

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Royal Bank of Canada v. Eastern Infrastructure Inc., 2019 NSSC 297

**Date:** 20191010

**Docket:** 483616

**Registry:** Halifax

**Between:**

Royal Bank of Canada

*Plaintiff*

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

*Defendant*

<b>Decision</b>
-----------------

**Judge:** The Honourable Justice Peter P. Rosinski

**Heard:** September 19, 2019, in Halifax, Nova Scotia

**Counsel:** Gavin MacDonald, for Royal Bank of Canada  
Stephen Kingston, for the Receiver

By the Court:

**Introduction**

[1] The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

[2] Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case<sup>1</sup>.

**The authority for vesting orders pursuant to s. 243(1)(c ) BIA**

---

<sup>1</sup> Attached hereto as Appendix “A” is the order granted.

[3] Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 and *Royal Bank of Canada v 2M Farms Ltd.*, 2017 NSSC 105), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744, in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

[4] As Justice Blair stated for the court in *Regal*:

[23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -- particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[24] In *Soundair*, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[25] In *Soundair* as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

**[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.**

...

**[31] In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act**, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**[32] The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, *Snell's Equity*, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

(Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

...

[45] Vesting orders properly registered on title, then -- like other conveyances -- are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

[5] Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v Ressources Dianor Inc.*, 2019 ONCA 508 per Pepall JA:

**“(e) Section 243 of the BIA**

**43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

**44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so.** As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

**45** Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) 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.

**46** "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control -- 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 -- under

(i)an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii)a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver -- manager. [Emphasis in original.]

**47** *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

...

**71** In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, **Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.**

#### Section 243 -- Jurisdiction to Grant a Sales Approval and Vesting Order

**72** This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

**73** The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. **As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets".** The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

**74** This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), *aff'd* (2000), 47 O.R. (3d) 234 (C.A.).

**75** Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

**76** It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

**77** Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain."

[6] Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel*.



[7] *Lemare Logging* was released one year after Justice Wood made his comments in *Crown Jewel*. Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

[8] Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montréal v. Sportsclick Inc.*, 2009 NSSC 354 at paras 32-33, which the court will eventually apply to all such sales:

**"Law**

**32** In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:

- 1.It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
- 2.It should consider the interests of all parties.
- 3.It should consider the efficacy and integrity of the process by which offers are obtained.
- 4.It should consider whether there has been unfairness in the working out of the process.

**33** Certain principles have been enunciated by the courts in consideration of these points:

The decision must be assessed as a matter of business judgment on the

elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;

the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para. 40;

the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg*, *supra*, at page 124, Anderson J. said:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. *see*, *Crown Trust Co., supra*."

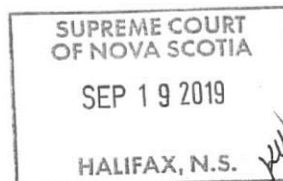
## Conclusion

[9] As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Rosinski, J

## Appendix “A”

2018



Hfx. No. 483616

Supreme Court of Nova Scotia  
in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and  
Allcrete Restoration Limited

Defendants

**APPROVAL AND VESTING ORDER (AUCTION)**

A handwritten signature in a circle, likely belonging to Justice Peter P. Rosinski.

Before the Honourable Justice Peter P. Rosinski in Chambers:

**UPON HEARING** Stephen Kingston on behalf of Ernst & Young Inc. (the "**Receiver**") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "**Debtor**");

**AND UPON** appearing that appropriate Notice of this Motion has been provided to all interested parties;

**AND UPON** having read the First Report of the Receiver dated September 11, 2019 (the "**Receiver's First Report**") and all other materials filed in connection with this Motion;

**AND UPON** the Receiver having negotiated an Auction Agreement (the "**Auction Agreement**") with Mirterra Industrial Appraisers & Auctioneers (the "**Auctioneer**") as more particularly described in the Receiver's First Report;

**AND UPON** the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "**Alberta Assets**"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

**NOW UPON MOTION:**

**IT IS ORDERED THAT:**

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.

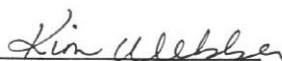
2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "**Transactions**") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "**Purchased Assets**").
3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "**Purchaser**") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "**Purchaser Bill of Sale**"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:
  - (a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and
  - (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.
4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.
5. Notwithstanding:
  - (a) the pendency of these proceedings;
  - (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and
  - (c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

- 3 -

6. This Court here requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such Orders and to provide such assistance to the Receiver, as an Officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Dated at Halifax, Nova Scotia this 19 day of September, 2019

  
Prothonotary

KIMBERLEY WEBBER  
Deputy Prothonotary