and subsequently reinstated at the request of the appellants.

18 Various disputes arose between the parties over the remediation and related issues. As a result, by order dated October 9, 2003, Morin J. transferred the claim against Petro-Canada to the receiver and ordered the company to pay the $308,200 it received from Petro-Canada to the receiver on the basis that this money formed part of National Trust's security. The company has not complied with that order.

19 On November 6, 2003, the receiver listed the property for sale at a price of $1,380,000.

20 The remediation finally started in December 2003. It was anticipated that the process would take approximately three months. Exterior remediation was completed in March 2004. However, contamination was discovered under the building, necessitating excavation through the floor of the building and underpinning of the structure. This interior excavation started in August 2004 but was delayed later in the month as a result of the Ministry of Labour's concern about work-safety conditions. Excavation resumed on September 20 but was again suspended a month later over a dispute about which Ministry of Environment guidelines applied.

21 The clean-up came to a complete halt in December 2004. The principal dispute at that time involved whether the building had to be demolished to facilitate remediation or whether the structure could remain in place while remediation - more costly remediation - could be carried out.

22 On December 8, 2004, the receiver wrote to Petro-Canada demanding that it complete the remediation work and pay the damages owed under the remediation agreement. The receiver sought payment of $488,000 in compensation for lost revenues, property taxes and insurance incurred as a result of the remediation delay. The receiver also took the position that damages for ongoing delay were accruing at $35,000 per month. Petro-Canada took the position that these claims were "completely unrealistic".

23 On February 10, 2005, a meeting was held at Mr. Ishac's request. Representatives of National Trust and the receiver concluded that their differences with Mr. Ishac were too great to continue attempting to find a resolution

acceptable to all parties. Beginning in February 2005, with the concurrence of the receiver, direct settlement discussions began between National Trust and Petro-Canada.

24 By August 31, 2005, the outstanding amount owed under the mortgage was just over $2,000,000. In September 2005, the settlement agreement was reached between National Trust and Petro-Canada.

25 The receiver provided three reports to the court; two within the first six months of the receivership. The third was provided on November 29, 2005. It was in this report that the receiver recommended the approval of the settlement agreement that contained the following terms:

1) Petro-Canada would purchase the property from National Trust for $1,187,500.
2) Petro-Canada would demolish the building and complete the remediation of the property in accordance with current Ministry of the Environment standards.
3) Petro-Canada would pay the receiver an additional $200,000 in full satisfaction of its claims for lost rent and delay costs in the remediation.
4) The remaining mortgage debt owed by the company and Mr. Ishac to National Trust, approximately $600,000, would be forgiven.
5) Petro-Canada would offer the property to the company or its nominee at fair market value once the remediation has been completed.[1]

26 The report also states that the receiver will not seek to recover the $308,200 that Morin J. ordered the company to pay to the receiver.

27 With the exception of the appellants, all parties supported the proposed settlement agreement. This state of affairs generated three motions before the motions judge. The appellants sought orders prohibiting the sale of the property, permitting the appellants to prosecute the action against Petro-Canada and for leave to commence an action against the receiver arising out of the administration of the receivership. As an alternative, the appellants sought an order replacing the receiver and instructing the new receiver to prosecute all claims of the appellants "with dispatch". National Trust brought a cross-motion to approve the settlement agreement. The receiver brought a cross-motion for the same relief and for approval of its third report.

THE REASONS OF THE MOTIONS JUDGE

28 The motions judge approved the settlement agreement on the basis that the materials provided were sufficient to determine that the settlement was reasonable. He did not find it necessary to address the appellants' alternative request to replace the receiver.

29 Specifically, the motions judge found that the value proposed by the respondents for Petro-Canada's purchase of the land was reasonable. There was substantial evidence before the court, expert and otherwise, concerning the value of the property at the relevant times. The motions judge expressed specific concerns about the evidence upon which the appellants relied. He ultimately concluded that he preferred the receiver's evidence that the property, *in a completely remediated state*, was properly valued between $600,000 and $1,200,000. Based on that finding, the motions judge held that the price Petro-Canada agreed to pay for the property actually exceeded its value.

30 In terms of the other major contentious area, the claim against Petro-Canada for damages resulting from the contamination, there were two issues. First, the parties were divided over who should bear the responsibility for the loss of revenue and additional costs associated with the delay in the remediation work. Second, the appellants argued before the motions judge, as they did before this court, that the remediation agreement required Petro-Canada to remediate the property despite the difficulties arising from excavating beneath the floor of the building.

31 With respect to delay, the motions judge noted that Petro-Canada, citing difficulties in obtaining access to the property and in obtaining permission to remove soil through the building floor, blamed the company and the receiver

for the delays. The receiver blamed the company for interfering with both the commencement and the scope of the remediation work. The appellants blamed the receiver for generally failing to take all proper steps to protect their rights under the remediation agreement. The motions judge did not make a direct finding with regard to the ultimate cause of the delay.

32 In terms of complexity of the remediation work, the discovery of contamination under the building gave rise to a dispute over how to deal with it. After reviewing the evidence and arguments on that issue, the motions judge concluded that the building was beyond financially reasonable repair and had to be demolished to effect remediation of the contamination that had migrated through much of the property.

33 Against the background of the recommendations of the receiver in its third report, the parties' submissions, his findings, and the applicable law, the motions judge concluded that the process followed by the receiver in the complicated circumstances leading up to the request for approval of the sale and settlement was prudent and that the terms of sale and settlement recommended by the receiver were reasonable.

34 Having approved the settlement agreement, the motions judge dismissed the appellants' motion for an order returning the claim against Petro-Canada to their control, and declared the claims to be extinguished by the settlement agreement.

35 However, the motions judge did, somewhat curiously, grant the appellants leave to commence or continue proceedings against the receiver for "negligence or a failure to act with a fiduciary's due regard to the interests of a debtor" on the basis that if the allegations contained in Mr. Ishac's affidavits were proven, it would not be "perfectly clear that there was no foundation for the claim or the action is frivolous and vexatious". He made clear that he was "not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believes he could have won from Petro-Canada", despite his explicit finding that the "settlement is reasonable."

THE APPLICATION TO INTRODUCE FRESH EVIDENCE

36 The proposed fresh evidence discloses the following.

37 The motions were argued over a period of four days between November 21, 2006 and April 5, 2007, at which point, the motions judge took the matter under reserve. He released his decision on October 10, 2008.

38 On May 28, 2008, counsel for the receiver unilaterally contacted the motions judge requesting that he expedite the release of his decision. On July 15, 2008, a meeting among counsel and the motions judge took place in the motions judge's chambers. Several months later, counsel for the receiver, again unilaterally, contacted the motions judge and the Regional Senior Justice in another attempt to expedite the release of the decision. Shortly thereafter, the reasons were released.

39 At the meeting in his chambers, the motions judge indicated that he was not prepared to approve the settlement. Then, eighteen months following argument and three months following the chambers meeting, the motions judge released his decision in which he approved the recommended settlement and, at the same time, gave leave to the appellants to commence an action against the receiver.

40 Counsel for the appellants submits that the proposed fresh evidence will demonstrate that the receiver brought pressure to bear upon the motions judge to release his decision. Relying on this court's decisions in *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, at 325, and in *Leader Media Productions Ltd. V. Sentinel Hill Alliance Atlantis Equicap Limited Partnership* (2008), 90 O. R. (3d) 561, at 571, counsel for the appellants argues that this evidence should be admitted as it demonstrates that the judicial process was fundamentally unfair and brings the administration of justice into disrepute.

41 I agree with the appellants that in these circumstances the fresh evidence ought to be admitted. The authorities the

appellants cite make it clear that where the proposed fresh evidence raises issues of the validity of the process of the hearing, the interests of justice require its admission. In such cases, the traditional criteria for the admission of fresh evidence, found in *R. v. Palmer*, [1980] 1 S.C.R. 759, do not apply. Here, the issues raised in the proposed fresh evidence implicate the integrity of the administration of justice.

ISSUES

42 The issues raised in the appeal and cross-appeal can be grouped into the following two main categories:

1. Whether the motions judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.
2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

STANDARD OF APPELLATE REVIEW OF ORDERS APPROVING RECEIVERS' REPORTS

43 The principles to be applied in reviewing a sale or proposed sale by a court-appointed receiver are set out in this Court's decision in *HSBC Bank of Canada v. Deloitte & Touche* (2004), 71 O.R. (3d) 355. A court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the debtor's property. The receiver, as an officer of the court, is obliged to make full and fair disclosure to the court in all of its applications: *HSBC* at para. 26. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown.

44 Particularly where, as in this case, the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances: *HSBC* at para. 23. While the court must carefully scrutinize the procedure the receiver followed, it must be remembered that the receiver must act "with meticulous correctness, but not to a standard of perfection": *HSBC* at para. 26.

45 Finally, I note that the orders appealed from are discretionary in nature. As in the case of all discretionary decisions, this court will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations: *HSBC* at para. 22.

46 In *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), at p. 6, four factors are identified as considerations for the court in considering "whether a receiver who has sold a property acted properly". In my view, with appropriate modifications, the same factors can be applied in considering the providence of this settlement, where the values of both a property and a claim for damages are in issue:

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

47 Finally, at p. 7., *Soundair* affirmed the principle first stated in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.), that a court "ought not sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which the decision is reached."

ANALYSIS

1. Whether the motion judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.

A. The Receiver's Efforts to Obtain a Good Price

48 I turn to the first *Soundair* factor, whether the receiver has made sufficient efforts to obtain the best price, both for the property and the claim against Petro-Canada. Counsel for the appellants submits that the settlement agreement substantially undervalues not only the property but also the company's claim arising out of Petro-Canada's breach of the remediation agreement. What the receiver should have done, say the appellants, is force Petro-Canada to honour its obligations under the remediation agreement, both in terms of the remediation itself and the compensation that it agreed to pay as a result of the contamination, and then sell the remediated property at fair market value. This course of action, according to the appellants, would have resulted in National Trust's recovering its mortgage debt, with leftover equity value for the appellants. The motions judge's approval of the settlement agreement as reasonable, according to the appellants, is unsupportable. Rather, they argue, the settlement agreement is improvident.

49 I disagree. In my view, the motions judge's conclusion that the receiver met its obligations, both in terms of the value of both components of the proposed settlement and in terms of the process by which it was arrived at, is amply supported by the application of the relevant legal principles to the motions judge's findings of fact.

50 The law requires the receiver to pursue the debtor's rights. It is up to the receiver to carefully consider the available information and use its expertise to determine how to maximize the value of those rights. In relation to a cause of action, this responsibility can be met by settling the matter as long as the proposed compromise is commercially reasonable.

i. The sale of the property

51 In terms of the proposed sale of the property, the appellants take issue with the fact that the motions judge approved the receiver's recommendation of a sale at a price, which assumed the land was remediated, but was determined when the property was in an unremediated state. They contend that the receiver should have sought specific performance of Petro-Canada's obligations to remediate the property, or damages in the alternative, and then sold the property for fair market value in a remediated state.

52 I do not accept that argument.

53 First, it is highly unlikely that the receiver would have been successful in obtaining an order against Petro-Canada for specific performance of its remediation obligations. As the considerations set out in *Semelhago v. Paramadevan,* [1996] 2 S.C.R. 415 at para. 14, demonstrate, the principles of specific performance are mainly related to the transfer of property (either personal or real) and even then only when the property is unique in some way. As Estey J. wrote in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 668, "[b]efore a plaintiff can rely on a claim to specific performance...some fair, real and substantial justification for his claim to performance must be found." There was nothing unique about this property. Indeed, the only reason the company wanted it remediated was for the purpose of immediately selling it. There is no justification for forcing Petro-Canada to go to the expense of remediating the land, when the appellants' only interest is in the value of the land rather than the land itself.

54 The alternative remedy for breach of contract is damages such that the affected party is put in a position as though the contract had been fulfilled. To establish these so-called "expectation damages", the appellants relied on an affidavit of Philip Augustine, an experienced civil litigator.

55 Counsel for the appellants argues that the damage claim, (putting aside for the moment the claim for loss of rental income) is either $1,735,000, using the "reduction in value" method, or $3,980,468, using the "cost of performance" method. The "cost of performance" method of valuing damages from breach of contract, which Augustine takes to include the cost of destroying the building, remediating the property, and reconstructing the building, raises substantially the same issues as specific performance. I have already explained why this basis for damages is

unavailable to the appellants. Since the purpose of damages is to recover value that the appellants would have obtained under the contract, and since it is known that they intended to sell the property in order to pay their mortgage debt, the proper valuation method of damages is the "reduction in value" method. See Swan, A., *Canadian Contract Law*, 2nd ed., (Markham: LexisNexis Canada, 2009), at pp. 370 - 379.

56 The question of the value of the land in a pristine state is critical for measuring the reduction in value of the property caused by the contamination. The appellants are wrong, however, to argue that the only way to determine this value is to remediate the land and try to sell it on the open market. The receiver utilized a commercially reasonable alternative method; it requested and received appraisals from several appraisers for the property, appraisals that assumed the property to be in an uncontaminated state. The motions judge approved this method as legitimate and I agree.

57 So much for the method of determining value. As for the value itself, based on his preference of the receiver's evidence concerning the value of the property over that of the appellants, the motions judge found that the proposed sale price of $1,187,000 represented a fair value for the property. This finding is sound.

58 The motions judge rejected the property value the appellants advanced through the Augustine affidavit - and properly so. The Augustine analysis in support of a "reduction in value" of $1,735,000 was deficient. Augustine accepted the 2003 Juteau valuation of the property notwithstanding its obvious flaws. The motions judge noted that Mr. Juteau acknowledged on cross-examination that he was "unaware of serious deficiencies in the premises and substantial rent reductions (and vacancies) resulting from them." The valuation was therefore based on a capitalization of rental income that did not take into account existing rental arrears or the high turnover in tenants.

59 I note that Mr. Augustine made no attempt to reconcile or otherwise address the receiver's expert and market evidence that supported the receiver's position that the property in a remediated state, at the time it recommended the comprehensive settlement, had a value of between $900,000 and $1,050,000. I refer to the receiver's four comprehensive market value appraisals, the listing price recommended by real estate agents and the results of the listing agent's attempts to sell the property.

60 The appellants also argued that, by reason of its mismanagement, the receiver was responsible for the property's low value. This is not supported by the evidence. The evidence before the motions judge, including the appraisal reports, demonstrated that when the receiver was appointed in June 2003, it inherited a rundown property struggling to attract and maintain tenants willing to pay rent sufficient to cover operating costs.

61 The appellants' position is not assisted by the tender of an offer to purchase the property for $1,320,000 that the company received in January 2006, after the receiver sought approval of the proposed sale and settlement. The offer, never delivered to the receiver, was unsigned and contained conditions unfavourable to the vendor concerning remediation and the nature of the tenants. As well, the receiver had no obligation to consider this offer, given its timing. Moreover, the offer does not show that the price the receiver was recommending was so unreasonably low as to demonstrate that the receiver was acting improvidently in recommending it: see *Soundair*, at p. 9.

62 I conclude that the motions judge's decision to approve the sale to Petro-Canada for $1,187,500, on the basis of the receiver's recommendation is unassailable. The receiver made appropriate efforts to obtain reliable information as to the value of the property. It secured an agreement with Petro-Canada based on this value that was provident and in fact advantageous to the creditors and the appellants. The fact that this agreement is with the polluter of the property, is, in my view, of no relevance.

ii. The acceptance of $200,000 in damages

63 I will now turn to the settlement of the loss of rental income claim for $200,000.

64 Counsel for the appellants forcefully argues that the $200,000 does not come close to adequate compensation for

the loss of rent, asserted to be $838,000, based on $488,000[2] to December 2004, plus $35,000 per month after that to the date of Petro-Canada's acceptance of the offer.

65 Once again, I would not agree with this argument. It completely ignores the weaknesses of the claim, and the risks and costs associated with pursuing it.

66 The appellants approach the claim from the perspective that the receiver will be successful in demonstrating that the contamination was the sole cause of the loss of rental income. As previously indicated, the record demonstrates quite clearly that this is not the case. Before the further contamination was discovered in the spring of 2004, Vox Lounge had abandoned the property and was in arrears of rent in the amount of $70,000, and the Buffet Palace's rent arrears, part of which Mr. Ishac had forgiven due to its complaints about the state of the building, had reached $140,000.

67 Further, the delay in the commencement of the remediation and the conflict over the reasons for that delay, added to the uncertainty over the amount that might be awarded against Petro-Canada. The receiver claimed loss of rent from October 2003 to December 2004 in the amount of $214,262 and carrying costs including property management fees, property taxes, property insurance, legal fees and the receiver's fees and utilities. However, Petro-Canada denied many of these claims on the basis that the appellants bore responsibility for some, if not all, of the delay in the commencement of the remediation work from May until November 2003.

68 Then, there was further delay resulting from the dispute over how to remediate the soil under the building. The remediation agreement did not address who would be required to bear the burden of the loss of rental income caused by that delay.

69 Finally, Petro-Canada not only resisted the claim for loss of rental income, but also indicated it was going to launch a counter-claim for the costs caused by the appellants' delay.

70 The evidence available to the receiver about the claim for loss of rental income demonstrated that the amount of Petro-Canada's ultimate liability for damages was far from certain. Furthermore, the receiver was well aware of the other costs associated with litigation of this complexity such as ongoing carrying costs and unrecoverable legal costs. The receiver did not know, therefore, the exact value of this claim. What it did know was that Petro-Canada and National Trust supported a comprehensive resolution of the mortgage debt, in addition to the $200,000 Petro-Canada agreed to pay. Petro-Canada had already paid $318,000 to the company for damages arising from the contamination of the property pursuant to the arbitration award, and the receiver agreed to leave that amount with the company.[3] National Trust had also agreed to forgive the remaining mortgage debt of $600,000 owed by the appellants to National Trust.

71 Against this background the receiver made a realistic appraisal of value of the company's ancillary claims against Petro-Canada. It had to evaluate the risks and costs associated with litigation. This court must defer to the assessment and judgment of its independent receiver and to the exercise of discretion of the motions judge. In my view, the receiver's appraisal and the motions judge's review of the receiver's recommendations based on that appraisal are, in all of the circumstances, perfectly sound.

B. The Interests of All the Parties

72 The next part of the *Soundair* test requires that the judge conduct an examination of the interests of all the parties.

73 The secured creditor, National Trust, supports the settlement. It does so with the knowledge that it will realize a significant shortfall. Petro-Canada also supports the settlement, and the interests of a party that has negotiated a settlement with a court-appointed receiver are very important: see *Soundair* at p. 12.

74 It is only the appellants, the debtors, who opposed the proposal. They argue that the receiver's dereliction of duty has deprived them of equity they had in the property at the time of the receivership. They will recover nothing from this

settlement.

75 The appellants contend that the acceptance of the receiver's recommendations results in a loss to the company of approximately $400,000 in equity. They base their argument on an alleged offer to purchase the property for $1,500,000 submitted before the contamination was discovered.

76 However, the offer is not in evidence and the respondent argues that it was far from certain. The reliable evidence that is in the record places the value of the property in an uncontaminated state between $900,000 and $1,200,000, roughly the amount of the mortgage debt at that time. In my view, the record does not support the appellants' position that the company had equity in the property at the time the contamination was discovered.

77 Clearly, the receiver owes a duty to the appellants to treat them fairly. However, its primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors: *Soundair* at p. 12. The duty of fairness also requires that it maximize the return to the debtors, but such a return is not always commercially feasible. As Farley J. recognized in *Royal Bank v. Rose Park Wellesley Investments Ltd.*, [1995] O.J. No. 147 (Ont. C.J. Gen. Div.), at para. 9, there will frequently be a point below which certain interested parties will be adversely affected by the receiver's decision. If the receiver's decision is otherwise reasonable, it is entitled to determine, in the words of Farley J. "where the cusp will lie".

78 Here, the cusp lies at a place that is to no party's clear advantage; the amount satisfies neither the appellants nor National Trust. I further note that given that $2,016,466 was owing under the mortgage at the time the settlement was reached, the appellants would only stand to benefit if a purchaser could be found that was willing to pay almost twice the value of the property, or if Petro-Canada consented to pay out several times the amount it has indicated a willingness to pay in response to the damage claim for loss of rental income.

79 The losses these parties will suffer are unfortunate but are the reality of the circumstances that plagued this property with these issues in this market. Also, it is important to bear in mind that no payments had been made under the mortgage since 2001. As time goes by, the receiver's costs constitute a priority charge on the property and therefore continue to reduce the amount available to pay National Trust and ultimately the appellants.[4] In this case, Petro-Canada was the only purchaser that would be reasonably expected to purchase the property in its current state as though it were pristine. Without the sale, it would have been impossible for National Trust otherwise to recover any significant portion of the debt. The value of the claims against Petro-Canada was, as I have explained, uncertain, and the receiver could not have relied solely upon them in the discharge of its duties. In considering the interests of those involved, and especially the receiver's primary duty to recover the mortgage debt from the appellants, the balance is clearly in favour of endorsing the settlement, and the motions judge considered these factors in making his ruling.

C. The Process Through Which the Sale and Settlement were Obtained

80 I now turn to *Soundair* factors (c) and (d) - the efficacy and integrity of the process and the fairness in the implementation of the process. The motions judge was required to consider the integrity of the process by which the receiver determined the fair value of the sale and the settlement and the fairness in the working out of that process.

81 The process under which the sale agreement is arrived at should be consistent with commercial efficiency and integrity. See *Selkirk (Re)* (1986), 58 C.B.R. (N.S.) 245, at p. 286.

82 The appellants' complaint about the process appears to be that National Trust and Petro-Canada negotiated the price between them, essentially behind closed doors. However, the receiver gave National Trust and Petro-Canada permission to negotiate a sale, if one could be reached, only after it proved impossible to continue with the appellants' involvement. The receiver's conduct until this point was open and transparent. It obtained various professional opinions as to the market value of the property independent of the contamination. These values were tested through the results of the listing and marketing initiatives. The appellants sought and obtained a meeting for the purposes of negotiating a settlement. They participated in that process until their demands threatened to interfere with any possibility that the

negotiations would be successful. The receiver was entitled to make the determination that, as the motions judge put it, "[the respondents'] differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties."

83 The motions judge clearly put his mind to the difficulty the receiver faced in valuing the property including the costs of remediation to current standards and the law suit with all of its costs and risks. In the light of the evidence before him and due consideration to the uncertainties, the motions judge quite properly held that "the process [of arriving at the settlement] was reasonable and prudent".

2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

84 Counsel for the appellants argues that the fresh evidence of events that took place while the matter was under reserve, together with the decision itself, give his clients a legitimate reason to doubt that they have been fairly treated within the context of the judicial process. The submission is based on the letters the receiver wrote to the motions judge asking about the status of the release of his reasons and on the decision itself in relation to comments the motions judge is alleged to have made in the course of the in-chambers meeting. On the basis of the pressure brought to bear on the motions judge by the receiver and the contradictions in the motions judge's thinking between the meeting and the decision and within the decision itself, there is good reason to be concerned that the process was not fair.

85 I disagree with this submission.

86 Concerning the letters, I agree that it may have been preferable for the receiver to have consulted with counsel for the appellants before writing the two letters inquiring about the status of the release of the decision. However, I am not persuaded that these letters, which were purely of an administrative nature, are any cause for concern about the integrity of the judicial process. I also note that the appellants' stated concern about those letters in the context of this appeal was not brought to the attention of the motions judge.

87 This takes me to the appellants' other argument that the fresh evidence demonstrates uncertainty in the motions judge's mind about whether to approve the receiver's recommendations. This uncertainty is demonstrated, they say, by the length of time the matter was under reserve, the comments the motions judge made during the in-chambers meeting and the contradiction in the decision itself of approving the receiver's recommendations and granting the appellants leave to commence an action against the receiver for breach of duty relating to its recommendations.

88 First, as this court has said in *Dusk v. Malone* (2003), 167 O.A.C. 333, at para. 3, "a lengthy delay in...releasing reasons, without more, will not automatically amount to a denial of a fair trial. The fairness of a trial must be determined by the particular circumstances of each case so that generally some evidence of active prejudice must be shown."

89 Second, the evidence of what was said at the meeting, namely the notes produced by lawyers who attended the meeting, is inconclusive in terms of what the motions judge said or was thinking. He may have indicated some ambivalence about his view of the case at the time. Regardless, he was entitled to go off and wrestle further with the decision. He was entitled to make up his mind after that meeting and prepare reasons that support his decision to approve the settlement.

90 Despite approving the receiver's third report, the motions judge granted leave to the appellants to commence an action against the receiver on the basis that the receiver failed to perform its obligations in relation to the property, including recommending the sale and settlement. The appellants submit that granting leave to bring such an action cannot be reconciled with approving the receiver's third report. It therefore shows the motions judge's doubts about whether the receiver had acted properly in relation to the sale.

91 The motions judge was very clear in his reasons that he did not think the receiver had acted improperly. He

granted leave because "[h]owever difficult, [the appellants] might succeed in demonstrating negligence..." He later reiterated that he was granting leave because it was not "perfectly clear that that there is no foundation for the claim or that the action is frivolous or vexatious." It would appear that this concern motivated the motions judge to grant leave to the appellants to take proceedings against the receiver, in the light of the possibility that the receiver may not have acted "with a fiduciary's due regard to the interests of the debtor". However, he obviously thought this was a long shot.

92 In my view, the motions judge, in granting leave, applied the wrong test. Rather than applying the low threshold he did, he should have been satisfied that the appellants had established a strong *prima facie* case, before granting leave. The conduct that the appellants wish to impugn is exactly the same conduct approved by the motions judge: see *Bank of America Canada v. Willan Investments Ltd.* (1993), 23 C.B.R. (3d) 98. As Blair J. put it at paras. 9 - 10:

> In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court...Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

93 The motions judge thought that this case did not apply because the receiver's actions had not been the subject of previous court approval. He did not consider that he had just approved the receiver's actions in this very instance, and that the *Bank of America* rationale applies here as well. It is contradictory and provides meaningless protection to a receiver, to grant an order approving its recommendations and simultaneously granting leave to bring an action for negligence or breach of fiduciary duty in arriving at these recommendations.

94 No matter which test the motions judge used, granting leave in these circumstances does not necessarily reflect an uncertainty in his mind regarding the receiver's recommendation of the overall appropriateness of the comprehensive settlement.

95 Based on this analysis, there is nothing in the evidence that supports the conclusion that there was any unfairness in the judicial process.

CONCLUSION REGARDING THE APPEAL

96 In the circumstances of this case and given the principles courts must apply when reviewing the receiver's recommendations, I can find no error on the part of the motions judge in the exercise of his discretion when granting the orders under appeal.

THE CROSS-APPEAL

97 As discussed above, the motions judge used the wrong test in granting leave to commence an action against the receiver. For the reasons given there, I would allow the cross-appeal.

DISPOSITION

98 For the foregoing reasons, I would dismiss the appeal from the order approving the receiver's third report approving the sale of the property and the settlement. I would allow the cross-appeal and set aside the order granting leave to sue the receiver.

99 At the conclusion of the hearing, it was agreed that the parties would make submissions as to costs following the release of this decision. Failing agreement as to costs both of the appeal and the cross-appeal, submissions are to be made according to the following timetable. The receiver and National Trust may make written submissions, no longer than three pages, to be received by the senior legal officer, no later than May 17. The appellants will make their submissions, again, no longer than three pages, to be received no later than May 25. The receiver and National Trust may deliver a brief reply, no longer than two pages, to be received no later than May 28.

G.J. EPSTEIN J.A.
M.J. MOLDAVER J.A.:-- I agree.
R.G. JURIANSZ J.A.:-- I agree.

* * * * *

Correction
Released: May 13, 2010

There is an error in paragraph 26 (page 10).

The paragraph currently reads: The report also states that the receiver will not seek to recover the $308,200 **the arbitration award** ordered the company to pay to the receiver.

It should read: The report also states that the receiver will not seek to recover the $308,200 **that Morin J.** ordered the company to pay to the receiver.

1 The forgiveness of the mortgage and the offer of the property to the company post-remediation (items 4. and 5.) were offered in exchange for the company's support of the settlement agreement upon presentation to court for approval.

2 Adjusted for a mathematical error made by the appellants.

3 Given that the property would ultimately be sold to Petro-Canada on a pristine basis, the damages paid to the company for stigma and loss of future development costs were no longer warranted and could properly be considered additional consideration.

4 This court was informed, though it was not in evidence, that as of July 2009, the amount owing under the mortgage exceeded $3.1 million, including principal, interest, property taxes and other receivership expenses.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO. *ET AL*

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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