Supreme Court of Nova Scotia
In Bankruptcy and Insolvency
Citation: Railside Developments Ltd. (Re), 2010 NSSC 13

Date: 20100114
Docket: Hfx No. 314695
Registry: Halifax

In the Matter of the Receivership of Railside Developments Limited

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Decision on Condominium Registration

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	December 18, 2009 in Halifax
Counsel:	Sheree L. Conlon and Maurice P. Chiasson, Q.C. for Green Hunt Wedlake Inc. as Receiver of Railside Developments Limited John Kulik, Q.C. and Joseph McNally for LaFarge Canada Inc. Alexander M. Cameron for the Province of Nova Scotia Ralph Winter and Jean Winter on their own behalf

Moir, J:

Introduction

[1] Railside Developments Limited built a commercial and residential complex on Harbourside Drive in Wolfville. RIC New Brunswick Inc. provided the financing, it took security in the complex, and it advanced about eight million dollars.

[2] Railside became insolvent, building contractors or subcontractors went unpaid, and RIC obtained an order under the recently proclaimed *Bankruptcy and Insolvency Act* provisions for the appointment of a final, rather than an interim, receiver. Green Hunt Wedlake Inc. is the receiver.

[3] About $400,000 is owed to builder's lien holders, of which LaFarge Canada is one. It is owed about $68,000.

[4] The complex was built with the intention that the residential units should become condominiums, and many units are occupied by people who intend to take title once a condominium is registered.

[5] The receiver believes that a greater amount will be realized through the registration, and subsequent sale, of condominium units, rather than through the sale of the complex as a whole. However, the *Condominium Act* requires that encumbrancers consent to registration, and the lien holders refuse to provide consents unless they are paid or, at least, paid more than whatever is being offered.

[6] The receiver moves for an order permitting registration of the units without consent of the encumbrancers. It does so on several bases. It says that the court has power under the *Condominium Act* and under the *Bankruptcy and Insolvency Act* to override the consent requirement. It also says that the requirement for consents is in operational conflict with both the scheme of distribution (s. 136) and the broad grant of powers to appoint a receiver (s. 243) under the *Bankruptcy and Insolvency Act*. The necessary notices of a constitutional issue were delivered. The province participated.

[7] The parties cooperated to have the motion heard quickly. As is so often the case with realization, delay involves significant expense. However, when arguments were about to begin, we saw that residents in the complex have interests

at stake. So as not to cause delay, I heard argument without notice to the residents, but I directed the receiver to inform the residents of the motion and to offer them the opportunity to make submissions. I received written submissions from Mr. Ralph Winter and Ms. Jean Winter.

Issues

[8] I will determine the following issues:

1. Whether the *Condominium Act* empowers the court to override the requirement for consents of encumbrancers for registration of units as condominiums?

2. If not, does s. 243 of the *Bankruptcy and Insolvency Act* provide a similar power?

3. If the court has no power to override the requirement, does the requirement constitutionally cease to have operation when the owner is in receivership under the *Bankruptcy and Insolvency Act*?

I will also respond to the written submission on behalf of Mr. and Ms. Winter.

Lien Holder's Consent Under the *Condominium Act*

[9] Section 6 of the *Condominium Act*, R.S.N.S. 1989, c. 85 provides for the creation of condominiums under the Act through registration of a declaration and a description. Sections 11 and 12 provide for the content of the declaration and the description, and for amendments of them. Clause 11(1)(b) requires that a declaration contain "the consent of all persons having registered encumbrances against the land or interests appurtenant to the land described in the description".

[10] Railside did not develop the condominium project to the point that a declaration and a description were registered. The receiver's desire to now do so is thwarted by the lien holder's refusal to provide consents under s. 11(1)(b). The refusals are tactical. No one quarrels with the receiver's opinion that registration will lead to better realization. But, the lien claimants want to be paid, or they want to be compensated for their consents beyond what can be agreed.

[11] The receiver moves for an order dispensing with the consents and requiring registration. Its argument is premised on an interpretation of s. 11(1)(c) that would have the requirement for consents qualified by a principle that the consents cannot unreasonably be withheld.

[12] On behalf of the receiver, it is said that *2475813 Nova Scotia Ltd.* v. *Rodgers*, [2001] N.S.J. No. 21 (C.A.) "left open for a future determination the issue of whether registered encumbrancers must not unreasonably withhold their consent."

[13] The decision in *2475813 Nova Scotia Ltd.* was one of many arising from disputes between Mr. Bruce Brett, who developed a two hundred unit condominium on the Bedford Highway and took title to eighty percent of the units, and the owners of the other units, who actually reside there. One of the issues on appeal was about the chambers judge's refusal to grant a declaration that the resident unit holders may not direct encumbrancers to withhold consent to a sale of the project as a whole.

[14] Cromwell, J. A., as he then was, provided the reasons. On this issue, he said (para. 47 - 49):

> On the cross-appeal, the respondents submit that "... the learned chambers judge erred in her interpretation that the owners were entitled to instruct registered encumbrancers to unreasonably withhold consent to the sale."
>
> The chambers judge refused to grant the declaration sought by the respondent to the effect that individual unit owners shall not direct a registered encumbrancer to unreasonably withhold consent to the sale of the property. She stated first, that the statute does not contain a stipulation that the encumbrancers cannot withhold their consent unreasonably; and, second, that in deciding whether to consent or not, an encumbrancer can consider "whatsoever it chooses, including any views of the unit owner."
>
> I agree with the second of these reasons. Provided the conduct is otherwise lawful, an owner is entitled to express his or her opinion about a proposed sale to an encumbrancer and the encumbrancer is entitled to consider whatever information it chooses. I also agree with the decision of the judge not to grant the declaration sought. Encumbrancers were not before the court and the declaration sought was premised on a hypothetical situation. Whether a duty not to withhold consent unreasonably should be read into the statute or otherwise be found to exist and to whom such a duty is owed are questions which, in my opinion, are better resolved in a concrete factual setting and in the presence of all affected parties. I would, for those reasons, uphold the decision of the judge to refuse this part of the declaratory relief sought by the respondents.

[15] *2475813 Nova Scotia Ltd.* did not concern s. 11 or the registration of a condominium. It concerned the sale of a registered condominium project and the termination of its government as a condominium. Section 40 provides for this, and s. 40(1)(b) provides for a sale authorized by “the consent of the persons having registered claims against the property...created after the acceptance for registration of the declaration and description.”

[16] In the present case, encumbrancers have notice. LaFarge Canada Inc. opposes the receiver, and other lien claimants have expressed their support for LaFarge's position. For its part, the receiver argues that "a duty not to withhold consent unreasonably should be read into the statute" and makes no argument in favour of Justice Cromwell's other possibility, "or otherwise be found to exist". Therefore, the issue for me is strictly one of statutory interpretation.

[17] The Brett case was dealt with at first instance by Oland, J., as she then was. She provided an interpretation of s. 40(1)(b). She said, at para. 64 of *2475813 Nova Scotia Ltd.* v. *Rodgers*, [2000] N.S.J. 151, this about the requirement for an encumbrancer's consent to turn a condominium into an ordinary building:

> There is no stipulation that such consent cannot be unreasonably withheld. Whether a registered encumbrancer consents or withholds consent is a decision for it to make. In doing so, an encumbrancer can consider whatsoever it chooses, including any views of the unit owner.

[18] There is a great similarity between the exercise in interpreting s. 40(1)(b) as regards withholding consent to a sale and the interpretation of s. 11(1)(b) that I must now provide about withholding consent to registration. Having the advantage

of the concrete factual setting, I have, nevertheless, reached the same conclusion as did Justice Oland.

[19] An implied duty of reasonableness cannot be read into a statute the way a term is implied in a contract. Long ago it was decided that it is not proper to the roles of the courts and the legislature for a court to attempt to fill in a gap, or a supposed gap, in a substantial provision, as opposed to procedure, in a statute: *Magor and St. Mellons Rural District Council* v. *Newport Corporation*, [1952] A.C. 189 (H.L.).

[20] A duty of reasonableness in withholding consent under s. 11(1)(b) is to be found, if at all, in the words of s. 11 read in context according to the principle in *Re. Rizzo and Rizzo Shoes*, [1998] S.C.J. 2.

[21] Section 11(1) requires a consent from each encumbrancer. Nothing in the text requires an encumbrancer to provide the consent, no text empowers the court to override the requirement for the consent, and no text qualifies the word "consent" to limit it to consent not unreasonably withheld.

[22] The text is harmonious with the scheme of the *Condominium Act*, its purposes, and the purposes of s. 11(1)(b). The scheme was discussed by Justice Cromwell in *2475813 Nova Scotia Ltd.* at para. 2 to 9. I would add that encumbrancers are in a position similar to owners. Indeed, their financial interests may be greater than those of the holders of the equity. The scheme allows owners to convert ordinary buildings into condominiums, and back again, without a requirement for reasonableness, and it is consistent that encumbrancers should have a free right of consent.

[23] Also, the scheme is administrative, and it allows for predictability. The Registrar accepts the declaration for registration. In doing so, this official does not determine the reasonableness of a condominium. Once the owner satisfies the requirements for registration under the statute and regulations, registration follows. It would be disharmonious for the statute to impose a duty of reasonableness into a scheme of this kind.

[24] The Act provides its own statement of purpose in s. 2:

> The purpose of this Act is to facilitate the division of land into parts that are to be owned individually, and parts that are to be owned in common, to provide for the

> use and management of such properties and to expedite dealings therewith, and this Act shall be construed in a manner to give the greatest effect to these objects.

Mr. Cameron also directed me to authorities that show that consumer protection was also a purpose legislators had in mind when the legislated type of condominium was created during the middle of the last century.

[25] To include a right of free consent by encumbrancers is not disharmonious with these purposes. Indeed, financing could be difficult without that on both ends, conversion to condominiums and conversion from that regime.

[26] As Mr. Krulik points out, provisions like s. 11(1)(c) often serve several purposes. As I see it, one such purpose is to avoid imposing a change in the nature of an encumbrancer's security without the creditor agreeing or being paid off.

[27] Thus, consent means consent and not consent which may not unreasonably be withheld. This is the plain meaning of s. 11(1)(b) when read in the context of the surrounding text, the scheme of the legislation, and its purposes.

Legislative History of *Bankruptcy and Insolvency Act* Receivers

[28] The arguments on whether s. 243 of the *Bankruptcy and Insolvency Act* contains a power for the court to dispense with a s. 11(1)(b) consent and whether s. 11(1)(b) constitutionally ceases to operate when s. 243 applies, require an understanding of s. 243, the new national receiver provision. As there is little guidance on the new provision, and as some of the arguments relied on authorities about interim receivers, the legislative history of receiverships under the *Bankruptcy Act*, and later the *Bankruptcy and Insolvency Act*, will be of assistance.

[29] The receivership remedy was available from courts of equity, not law, to do one of two things. A receiver might be appointed to preserve and manage property pending the outcome of litigation. As with discovery, courts of equity could aid courts of law by providing a receiver on an interlocutory basis for an action at law. Secondly, a receiver was appointed to enforce rights over property and to preserve it pending realization. See, Muir Hunter, Q.C. *Kerr and Hunter on Receivers and Administrators*, 18th ed. (London: Sweet & Maxwell, 2005) at pp. 1 to 7.

[30] Counsel for the receiver submit “the ultimate purpose of a receiver’s appointment is the realization of the debtor’s assets.” They refer to the decision of Hallett, J. A. in *Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. 488 (C.A.) where he discusses *Re. Newdigate Colliery Ltd.*, [1912] 1 Ch. 468 (C.A.). I distinguish those cases on the basis that they concerned the appointment of a receiver-manager.

[31] *Newdigate* was decided within a decade or so after the courts first recognized the power to appoint a manager as part of the long established receivership remedy. In both *Newdigate* and *Bayhold*, the court had to consider the duty of a receiver-manager to preserve the goodwill of the business in receivership and under management. The point was that the receiver-manager was appointed with a view to the sale of a going concern including the goodwill.

[32] In my opinion, receivership was, and remains, a versatile remedy that is not restricted to sales of businesses in receivership. See, *Kerr and Hunter*, Ch. 2 for examples of the many different situations in which the court may appoint a receiver. (I agree, however, that a receivership for a secured creditor, such as one under s. 243, is usually with a view to a sale.)

[33] In the beginning, the remedy of receivership was not available for mortgagees. That only changed with the "just or convenient" provision in the Judicature Acts of the late nineteenth century, such as s. 43(9) of our *Judicature Act*. At that, the remedy kept its primarily interlocutory character. The receiver was appointed pending realization and obtained no power to sell. It was only by a further exercise of the court's power to order a sale that receivership became, effectively, a foreclosure remedy. (See *Kerr and Hunter*, p. 25 and p. 184).

[34] With that background in mind, we can better understand the provisions for an interim receiver incorporated into the first *Bankruptcy Act*, S.C. 1919, c. 36, s. 5 as amended by S.C. 1921, c. 17 and S.C. 1925, c. 31. The remedy was very limited.

[35] Separate procedures for creditors and debtors were present from the beginning of bankruptcy in Canada. A creditor could petition for a receiving order and, once the petition was heard or tried, and if the creditor was successful, the bankruptcy dated from the filing of the petition. This was much as it is today.

[36] The interim receivership provisions were designed to maintain the *status quo* after the filing of a petition and pending its hearing or trial. The creditor had to show the appointment was "necessary for the protection of the estate": s. 5(1). The only powers to be conferred on an interim receiver were to take possession of some or all of the debtor's property: s. 5(1), to sell perishable goods: s. 5(2), and to carry on the debtor's business for "conservatory purposes": s. 5(2). The court lacked power to realize on assets through such an interim receiver.

[37] From the beginning, the courts were very cautious about appointing interim receivers. Concern was expressed for the damage that could be done to the debtor's business, especially the good will, because the remedy was granted on a merely interlocutory basis before the allegations in the petition were proved. See *Re. Borts Ltd.* (1927), 8 C.B.R. 536 (O.S.C.) and *Re. Stewart & Sutterby* (1930), 11 C.B.R. 1 (O.S.C.) reversed on other grounds 11 C.B.R. 279.

[38] This cautious approach was reinforced by Parliament when the following phrase was incorporated into the new *Bankruptcy Act* of 1949, S.C. 1949 (2nd Sess.) c. 7, s. 24(2), formerly s. 5(2), now s. 46(2):

> ...but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for the conservatory purposes or to comply with the order of the court.

[39] The situation remained the same until the major amendments of 1992. These included the first significant expansion of the *Bankruptcy Act* into fields of insolvency law outside the bankruptcy regime, and the consequential change in name to the *Bankruptcy and Insolvency Act*.

[40] The 1992 amendments added Part XI - Secured Creditors and Receivers, which brought under federal law, without much change in substance, various aspects of receivership law that had previously applied to insolvent debtors at common law or under provincial legislation.

[41] Part XI includes refinements on *Ronald Elwyn Lister Ltd.* v. *Dunlop Canada Ltd.*, [1982] S.C.J. 38. Section 244 prescribes a form of notice to be sent, and a ten day notice period to be given, to a debtor before the appointment of a receiver of a debtor’s inventory, accounts receivable, or other property.

[42] Section 47 was also enacted by the 1992 amendments. It created a new kind of interim receiver, one available under s. 47(1) when "a notice is about to be sent or has been sent under subsection 244(1)". In either of those circumstances the court may "appoint a trustee as an interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates". Subsection 47(2) allows the bankruptcy court to give directions for the receiver to:

> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
>
> (c) take such other action as the court considers advisable.

[43] The 1992 amendments created yet a third kind of interim receiver. Section 47.1 provides for an interim receiver during the course of a proposal. Paragraph 47.1(2)(a) permits directions for the interim receiver to carry out duties of a trustee under a proposal but, otherwise, s. 47.1(2) is similar to s. 47(2).

[44] Last September the parts of S.C. 2005, c. 47 and S.C. 2007, c. 36 changing s. 47 and instituting a national receivership under new s. 243 were proclaimed. The receiver in this case was appointed under the new s. 243. The need to understand

context apparent from the legislative history, as well as the need to assess arguments put forward on behalf of the receiver on the interpretation of s. 243 and the constitutional relationship of it with s. 11(1)(c) of the *Condominium Act*, require us to take a close look at s. 47 before the recently proclaimed amendments.

[45] The receiver contends that the interim receivership under s. 47 was not at all like the restricted interim receivership under s. 46. The power of the court to give directions under s. 47 included wide substantive powers to do what was practical. Counsel for the receiver argue that these very broad powers under the former s. 47 are intended to continue under s. 243(1).

[46] The contention that s. 47 conveyed wide-ranging powers relies on the decision of Justice Farley in *Canada* v. *Curragh Inc.*, [1994] O.J. 953 (O.C.J.). Peat Marwick Thorne Inc. had been appointed as a s. 47 interim receiver of Curragh whose head office was in Toronto, but whose assets were mines in the Yukon, British Columbia, and notoriously, Nova Scotia. The interim receiver applied for an order barring claims so that it could sell a mine in Faro, in the Yukon. Creditors with builder's lien claims under Yukon law opposed the application. At para. 6, Justice Farley said that directions under s. 47(2)(c) "should

be tailored to meet the practical demands of the situation which is being encountered in any given case". The interim receiver submitted that "a sale would be enhanced if potential bidders were [made aware of the] claims against the property and with a confidence that they would be the sole claims, all others having been barred" (para. 7). Justice Farley was of the view "that this would be an obvious practical benefit in the circumstances" (para. 7), although this approach seems to override the statutory rights of barred creditors from becoming lien holders.

[47] At para. 15 and 16, Justice Farley based his assertion of authority to bar claims against land in another jurisdiction on inherent jurisdiction. It is evident that the kind of inherent jurisdiction he had in mind is the jurisdiction to set procedure when a court is given power to do something but the means of doing it are not prescribed, or are not prescribed in sufficient detail. On that basis, s. 47(2)(c) was interpreted, at para. 16, to provide "that the Court could enlist the services of an interim receiver to do not only what 'justice dictates' but also what 'practicality demands'."

[48] *Curragh* was extended to a s. 47.1 interim receiver in *Re. Charon Systems Inc.*, [2001] O.J. 5129 (O.S.C.J.). In that case, the Ontario court used an interim receivership as a vehicle to create debtor in possession financing with priority over secured creditors.

[49] Justice Farley returned to the theme in *Curragh* in a number of subsequently reported decisions, and other judges adopted his reasoning, see *Re. Battery Plus Inc.*, [2001] O.J. 4510 (S.C.J.) and *Re. Mums Unlimited Inc.*, [2004] O.J. 4743 (S.C.J.). Also, Justice Farley's decision in *Curragh* has been referred to in many subsequent decisions for its general approach to insolvency issues, which emphasizes the need for business-like practicality.

[50] The development of a broad approach to s. 47 led to numerous orders, especially out of the Toronto Commercial List, that appointed interim receivers with nation-wide powers, that often seemed to override local legislation, that were often *ex parte* but with a come back clause, and that often extended to the complete and final liquidation of the debtor's assets.

[51] The decision in *Curragh*, the decisions that followed it, and the practice of creating *ex parte* nation-wide, broadly empowered, full receiverships out of s. 47 were open to the criticism that they failed to give meaning to the word “interim” and the phrase “notice under subsection 244(1)” in s. 47(1) and the conservatory focus of the only specified powers in s. 47(2), that is, paragraphs (a) and (b). Issues remained about whether s. 47 could be used as a basis for a full receivership (interim to what?), whether it could be used as a basis for disposing of property other than for preservation, whether it could be used to override substantive provincial law, especially in other jurisdictions, and whether restrictions on persons who receive no notice are adequately protected by a come back clause.

[52] Justice Slatter was confronted with these issues in *Re. Big Sky Living Inc.*, [2002] A.J. 886 (Q.B.). Although consents from the most interested parties made it unnecessary to decide, he did observe at para. 8 “section 47 appears to contemplate that an interim receiver will be appointed for a brief period only, to protect the interest of the creditors while the 10-day notice period under s. 244 is running.”

[53] Justice Slatter confined *ex parte* restrictions of third party rights to situations of necessity. For example, he limited the stay provisions to thirty days except for

parties on whom the order is served (para. 35) and he limited the provision against terminating contracts to contracts for utilities and telecommunications (para. 27).

[54] Justice Slatter criticized the standard terms as being "in some respects 'legislative' in nature" (para. 13). He refused to include a paragraph limiting legislated rights of employees beyond what the *Bankruptcy and Insolvency Act* itself provides, which paragraph included an override of successor employer provisions (para. 42). He also limited a paragraph of the order about environmental liability, reducing it to the limits of s. 14.06(2) of the *Bankruptcy and Insolvency Act*.

[55] So, the 2005 and 2007 amendments were not made against a background of jurisprudential harmony in favour of an expansive authority to appoint receivers under s. 47. To the contrary, jurisprudence was split on the issues of making a full receivership out of an interim remedy, creating broad powers on an *ex parte* basis, and including provisions that seemed to interfere with legislation.

[56] The refusal in *Big Sky* to limit successor employer provisions not in conflict with the *Bankruptcy and Insolvency Act* was followed by the Ontario Court of

Appeal in *GMAC Commercial Credit* v. *T.C.T. Logistics Inc.*, [2004] O.J. 1353 (C.A.), upheld by a majority of the Supreme Court of Canada in [2006] S.C.J. 36.

[57] The Supreme Court of Canada decision, which we shall return to later, gives some indications for caution about an expansive approach to powers of the court under the former s. 47. The powers are "not openended" (para. 45). The section does not provide "jurisdictional largesse" (para. 46) "to make unilateral declarations about the rights of third parties affected by other statutory schemes" (para. 45). A "postscript" in the majority opinion also gives us reason to be cautious about the tendency towards *ex parte* orders and the absence of opportunities for interested persons to be heard before the court gives its initial rulings.

[58] With that jurisprudential background in mind, we turn to the 2005 and 2007 amendments. They left s. 46, the original interim receivership provision, unchanged except for the addition of s. 46(3), which restricted the power to make the appointment to "a court having jurisdiction in the judicial district of the locality of the debtor". In this instance, "court" means the bankruptcy court: s. 2 and s.

183. The restriction is the same as is found in s. 43(5), about the place for filing a petition.

[59] Section 47 was amended so that a receivership in connection with a notice of intention to enforce security is clearly interim. It lasts only until the secured creditor or a trustee in bankruptcy takes possession, or a deadline expires: s. 47(1). The catchall for the interim receiver's powers was changed from "take such other action as the court considers advisable" to "(c) take conservatory measures" and "(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value".

[60] The interim receivership for proposals was similarly made clearly interim: s. 47.1(2).

[61] As with the first kind of interim receivership, the jurisdiction to appoint s. 47 and s. 47.1 interim receivers was restricted to the local bankruptcy court.

[62] Having made interim receivership clearly interim, Parliament overhauled Part IX - Secured Creditors and Receivers to bring in a national receivership

regime. Subsection 243(1) now gives the bankruptcy courts power to appoint receivers where the former subsections applied to the superior courts as provincially constituted and exercising their ordinary jurisdiction. The kinds of powers the bankruptcy court may give to an interim receiver are:

> 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.

[63] As with interim receivers, an application for the appointment of a national receiver must be filed with the local bankruptcy court: s. 243(5). Only a licensed trustee in bankruptcy may be appointed a national receiver: s. 243(4).

[64] A national receiver picks up the duties, and protections, formerly only imposed by Part XI on, and afforded to, receivers appointed under provincial law. These include notice requirements under s. 245, statements and reports under 246, the general duty of good faith codified in s. 247, the right to seek directions codified in s. 249, and a limitation on liability in s. 251.

[65] The new national receivership regime is not part of the bankruptcy regime. The *Bankruptcy and Insolvency Act* keeps the two remedies separate, but there is some overlap. The overlap is important to some of the issues I have to decide. Overlapping protections and powers include, by operation of s. 14.06(1.1), some relief from liability for wages, successor employment, and pensions under s. 14.06(1.2), some relief from environmental liabilities under s. 14.06(2) and (4), power to borrow under s. 31, and power under s. 50(1)(b) to make a proposal. Overlapping duties or liabilities include the protections afforded to unpaid suppliers, farmers and fishermen, wage earners, and pension holders in s. 81.1 to 81.5.

[66] There are a few points to be taken from the legislative history that may assist the interpretation of s. 243:

- The interim receivership provisions have been returned to their original, 1919, conservatory purposes.

- Nevertheless, Parliament recognized the need for a national receivership as had been developed under s. 47 and it used, in s. 243(1)(c), the general words of former s. 47(2)(c) without the apparent constraints of “interim” and “notice under subsection 244(1)”.

- The new provision represents a departure from the interim receivership provisions because it provides a remedy that is clearly independent of the bankruptcy remedy.

- The new provision was enacted against a background of jurisprudential developments that called into question the “legislative” tendencies of some interim receivership orders.

Condominium Act, s. 11 and *Bankruptcy and Insolvency Act*, s. 136

[67] The receiver submits that the line of Supreme Court of Canada decisions from *Québec* v. *Rainville*, [1979] S.C.J. 93 down to *Husky Oil Operations Ltd.* v.

Canada, [1995] S.C.J. 77 support the view that s. 11(1)(b) is in operational conflict with the scheme of distribution under s. 136 of the *Bankruptcy and Insolvency Act* after the appointment of a receiver under s. 243. I hold the contrary view, that there is no operational conflict, for two reasons.

[68] Firstly, the *Rainville* line of cases holds provincial legislation to be in operational conflict only to the extent that the provincial legislation would alter the scheme of distribution in bankruptcy. In each case in this line, a conflict arose because of a provincially enacted security, or other advantage, for a preferred creditor. Otherwise, the scheme of distribution does not distinguish between a statutory security and a consensual security.

[69] A builder is not in the s. 136(1)(a) to (j) list of preferred creditors, and provincial law remains competent to provide statutory security in the form of a builder's lien and related advantages, such as s. 11(1)(b) of the *Condominium Act*.

[70] Mr. Kulik referred me to *Re. NsC Diesel Power Inc.*, [1990] N.S.J. 484 (S.C., T.D.) at para. 13, where it was recognized that a mechanic's lien holder remains a secured creditor in bankruptcy. The builder is either a secured creditor

under the opening phrase of s. 136(1) by virtue of its statutory lien or an unsecured creditor under s. 136(3) by virtue of its contract, but it is not a preferred creditor under s. 136(1)(a) to (j) to which the *Rainville* line of cases applies.

[71] Secondly, the scheme of distribution does not apply on a receivership under the *Bankruptcy and Insolvency Act*. As discussed, bankruptcy and receivership are distinct remedies available under the statute. The remedies overlap to the extent that some provisions in the Act apply to both bankruptcies and receiverships, but s. 136(1) applies only to "to proceeds realized from the property of a bankrupt".

Power to Override s. 11(1)(b)

[72] The receiver argues that the new s. 243(1), and especially s. 243(1)(c), "take any other action that the court considers advisable", is so broad as to permit the court to override some aspects of provincial legislation.

[73] The receiver's argument draws on the *Curragh* decision, and the interpretation of *Bayhold* already discussed. It is summarized this way in the written submissions on behalf of the receiver:

> The ultimate purpose of a receiver's appointment is the realization of the debtor's assets.
>
> The question then becomes whether this Court has the power under s. 243 to dispense with the consent of lien claimants and permit the registration of the condominiums as a necessary means of achieving that goal. It is submitted this result is entirely consistent with the purpose and intent of a s. 243 receiver to liquidate the asset. Indeed, granting this relief is necessary for the receiver to fulfill its mandate.
>
> It is recognized that the order sought would provide the Receiver with the power to override statutory rights where it is "just and convenient" to do so. It is submitted that the circumstances currently existing merit the exercise of such a power; specifically the process cannot move forward without it. Indeed, courts have often granted extraordinary powers to receivers in appropriate situations.

[74] In addition to *Curragh*, counsel for the receiver rely on *B.C. Central Credit Union* v. *Metro Co-operative Services*, [1982] B.C.J. 1933 (C.A.), in which it was held that the court could prevent a telephone service from refusing a receiver-manager the use of the telephone number of the company in receivership. As discussed, this sort of provision in a receivership order was approved in *Big Sky*. It does not involve overriding a statute. Indeed, the British Columbia Court of Appeal relied on a statute as an alternative reason for preventing the withdrawal of telephone numbers (para. 26).

[75] Counsel for the receiver also refer to *York* v. *Thornhill Green Co-Operative Homes Inc.*, [2009] O.J. 3036 (S.C.J.). A receiver moved for sale of a co-operative housing project. The members' occupancy agreements would be terminated and replaced with leases. Members of the co-operative opposed the motion. Justice Morawetz found that the transaction "reflects the commercial realities of the situation and addresses in a comprehensive manner the financial problems currently facing Thornhill Green" (para. 70). He said, at para. 74:

> The inescapable conclusion is that the co-operative governance model of Thornhill Green has not worked as envisioned. In my view, an operational change is necessary.

[76] Counsel for the receiver say that in *Thornhill Green* "the court...was willing to waive the resident's and the co-operative's right to withhold consent". I do not think that is what Justice Morawetz said. He said, at para. 72 and 73:

> It is recognized that currently each member of Thornhill Green is the beneficiary of protected housing rights, including occupancy rights and the right to participate in management, confirmed in the CCA and that a sale to HYI will eliminate occupancy rights of members and replace them with tenancy rights.
>
> However, the provisions of the SHRA [*Social Housing Reform Act*], including those provisions dealing with the Receiver's powers to sell the assets of a housing provider, apply despite any act or regulation to the contrary. Further, pursuant to s. 156 of the SHRA, where there is a conflict between any act or regulation and the SHRA, it is the SHRA that prevails.

He was not waiving a statutory right. He was giving effect to the statute under which the receiver was appointed and by which that receiver's powers prevailed over the rights of the members.

[77] Counsel refer me to other decisions showing the broad approach adopted by the courts to the remedy of receivership, but I do not take counsel to suggest that any of these supports the view that the remedy is employed to override a statute.

[78] Mr. Kulik for LaFarge and Mr. Cameron for the Attorney General made submissions premised on the deliberate interplay the *Bankruptcy and Insolvency Act* allows between the bankruptcy and insolvency regimes and provincial property law. Those submissions go to both the interpretation of s. 243, the issue now under consideration, and the issue of an operational conflict between s. 243 and s. 11(1)(b) of the *Condominium Act*. I am persuaded that s. 243 cannot be interpreted to authorize this court to empower a receiver to register a condominium without consents under s. 11(1)(b).

[79] Now that the wide description of kinds of powers for a receiver have been moved, with very little change in text, from interim receivership provisions to the

new national receivership provisions it is clear that Parliament authorizes the provision of a broad receivership remedy under the *Bankruptcy and Insolvency Act*. However, authority to override provincial legislation not otherwise in conflict with the *Bankruptcy and Insolvency Act* is not indicated when s. 243(1)(c) is read in context.

[80] The words "take any other action that the court considers advisable" are to be read in context. The closest context is that this is part of a provision that creates a remedy, receivership. At that, it creates a remedy only for secured creditors of insolvent debtors. It is premised on a substantive right, and provides only a remedial right. The words of s. 243(1)(c) are broad, but their focus is remedial.

[81] The wider context includes the approach taken by the *Bankruptcy and Insolvency Act* to the relationship between the bankruptcy and receivership remedies, on the one hand, and the general law of property and contracts, on the other. As already discussed, Justice Slatter, in *Big Sky*, confined restrictions on employee rights and environmental liability in an interim receivership to the modifications of provincial law authorized specifically by the *Bankruptcy and Insolvency Act*. As discussed, the Supreme Court of Canada interpreted the former

interim receivership provision as being limited by a provincial labour law not otherwise in conflict with the Act. It is necessary to take a closer look at *GMAC Commercial Credit Corp of Canada* v. *T.C.T. Logistics Inc*., [2006] S.C.J. 36.

[82] A s. 47 interim receivership order had made declarations about successor employment and a bankruptcy court judge had also refused leave for an application to the Ontario Labour Relations Board for a determination of whether the receiver's purchaser was a successor employer. The Ontario Court of Appeal decided that s. 47 did not override the Ontario *Labour Relations Act*, but the court split on whether to remit the case back to the bankruptcy court or to grant the leave itself.

[83] MacPherson, J.A. dissented in favour of granting the leave. A majority of the Supreme Court of Canada agreed with the appeal court on the scope of s. 47, but the appeal was allowed on the question of leave.

[84] Justice Abella wrote for the majority. In my opinion, her remarks at para. 44 to 49 are critical to the present issue. She begins by quoting s. 47(2), (a) to (c) of which are worded very closely to those of the new s. 243.

[85] Justice Abella says of s. 47(2), at para. 45:

> These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

She follows at para. 46 with "Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1)...".

[86] Subsection 72(1) is the primary mechanism for controlling the relationship between civil law and bankruptcy, and now *Bankruptcy and Insolvency Act* receiverships. It says "the provisions of this Act shall not be deemed to abrogate or supercede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act...".

[87] Justice Abella agreed with the Ontario Court of Appeal on the limits of the s. 47 powers:

> 47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the *Ontario Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:
>
> > ... the first half of [s. 72] clearly states that the *Bankruptcy and Insolvency Act* will not abrogate or supercede any provincial law unless that law is in conflict with the *Bankruptcy and Insolvency Act*. The language of s. 47(2) of the *Bankruptcy and Insolvency Act* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

[88] The present question is one of statutory interpretation. Specifically, it is a scope question. How far do the words of s. 243(1)(c) go? The reasoning in *T.C.T. Logistics* on the scope of s. 42(2)(c), in its earlier less restrictive setting, applies to the new s. 243(1)(c). The scope does not extend beyond the scheme in the rest of the *Bankruptcy and Insolvency Act* for keeping general laws of property and civil rights effective to the extent they are not overridden by the Act.

[89] Subsection 72(1) is part of a complex scheme in which the preservation of general laws of property and civil rights gives way to specific modifications or overrides. Some examples of the *Bankruptcy and Insolvency Act* modifying or overriding laws of property and contracts are: expansion of bases for challenging

conveyances and payments in the reviewable transactions, settlements, and preferences provisions, the eclipse and eventual discharge of judgments, restrictions on employee rights and environmental liability, termination of executions and distresses, limits on assignments of book debts and wages, overriding land registry filings, requiring other land registry filings, restrictions on third party rights of possession, modifications to patent and copyright laws, directors' liability for certain dividends, and special rights for suppliers, farmers, fishermen, wage earners, and pension beneficiaries. The general provision for powers that can be given to a receiver under s. 243 is different from these specific provisions. It is no more a basis for a conflict within the meaning of s. 72(1) than was the general provision for powers to an interim receiver in *T.C.T. Logistics*.

[90] Mr. Cameron put it well when he said that RIC New Brunswick Inc. does not have security in a condominium, it only has security in a building. Modern condominiums are "a creature of statute": *2475813 Nova Scotia Ltd.* v. *Rodgers*, para. 5. The receiver's proposal would take advantage of a statute but avoid a part of the statute that is disadvantageous to the secured creditor. Subsection 72(1) of the *Bankruptcy and Insolvency Act* does not work that way, and to order such a thing would be beyond the scope of s. 243(1)(c).

Operational Conflict Between *Condominium Act* and *Bankruptcy and Insolvency Act*

[91] It follows from the interpretation I have placed on s. 243 of the *Bankruptcy and Insolvency Act* that s. 11(1)(c) of the *Condominium Act* is not in any kind of conflict with it.

Residents

[92] Mr. Ralph Winter and Ms. Jean Winter provided a written submission. They are residents in the Railside building, they have a purchase agreement for the unit they occupy, and they have made significant improvements to the unit in the expectation that it would become a condominium and the agreement would be closed. The Winters tell me that there are other residents in similar circumstances.

[93] The Winters are concerned that if the consents of the lien claimants are not bypassed “the Receiver will likely proceed towards bankruptcy failing any future agreement with the lienholders”. They are concerned that bankruptcy, or a vesting

or foreclosure order, will extinguish their interests. They ask “that when balancing the interests of other ‘stakeholders’ in your decision you will also consider ours”.

[94] I have determined that the court does not have the authority to balance interests at this juncture. The builders’ lien holders have a right in law to provide or withhold their consent, and s. 243 of the *Bankruptcy and Insolvency Act* does not authorize the court to take that right away from them.

[95] At this stage, the receiver does not have the power to make an assignment in bankruptcy on behalf of Railside Developments Limited and the receiver has not brought a sale to the court for approval. Orders of those kinds will not be made without notice to residents who wish to receive notice and an opportunity to be heard.

[96] I am asking the receiver to advise the residents that they may obtain notice of a motion for an order that affects their interests by filing a designation of address for delivery under the *Nova Scotia Civil Procedure Rules,* as incorporated by the *General Rules Under the Bankruptcy and Insolvency Act*. The designation my be filed by sending it to:

Mr. Richard W. Cregan, Q.C.
Registrar in Bankruptcy
Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

A copy of the designation must also be sent, immediately before or after it is filed, to Ms. Conlon.

[97] Nothing in this decision is meant to indicate that the interests of the residents will, or will not, be foreclosed or that the court has, or does not have, a discretion to avoid that result without voluntary subrogation by RIC. The residents are advised to take advice of a lawyer, but they do not have to be represented by a lawyer to be heard on a motion.

Conclusion

[98] The receiver's motion for an order allowing the receiver to register the Railside building under the *Condominium Act* is granted, but the motion to dispense with the consent of the registered encumbrances is dismissed.

[99] The receiver will have solicitor and client costs, out of the estate in priority to secured creditors. LaFarge Canada Inc. and the Attorney General will have party and party costs out of the estate in priority to secured creditors. If counsel cannot settle on the amounts for party and party costs, I will determine the amount after considering written submissions.

[100] I thank counsel for their excellent written and oral presentations.

J.