



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00680668-00CL DATE: 3 October 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: RBC v. CNS FABRICATIONS LTD

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
TIM HOGAN	ROYAL BANK OF CANADA	THOGAN@HARRISONPENSA.COM

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
DOMENICO MAGISANO	MNP (RECEIVER – COURT APPOINTED OFFICER) – ROB SMITH	DMAGISANO@LERNERS.CA

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## **ENDORSEMENT OF JUSTICE KIMMEL:**

1. This is a motion by MNP Ltd. ("MNP"), the court appointed as Receiver of the property, assets and undertaking (collectively, the "Assets") of CNS Iron Fabrication Ltd. ("CNS") and Claeys Family Holdings Inc. ("HoldCo" and together with CNS, the "Companies"), for:
  - a. approval of its activities and fees, and those of its counsel, as outlined in the Second Report of the Receiver dated September 12, 2022 (the "Second Report");
  - b. approval of its Statement of Receipts and Disbursements (the "SRD");
  - c. approval of a distribution to the applicant, Royal Bank of Canada ("RBC"); and
  - d. the power and authority to bankrupt CNS, and relief related thereto.
2. RBC supports the Receiver's motion and the relief sought. None of the other persons on the service list who were served with this motion appeared or indicated any intention to oppose the relief sought. It was confirmed by the Receiver that the principal and sole director of the Companies (Robert Claeys, "Claeys") acknowledged having received the material that was delivered in connection with this motion.
3. The Receiver was appointed pursuant to the Order (the "Appointment Order") of Justice Gilmore dated May 13, 2022. Pursuant to an Order of Penny J. dated July 8, 2022, the court approved a sale (the "Transaction") of substantially all of the Assets (save for CNS' accounts receivable) to 1000221800 Ontario Inc. o/a SP Steel Manufacturing and Engineering ("SP Steel").
4. The Receiver's factum filed summarizes the evidence on this motion that is particularly relevant to the request for the approval of its proposed distribution to RBC and for the request that it be given the power and authority to bankrupt CNS:
  - a. The Transaction closed on July 25, 2022 and resulted in cash realizations of \$400,000.00 that were distributed to RBC.
  - b. The Transaction also appointed SP Steel the Receiver's exclusive agent for the collection of CNS' accounts receivable. To date SP Steel has collected \$1,192,555.00 of the outstanding accounts receivable owing to CNS as at the Appointment Date.
  - c. During its review of the Debtors' books and records, the Receiver has identified multiple transactions that took place in the weeks prior to the Appointment Order that remain unaccounted for. These unaccounted for transactions total \$115,511.00 of debits, and \$25,000.00 of credits, all occurring between May 3 and May 6, 2022 (the "Unaccounted For Transactions").
  - d. CNS's management group was not able to provide information related to the Unaccounted For Transactions and directed the Receiver to Claeys. The Receiver has contacted Claeys, but he has not provided any information or explanation about the Unaccounted For Transactions.
  - e. The Receiver recommends that it, on behalf of CNS, file an assignment into bankruptcy. The Receiver is willing to be appointed the trustee in bankruptcy, and use the enhanced remedies afforded to it under the BIA to assist it with the investigation and potential recovery of the Unaccounted For Transactions.
  - f. An assignment into bankruptcy will also reduce the CRA's deemed trust priority claim for unremitted HST to an ordinary unsecured claim and allow the Receiver to set up a forum to communicate with all creditors of the Debtors.

5. The focus of submissions on the motion was in respect of the relief sought by the Receiver to be granted the authority to make an assignment into bankruptcy on behalf of CNS and also be appointed the trustee in bankruptcy.
6. The other relief sought, for approval of the Receiver's Second Report and its activities and fees and those of its counsel, as well as for the proposed distribution of to RBC of some of the post-Transaction accounts receivable that have been collected, subject to a holdback in respect of CRA trust-related claims, is unopposed. All of that other relief is supported by the record and I consider it to be reasonable and appropriate to grant in the circumstances. The circumstances include that RBC is projected to have a significant shortfall in its recoveries and, as the senior secured creditor, is the one who is directly affected by this other relief and it supports the granting of the requested order.
7. The request for the authority and power to cause CNS to make an assignment into bankruptcy is justified so as to allow a trustee in bankruptcy, if appointed, to take advantage of the enhanced investigatory and enforcement powers granted to a trustee in bankruptcy to investigate the Unaccounted For Transactions that occurred just over a week prior to the Appointment Order (leading to a net withdrawal from the Companies of approximately \$90,000 according to the Receiver's preliminary investigation). These enhanced powers are found in s. 95, 96 and 101(1) of the *Bankruptcy and Insolvency Act* ("BIA") which provide remedies for preferences and transfers at undervalue, as well as allows for the inquiry of payments made by a bankrupt corporation. An investigation might uncover additional irregularities and the prospect of other remedies under the BIA as well.
8. These remedies may enhance the recoveries of RBC. The RBC recoveries could also be enhanced as a result of the elimination of one of the CRA trust-related claims in respect of HST upon a bankruptcy filing, and reducing those to unsecured claims in the bankruptcy. This is something that the CRA is on notice of and has not objected to in the context of this motion. The total currently estimated CRA trust-related claims (for HST and employee source deductions) total less than \$150,000 in the aggregate. The Receiver is proposing a holdback of \$200,000 (The "CRA Reserve"). In the event the CRA's deemed trust claims are less than the CRA Reserve, or CNS makes an assignment into bankruptcy, the residual monies after payment of CRA's deemed trust claim(s) and satisfaction of any subsequently approved ongoing professional fees, costs and expenses will be considered surplus property proceeds available to RBC. The Receiver anticipates dealing with any further distributions from the CRA Reserve on a future motion.
9. A further advantage of an assignment into bankruptcy that has been noted is that it will provide a forum to address unsecured creditor claims pursuant to s. 102-104 of the BIA.
10. The Receiver has cited precedents for such authority having been granted to cause a debtor to make an assignment into bankruptcy and for the Receiver to act as the trustee in bankruptcy. Orders dated August 27, 2020 and April 22, 2022 granting relief of this nature were made by McEwen J. in *Royal Bank of Canada v. National Recycling Inc. et al.*, and *Clearflow Commercial Finance Corp. v. Trigger Wholesale et al.* An earlier example can be found in *Roynat Inc. v. Creative Building Maintenance Inc.*, 2006 CanLII 18362 (ON SC). A copy of the granted order is cited as *HSBC Bank Canada v. Creative Building Maintenance Inc.*, 2006 CanLII 18361 (ON SC).

12. I am satisfied, in the circumstances of this case, that the Receiver should be granted the authority to, if it deems it to be necessary and appropriate, make an assignment into bankruptcy on behalf of CNS.
13. Order to go in the amended form signed by me today with immediate effect and without the necessity of formal issuance and entry.
14. The Receiver is directed to serve a copy of this endorsement and the signed order on the Service List.

A handwritten signature in black ink, appearing to read "Kimmel J.", written in a cursive style.

KIMMEL J.