SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243

Date: 20190607
Docket: Hfx No. 483616
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

Defendants

Judge: The Honourable Justice D. Timothy Gabriel

Heard: June 7, 2019, in Halifax, Nova Scotia

Oral Decision: June 7, 2019

Counsel: Gavin D.F. MacDonald, for the Plaintiff
Kevin A. MacDonald, for the Defendants
Stephen J. Kingston and Colin J. Boyd (summer student) for Ernst and Young (Receiver-Monitor)

By the Court (orally):

Background

[1] The Plaintiff, Royal Bank of Canada ("RBC"), moves for an order appointing Ernst and Young ("EY") as a receiver of the property of the Defendants, Eastern Infrastructure Incorporated and Allcrete Restoration Limited. Both are, of course, corporate entities, and I will refer to them individually as "Eastern" and "Allcrete", and jointly as "the Companies".

[2] EY already has an appointment as Receiver-Monitor of the assets of the Companies, pursuant to an order of this court dated February 4, 2019 ("the first order"). All parties consented to it.

[3] However, the scope of that order limits the powers of EY as compared to those which would ordinarily be contained in a receivership order under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The order sought by the Plaintiff would discharge EY of its obligations under the order of February 4, 2019, and substitute therefore the expanded powers and responsibilities contained in the order sought, which is a "traditional" receivership order.

[4] For its part, EY supports RBC's motion. It has indicated that it is prepared to "act as a fully empowered Receiver of the Companies pursuant to s. 243 of the *BIA*", if RBC's motion is granted.

[5] The second order issued in this proceeding was granted by Justice Michael J. Wood (as he was then) on March 19, 2019. It came about after RBC had filed a motion "seeking the advice and direction of the court as regards to the further discharge of its powers and duties under the Consent Order" of February 4, 2019. The Defendant Companies were ordered to provide EY with certain information as set out in Schedules "A" and "B" thereto on or by 5 p.m. on March 22, 2019.

[6] The first order did not empower the Receiver-Monitor, EY, to take possession or control of the Defendant Companies' assets or business. It was, however, similar in most other ways to a standard Receivership Order. This limitation resulted, primarily, from concerns raised by the Companies, the most pressing of which was to the effect that they should be permitted more time to arrange their own sale process, while their businesses remained going concerns.

Having said that, EY asserts that it has not yet been provided with all of the information contemplated by the second order.

[7] There are also other matters of concern both to the Plaintiff and EY. For example, the Companies have not provided a sales plan or a proposal for the sale of their assets, or a plan for debt restructuring either to this court or to EY, the Receiver-Monitor. Nor is there a plan or agreement in place to repay monies owing to RBC. Indeed, no such payments have been made by the Companies since RBC commenced this proceeding. More concerningly, the Companies' financial positions have become much worse over that interval.

[8] RBC contends that the situation has become untenable, that the powers under the first order are not sufficient to protect either RBC's interests or those of the other creditors, and that the only way to extend appropriate safeguards for the benefit of all is to provide EY with a full receivership. The Companies have filed no materials or written brief in response. However, their counsel attended the hearing and initially stated that he took "no position" with respect to the relief sought by RBC. He then proceeded to argue vehemently against it.

Discussion and Analysis

[9] It is clear from the affidavit of Dave Northup (Special Loans and Advisory Services for RBC), dated December 21, 2018, that the Companies are indebted to RBC. For example at para. 4 we note that:

> According the records of RBC, Eastern Infrastructure Inc. ("Eastern") was directly indebted to it as of November 19, 2018 in the aggregate amount of $523,088.61 excluding accruing interest and costs of enforcement. In addition, Eastern has guaranteed the obligations of Allcrete Restoration Limited ("Allcrete") limited to the amount to $1,600,000.00 plus interest accruing from the date of demand. Therefore, Eastern's total obligation to RBC is $2,131,088.61 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[10] In para. 15, Mr. Northup continues:

> According the records of RBC, Allcrete was directly indebted to it as of November 19, 2018 in the aggregate amount of $2,096,167.86 excluding accruing interest and costs of enforcement. In addition, Allcrete has guaranteed the obligations of Eastern to RBC limited to the amount of $1,600,000,000.00 plus interest from the time of demand. Therefore, Allcrete's total obligation to RBC is 2,619,256.47 as of November 19, 2018 excluding accruing interest and costs of enforcement.

[11] Demands for payment were issued by RBC on March 9, 2018. The demands were reissued on November 18, 2018. This latter instance included provision to the Companies by RBC of fresh notices of intention to enforce security pursuant to s. 244 of the *BIA*.

[12] During RBC's forbearance, or the hiatus between the two demands, significant negotiations took place between the parties. No settlement was made, nor was repayment of the debts effected. No payments have been made by the Companies to RBC or EY at all since the second demand was made in November 2018.

[13] I am satisfied that both the General Security Agreement and collateral mortgage provide RBC with the ability to appoint a receiver. For example, at Tab "J" of Mr. Northup's affidavit, we find the former, executed by Eastern Infrastructure, para. 2 of which reads:

> The Security Interest granted hereby secures payment and performance of any and all obligations, indebtedness and liability of Debtor to RBC (including interest thereon) present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wheresoever and howsoever incurred and any ultimate unpaid balance thereof and whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again and whether Debtor be bound alone or with another or others and whether as principal or surety (hereinafter collectively called the "Indebtedness"). If the Security Interest in the Collateral is not sufficient, in the event of default, to satisfy all Indebtedness of the Debtor, the Debtor acknowledges and agrees that Debtor shall continue to be liable for any Indebtedness remaining outstanding and RBC shall be entitled to pursue full payment thereof.

[14] Para. 13(a) goes on to provide:

> Upon default, RBC may appoint or reappoint by instrument in writing, any person or persons, whether an officer or officers or an employee or employees of RBC or not, to be a receiver or receivers (thereinafter called a "Receiver", which term when used herein shall include a receiver and manager) of Collateral (including any interest, income or profits therefrom) and may remove any Receiver so appointed and appoint another in his/her stead. Any such Receiver shall, so far as concerns responsibility for his/her acts, be deemed the agent of Debtor and not RBC, and RBC shall not be in any way responsible for any misconduct, negligence or non-feasance on the part of any such Receiver, his/her servants, agents or employees. Subject to the provisions of the instrument appointing him/her, any such Receiver shall have power to take possession of Collateral, to preserve Collateral or its value, to carry on or concur in carrying on all or any part of the business of Debtor and to sell, lease, license or otherwise dispose of or

> concur in selling, leasing, licensing or otherwise disposing of Collateral. To facilitate the foregoing powers, any such Receiver may, to the exclusion of all others, including Debtor, enter upon, use and occupy all premises owned or occupied by Debtor wherein Collateral may be situate, maintain Collateral upon such premises, borrow money on a secured or unsecured basis and use Collateral directly in carrying on Debtor's business or as security for loans or advances to enable the Receiver to carry on Debtor's business or otherwise, as such Receiver shall, in its discretion, determine. Except as may be otherwise directed by RBC, all Money received from time to time by such Receiver in carrying out his/her appointment shall be received in trust for and paid over to RBC. Every such Receiver may, in the discretion of RBC, be vested with all or any of the rights and powers of RBC.

[15] Sub paras. (b) – (h) go on to further particularize powers that RBC may exercise ancillary to the appointment of a receiver.

[16] At tab (h) of Mr. Northup's affidavit, we find the collateral mortgage executed by Eastern on November 24, 2011. The relevant portions of para. 12.1 (i) and (j) of that instrument provide as follows:

> Notwithstanding anything herein contained, it is declared and agreed that if at any time when there shall be default under the provisions of this Mortgage, the Mortgagee may, at such time and from time to time, and with or without entry into possession of the Mortgaged Premises, or any part thereof, by instrument in writing appoint any person, whether an officer or officers or an employee or employees of the Mortgages or not, to be a receiver (which term, as used herein, includes a receiver manager) of the Mortgaged Premises, or any part thereof, and of the rents and profits thereof, and with or without security, and may from time to time by similar writing remove any receiver and appoint another receiver, and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor, but no such appointment shall be revocable by the Mortgagor. Upon the appointment of any such receiver from time to time, the following provisions shall apply:
>
> …
>
> (j) The rights and powers conferred herein in respect of the receiver are supplemental to and not in substitution of any other rights and powers which the Mortgagee may have.

[17] Since EY's appointment as Receiver-Monitor pursuant to the first order on February 4, 2019, it has issued three reports. The first report is dated March 8, 2019. In the interests of brevity, I will point to only some of its relevant features. All references to "RM" in the reports relate to Ernst and Young, the receiver-monitor.

[18] First, para. 10:

> On 6 February 2019, the RM, through its counsel, issued a preliminary request for information to both the Company and RBC (the "Preliminary Request"). A copy of the Preliminary Request is attached as Appendix "B". The Preliminary Request included among other items that RBC provide copies of all appraisals commissioned and copies of its loan agreements with the Company and that the Company produce various financial data, including a 13-week cash flow projection with primary assumptions (the "Cash Flow"), necessary to provide the RM with an overview of the Company's current financial situation.

[19] Then, paras. 17 and 18:

> During the February 18 Call, Management advised that t he Company had limited liquidity and anticipated cash flow challenges in the next few weeks. The RM reiterated its request for the Cash Flow during the call. Management undertook to provide the Cash Flow prior to 21 February 2019, being the date of the next scheduled in person meeting between the RM and management at Company premises at 129 Park Street, in Elmsdale, Nova Scotia.
>
> The RM provided Management, including Mr. Wheaton (who was unavailable for the February 18 Call) a summary of the February 18 Call to which Mr. Wheaton provided his comments. A summary of the call and email exchanges as between the RM and the Company is attached as Appendix "C".

[20] Then, at para. 20:

> The Company did not produce a Cash Flow during the February 21 Meeting notwithstanding the RM's Preliminary Request, the February 12 Email, the February 14 Email and the February 18 Call. During the February 21 Meeting Management and Mr. Wheaton undertook to prepare and provide the RM with the Cash Flow by 22 February 2019. The RM offered to assist the Company in the preparation of the Cash Flow if required and, in an effort to advance the process, the RM provided the Company with a Cash Flow template for guidance.

[21] Then, at para. 23:

> The Company again failed to produce the information requested by the 28 February 2019 deadline. On 1 March 2019, correspondence from the RM's counsel was delivered to counsel for the Company and RBC confirming that:
>
> a. information requests remained outstanding;
>
> b. the production of the Cash Flow was critical in relation to the RM's monitoring, efforts to develop a sales process, and the RM's assessment of the Company's liquidity concerns;

c. The RM was, as a result of information requests not being provided, unable to respond to concerns raised by counsel for Intact Insurance (as described below), referencing certain bonded Company projects, and their confirmation request that the Company was meeting its obligations under the *Builder's Lien Act*; and

d. The current status quo situation was untenable and that the RM would be issuing a report to advise the Court on the lack of cooperation being provided.

[22] Next, at paras. 26 and 27:

> As noted above, the RM received correspondence from Intact Insurance ("Intact"), a copy of which is attached as Appendix "F", which provides surety bonding for EII and various Performance and Labour and Material Payment Bonds ("Bonds") in relation to Company projects. Intact advised the RM that it had received various claims under its Bonds and accordingly requested confirmation from the RM that the Company was meeting its obligations under the *Builder's Lien Act*. The RM advised Intact that it was not in a position to confirm the information requested because the RM's information requests to the Company remaining outstanding. A copy of the RM's response, through counsel, is attached as Appendix "G".
>
> The RM received e-mail correspondence on a without prejudice basis from counsel of an alleged unpaid vendor seeking the RM's consent to allow said vendor to register a lien claim against ARL pursuant to the *Builder's Lien Act*. In addition, the RM has been contacted by a third counsel also seeking to file a lien claim against ARL. Counsel for the Company and RBC have been provided with copies of the lien claim correspondence.
>
> [Emphasis added]

[23] Finally, at paras. 29 and 30:

> In addition to possible prejudice to lien claimants the RM is concerned, based upon initial comments arising from the 18 February Call in which Management advised that the Company had limited liquidity and anticipated cash flow challenges in the next few weeks, that the Company may not be in a position to sustain its operations on a cash flow positive basis such that other creditor interests (including but not limited to RBC, Canada Revenue Agency and/or other trade vendors providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> The RM has serious concerns that such stakeholders may have a false sense of comfort that the RM is monitoring the Company operations pursuant to the terms of the Consent Order when, in fact, the RM is not in a position to provide comfort to these stakeholder groups or the Court with respect to the financial position of

the Company as a result of the lack of cooperation extended by the Company to date.

[Emphasis added]

[24] Reference to the second report, dated April 12, 2019, indicates:

Pursuant to the terms of the Production Order, the Company was directed to provide the RM with specific information on or before 22 March 2019 (the "Deadline"). A portion of the specific information required to be produced was delivered to the RM on the Deadline date. However, not all of the Court ordered information was provided. Most notably, the Company failed to provide the RM with its bank statements (and/or online access to the bank statements) for the periods requested. The Company did produce a 13-week cash flow projection, a copy of which is attached as Appendix C (the "Original Cash Flow"). The Original Cash Flow unfortunately did not provide sufficient disclosure to address the RM's monitoring needs.

[25] At paras. 13 and 14 we find:

The Company, with the assistance and guidance of the RM, agreed to prepare an amended cash flow incorporating actual cash receipts and disbursements from the date of the Consent Order through 29 March 2019 (the "Period") and a 12 week forecast for the period ending 21 June 2019 (the "Projected Period").

The amended cash flow report was provided to the RM on 2 April 2019. The RM adjusted and reconciled the Period results to the EII's bank statements. A copy of the reconciled amended cash flow report (the "Amended Report") is attached as Appendix E. No banking activity was processed through ARL's bank account during the Period with the exception of service fees. ARL's closing cash balance at the end of the Period was $6,122.

[26] Paras. 16 and 17 tells us that:

Actual cash receipts of $496,686 were comprised of:

a. Trade accounts receivable collections - $451,999;

b. Advances from Related Parties (as defined below) - $20,000;

c. Advances from third parties - $16,500 (see below offsetting disbursement); and

d. Rental (69 Park Road) receipts - $8,188.

Actual cash disbursements of $468,930 were comprised of:

a. Payroll and source deductions - $226,175;

b. Related Party (as defined below) payments - $137,100;

c. Repayment of third party advances - $16,500 (see above offsetting advance);

d. HST payment - $10,000; and

e. General operating disbursements - $79,155.

[27] Paras. 18 - 20 of the second report go on to describe the relentless deterioration of the Companies' financial structures. For example, although the Companies' net cash positions remained neutral, there was a troubling erosion of net working capital during the period from February 4, 2019 to March 2019. Accounts receivable were utilized to cover payroll and other operating expenses. Sufficient new revenue was not generated to replace the funds exhausted by this process to sustain the Companies' capital positions.

[28] As a result, the extrapolated cash flow for the ensuing period ending June 21, 2019 forecasted a cash deficiency position of $242,019, even excluding those professional fees which are being funded directly by RBC. Moreover, EY indicated that it was unaware of any credit facilities to which the Companies could turn to remediate or mitigate their dire straits.

[29] At para. 22 of the second report, EY notes:

> The reduction of the trade accounts receivable balance since the issuance of the Consent Order has negatively impacted the value of the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist.

[30] Para. 24:

> The RM has requested the necessary information to enable it to assess whether there are any unpaid subcontractors and/or potential Builder's Lien claims pertaining to these projects, but the requested information has not been provided to date.

[31] Paras. 31 – 34:

> <u>HST Filings and Obligation</u>
>
> The RM has reviewed EII's HST account obligation due to the Canada Revenue Agency (the "CRA") which totals approximately $305,000.
>
> Management have not filed their December 2018 HST return nor their February 2019 HST return. EII anticipates the filing of these returns will generate HST refunds thereby reducing EII's net HST exposure to the CRA. The RM submits that an organization benefiting from a Court ordered stay of proceeding has an

> obligation to file its statutory remittances when due. As such, the RM has advised Management to file its December 2018 and February 2019 returns forthwith.
>
> Workers' Compensation Filings and Obligation
>
> The RM understands that EII has a Workers' Compensation Board (the "WCB") obligation of $25,226 and that it has not filed WCB reports for the months of October 2018, November 2018, December 2018, January 2019 and February 2019.
>
> The RM advised Management to file the outstanding WCB returns forthwith.

[32] Then, there are the lien claimants. Battlefield Equipment Rentals has filed a lien under the *Builders Lien Act* ("*BIA*") in the amount of $27,304.70 plus interest and costs against Allcrete. One of Eastern's subcontractors, Arrow Construction Products Limited has filed against the Queen's Marque Development Limited project ($16,271.44). Queen's Marque made a $13,287.99 payment directly to Arrow under s. 14 of the *BIA*. (para. 36, second report). All of this on top of Intact's (Eastern's bonding company) earlier noted indication that it has received $222,767.78 in bond claims as of March 27, 2019.

[33] The concerns of the Plaintiff should now be obvious. RBC fears that the Companies will not be in a position to sustain their operations even over the short term, and that creditor interests (including RBC, lien claimants, CRA, Workers' Compensation, and other trade vendors or employees) may be adversely affected while the Companies continue to operate.

[34] The third report of May 10, 2019 continues in the same vein. For example in para. 17:

> The continued reduction of the trade accounts receivable balance further erodes the operating lenders' security position and, potentially, the security position of lien claimants to the extent lien claims exist. The RM anticipates the operating lenders security position will continue to erode unless immediate action is taken to discontinue operations as there is no evidence available to suggest that a viable and profitable operating plan is in place.

[35] It also references concerns about additional related party payments which are either being made to Brian Wheaton, who is the controlling mind of both Companies, or to other entities controlled or related to Mr. Wheaton.

[36] At paras. 23 and 24 of the third report, we find again a reference to the fact that the Companies are failing on an ongoing basis to comply with statutory obligations respecting payment of HST and WCB premiums. As we have seen

from the second report, they already had (at the time of that report) accumulated indebtedness of $305,000.00 respecting HST and $25,266.00 for WCB. No evidence of any resolution of the lien claims is noted in the third report, either.

[37] At paras. 27 and 28 of the third report, EY points out:

> There has been further erosion to the security positions of certain affected creditors since the issuance of the Second Report and further erosion is likely to be crystallized if the Company is permitted to continue to operate. The RM remains concerned that the Company's access to cash may run out should accounts receivable collections fail to materialize and that creditor interests (including but not limited to RBC, Lien Claimants, CRA, Workers' Compensation Board and/or other trade vendors or employees providing services on credit to the Company) may be adversely affected as a result of the Company continuing to operate.
>
> Management has not responded to various RM information requests and accordingly our ability to monitor the operations has been challenging. Absent the Company immediately securing profitable projects and adequate financing to complete same a liquidity crisis may be inevitable. In the interim, the security positions of the affected creditors are deteriorating.

Issues

[38] In order to determine whether to grant the relief sought it is necessary to consider:

(i) the nature of the receivership sought,

(ii) whether the Companies are "insolvent persons" within the meaning of the *BIA* and,

(iii) if it is "just or convenient" that the remedy sought be granted.

Analysis

(i) The nature of the receivership sought.

[39] At the outset, I observe that RBC has the power to appoint a receiver pursuant to its security documents. Some reference to these documents has earlier been made. It is important, however, to appreciate the distinction between a privately appointed receiver and one appointed by the court.

[40] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch, Inc.*, 2014 NSSC 128, Justice Edwards put it this way:

> The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed …
>
> The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However, in *Houlden, Morawetz and Sarra* at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> [Emphasis added]

[41] Obviously, there are myriad creditors beside RBC in this case. We have heard of lien claimants, and significant amounts owed pursuant to both HST and WCB legislation, to name just some. This would, in my view, tend to favour a court appointed receiver, accountable to the court, who will be able to offer protection to all of the various interests involved, as opposed to one appointed privately by the Plaintiff pursuant to its security documents. To be fair (and to repeat), this is in accord with RBC's position.

[42] As to whether it is appropriate to make such an appointment, the legislation itself must be considered. As section 243(1) of the *BIA* states:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) Exercise any control that the court considers advisable over that property and over the insolvent person s or bankrupt's business; or
>
> (c) Take any other action that the court considers advisable.
>
> [Emphasis added]

(ii) Are the Companies "insolvent persons" within the meaning of the BIA?

[43] The Companies are clearly insolvent within the meaning of s. 243(1) of the *BIA*. Consider that the legislation defines "insolvent person" to mean:

> … a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this act amount to $1,000, and
>
> (i) Who is for any reason unable to meet his obligations as they generally become due
>
> (ii) Who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) The aggregate of whose property is not at a fair valuation, sufficient or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;"

[44] The evidence of the receiver-monitor, EY, is uncontradicted. The Companies are indebted to and/or cannot meet their "obligations as they generally become due" with respect creditors including CRA (on account of HST), WCB (second report para. 30), Battlefield Equipment Rentals and Arrow Construction (second report paras. 35-36) not to mention RBC itself, to whom they have significant financial obligations that have long been outstanding. There are also the performance bond claims which have been brought by some other creditors of the Companies, as reported by Intact Insurance and noted in the second report (para. 37). Also troubling is the forecasted cash deficiency position of the Companies posited by EY in its reports.

[45] Criteria (i) and (ii) of the characteristics which define an "insolvent person" pursuant to the *BIA* have been established. Also, the third criterion has likely been established as well. In any event, given the disjunctive nature of the definition of "insolvent person" in the legislation, the threshold specified in s. 243(1) is easily met in this case.

(iii) Is it "just or convenient" that the remedy sought by RBC be granted?

[46] The seemingly innocuous words "just or convenient" do not, of course, clothe the court with *carte blanche* to do as it pleases. There is authority as to what they mean within the current lexicon. Consider, for example, the following excerpt from *Enterprise Cape Breton* (supra) at pp. 13 - 16:

> In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell: Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
>
> (b) The risk to the security holder taking into consideration the size of the debtor s equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> (c) The nature of the property;
>
> (d) The apprehended or actual waste of the debtor's assets;
>
> (e) The preservation and protection of the property pending judicial resolution;
>
> (f) The balance of convenience to the parties;
>
> (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
>
> (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
>
> (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
>
> (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
>
> (k) The effect of the order on the parties;
>
> (l) The conduct of the parties;

> (m) The length of time that a receiver may be in place;
>
> (n) The cost to the parties;
>
> (o) The likelihood of maximizing return to the parties; and
>
> (p) The goal of facilitating the duties of the receiver.
>
> The author's further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument – appoint a receiver.
>
> [Emphasis added]

[47] It is not necessary that RBC or EY demonstrate irrevocable harm in order to succeed. Certainly, one may agree with RBC's contention that its position is being harmed or seriously compromised on the basis of what is contained in EY's reports, without necessarily accepting that this harm is irrevocable. I will state, however, that the failure by the Companies to bring forward or lead a single piece of evidence at this hearing, in the face of significant evidence that their capital position is relentlessly deteriorating, is very troubling.

[48] Certainly, there is significant risk to RBC and the other creditors. The Companies' capital positions have inexorably and precipitously declined, particularly during the period from November 2018 to the present. The powers provided under the first Order have proven inadequate to the job with which EY has been tasked. The overall tenor of EY's three reports is that cash reserves and assets are being depleted. That pool is shrinking and it not being replenished. Related party transactions are also taking place.

[49] Many of the Companies' assets are mobile. Some of these assets consist of equipment that is used at many different construction sites, some in different provinces. If equipment is being used by the Companies without adequate payments being received by them to maintain operations, this equipment could be damaged (as RBC argues) or dissipated, along with the cash reserves.

[50] As we continue to consider the apprehended or actual waste of the debtor's assets, it is also difficult to overlook the decrease in accounts receivable and cash balances, and the steady increase in liabilities having statutory priority outside of a bankruptcy (including the HST and WBC amounts). We have earlier discussed the related party transactions reported by EY. Even if the submissions of the Defendants' counsel are accepted (which is to the effect that they were repayments of monies earlier loaned by Mr. Wheaton to the Companies), these would still constitute "preferences" under virtually every relevant or potentially relevant

statutory regime. Further, neither company has offered one iota of evidence on this point, or with respect to any of the other concerns raised by the Plaintiff and/or EY.

[51] As to the balance of convenience between the parties, I first note that the court has been provided with no plan by the Companies to repay or pay down their obligations. Justice Rosinski in *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, at para. 33 treated such as a factor to be considered under this rubric.

[52] I also note that an order for a court appointed receiver will not necessarily "dictate the financial end" of the Companies (to borrow from the language used in *Enterprise Cape Breton*, at page 23). Indeed, it would be expected that the Companies would continue in their efforts to cooperate with the receiver in order to maximize the returns, even though their previous efforts to keep the businesses afloat since the first Order was granted have generated such unencouraging results.

Conclusion

[53] It is not necessary to "check all the boxes" with respect to the factors noted in *Enterprise Cape Breton* in order for the Plaintiff to succeed. Indeed, not all of these factors will be applicable to every case. Those that do apply in a given situation will also vary to some extent in the weight to be assigned to them. Conversely, in some cases, there will be additional factors which may militate for or against the remedy sought. The list is not exhaustive.

[54] It is correct to observe that a receivership is an extraordinary remedy, and is often sparingly granted. This concern is significantly attenuated, however, by the fact that RBC has a contractual right to appoint a receiver.

[55] I have concluded that the totality of the relevant factors noted in the *Enterprise Cape Breton* case, as well as the significant efforts made by RBC to accommodate the Companies since at least January 2019, shows that the decision to approach the court for relief in the present context has not been made precipitously.

[56] Moreover, the futility of other alternatives has been exposed over the period of time from at least November 2018 to the present. A private receivership was attempted, the Companies resisted. A limited receivership-monitoring regime was put in place by the first order as a result. Moreover, the Companies have cooperated only sparingly with provisions in the second order to supply EY with information that it needed to do its job. The present limited receivership/monitoring powers contained in the first Order, which were

anticipated to culminate in a mutually acceptable sales process, instead saw the Companies' fortunes continuously decline while their operations continued.

[57] The Companies are, at their best, presently stagnant. However, an analysis of all relevant factors demonstrates that if the order sought by RBC is not granted, Eastern and Allcrete will soon likely hit the proverbial "wall". The prejudice to existing creditors will be exacerbated. In all likelihood, new creditors will come into being. The status quo is untenable. The order sought is necessary. More to the point, it is both "just" and "convenient", given the present factual matrix.

[58] There are a number of problems with which EY will have to contend. Most are obvious, and include the need to collect mobile equipment, come up with a sales process that maximizes returns, and seek court approval. I will grant the receivership Order sought without security, and without specifying a limited time period for the appointment.

Gabriel, J.