

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**FEDERAL BUSINESS DEVELOPMENT BANK**

**Plaintiff**

- and -

**CONSTRUCTION J.C. COTE LTEE., 151930 CANADA INC.,  
JEAN CLAUDE COTE, LISE COTE, 167684 CANADA INC.,  
GUY BERUBE and JEANNE VALLEE**

**Defendants**

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Application for order confirming judicial sale of property in a foreclosure action.

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES**

Heard at Yellowknife, N.W.T.  
May 11, 1994

Judgment filed: May 13, 1994

Counsel for the Plaintiff: Garth Malakoe

Counsel for the Defendants,  
Construction J.C. Cote Ltee.,  
151930 Canada Inc., Jean  
Claude Cote, and Lise Cote: Garth Wallbridge

Counsel for the Defendants,  
167684 Canada Inc.,  
Guy Berube, and Jean Vallee: Lloyd W. Stang

Counsel for Roch Lessard Inc.: Ian W. Blackstock

Counsel for Toonoonik Sahoonek  
Co-Operative Ltd.: Geoffrey P. Wiest

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REASONS FOR JUDGMENT

This is an application for an order confirming a judicial sale in a foreclosure action. The issue raised on this application is whether the high bidder on the tender sale should be allowed to revoke its tender or should it be compelled to proceed with the purchase according to its tender?

2 The defendant, 167684 Canada Inc., has a leasehold interest in three lots located at Iqaluit, Northwest Territories. On these lots some of the defendants operated a business locally known as the "Bayshore Hotel". The plaintiff at various times advanced loans on the security of the business and leasehold assets and those loans went into default. Foreclosure proceedings were commenced and, at the present time, in excess of \$654,000 is owed to the plaintiff. In March of 1993, an appraisal of the business and

leasehold premises estimated market value in excess of \$1 million.

3 On September 13, 1993, an Order Nisi was issued by this court directing that, on default of payment of the then outstanding debt, the leasehold interest was to be sold by tender. In addition to the leasehold interest a schedule of chattels was attached to the Order Nisi. These chattels were included as part of the sale.

4 The Order Nisi provided that the leasehold interest and chattels were to be offered for sale by newspaper advertisement which was to be "subject to the Directions for Advertising to be approved by this Court". Further, all tenders received were to be submitted to the court for approval.

5 The advertisement as directed offered for sale the leasehold interest in the three lots plus "those certain chattels described in the Amended Statement of Claim". Those chattels were the same as described on the schedule attached to the Order Nisi. In addition, the advertisement contained the following:

**The balance of the purchase price shall be paid into Court within thirty (30) days after acceptance of the tender. Tenders are irrevocable and shall remain open until dealt with by this Court. If the successful tenderer does not complete the purchase after acceptance of his tender, the deposit shall be forfeited. The highest or any tender will not necessarily be accepted. Cheques of unsuccessful tenderers will be returned to them. The acceptance of any tender and any sale are subject to confirmation by the Court.** (Emphasis added)

6 By the closing date of March 28, 1994, the clerk had received four tenders. Of these, the two highest were (a) a tender from Roch Lessard Inc. in the amount of \$850,000; and (b) a tender from Toonoonik Sahoonek Co-Operative Limited in the amount of \$650,000.

7 A few days after the opening of the tenders, counsel for Lessard notified plaintiff's counsel that certain specific chattels listed on the schedule to the Order Nisi were not owned by the debtor and therefore could not be included in the sale. The specific chattels referred to were four vehicles described individually by make, year, and serial number, on the schedule. There is no evidence as to the value of these vehicles.

On April 7, 1994, Lessard's counsel informed plaintiff's counsel that Lessard wished to withdraw its tender because the vehicles were not available for transfer. Subsequently, on April 29, 1994, Lessard filed with the clerk a document entitled "Notice of Withdrawal of Tender". Also, in the meantime, Toonoonik Sahoonek confirmed that the unavailability of the vehicles did not affect its tender.

9 On April 12, 1994, the plaintiff filed this application to accept the Toonoonik Sahoonek tender. On April 27, 1994, the defendants, 167684 Canada Inc., Bérubé and Vallée, filed a cross-application to accept the Lessard tender.

At the hearing of this matter plaintiff's counsel quite frankly conceded that,

notwithstanding its application, it could not oppose the cross-application. This position should be self-evident since under the Lessard bid an additional \$200,000 becomes available for distribution.

11 The court is now faced with a very practical dilemma.

12 On the one hand, Lessard has bid in excess of the debt which means that other creditors or the debtors themselves may share in the sale proceeds. On the other hand, Lessard maintains its desire to withdraw from the proceedings and it is not unrealistic to assume that, if forced to complete the transaction, Lessard may default even if it means losing its deposit. Toonoonik Sagoonik, meanwhile, stands by its bid and is ready, willing and able to close the transaction. Underlying all of this is the concern, apparently shared by all parties, that because of the type of business at stake any sale should be concluded as expeditiously as possible.

13 The questions I have to answer are:

- 1) Is the Lessard tender irrevocable?
- 2) If it is irrevocable, are there specific grounds to allow for Lessard to now withdraw its tender?
- 3) If Lessard is allowed to withdraw, should the Toonoonik Sagoonik tender be accepted?

14 The guiding principle on a judicial sale such as this is quite simply that I must look to the interests of all persons concerned: Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.). The court's duty is to see that "the sale is conducted fairly and openly under reasonable conditions, and fairly advertised": Bank of Toronto v. Matheson [1928] 1 W.W.R. 846 (Sask.K.B.) at page 847.

15 There was much argument at the hearing, advanced in particular by Lessard's counsel, that the tender is not irrevocable. I cannot agree.

16 The plain fact is that the advertisement for tenders clearly specified that the bids were irrevocable. That advertisement was approved and directed by the court. While it is true that the Rules of Court do not specify irrevocability for sales by tender, in each action the terms of such sale are dictated by the form of advertisement: Allen v. Greaves (1982), 44 A.R. 300 (M.C.).

17 This case is exactly the situation contemplated in the Supreme Court of Canada judgment in The Queen v. Ron Engineering & Construction (Eastern) Ltd. (1981), 119 D.L.R. (3d) 267, where Estey J. said for the Court (at page 272):

**There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on**

the acceptance of a tender, and which I refer to as contract B. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender.

18 In this case the advertisement stipulated a condition of irrevocability. Therefore, Lessard's tender became irrevocable immediately upon filing. But should Lessard now be able to withdraw it?

19 Lessard's counsel submits that here there can be no contract. Part of what was advertised for sale cannot be sold. Counsel for the defendants, however, argue that the missing chattels, having regard to their "minimal" value compared to the overall amount of the bid, are not material to the contract and, in any event, the court may exercise a power to adjust the final sale price to account for the specific items.

20 Counsel for some of the defendants, while recognizing that the court has a discretion in accepting or rejecting tenders, suggested that the highest possible price should be achieved. In this vein reference was made to Bank of British Columbia v. Crowe (1986), 124 A.R. 239 (C.A.).

21 I do not read that case as suggesting that the highest possible price must be the one accepted by the court. There is authority that the court is not bound to order a sale to the highest bidder: Hector's Ltd. v. 26th Avenue Estates Ltd., [1963] 43 W.W.R. 85

(Alta.S.C.). In the Crowe case, the Court was merely reasserting its support of a wide discretion which is available to take into account a variety of factors, and to adopt innovative approaches, to achieve the best results in light of all of the circumstances of a given case. See also Salima Investments Ltd. v. Bank of Montreal (1986), 59 C.B.R. (N.S.) 242 (Alta.C.A.).

22 To my mind the significant problem is the missing vehicles. These items were specifically listed on the schedule of chattels. They were not, as most of the other items listed, generic inventory items related to the business operation. Some differences in the inventory may be an accepted part of a sale of an ongoing business. But where, as here, certain chattels are set out as distinct and individual chattels ----- "unique" as it were since even the serial numbers were listed ----- then in principle they become an integral component of the bargain made by the parties.

23 In First Western Capital Ltd. v. Taylor, [1980] 6 W.W.R. 69 (B.C.S.C.), the court was confronted with an application to set aside a court-approved sale. There too the sale included chattels comprising inventory some of which formed part of the security and some did not. The court held that the contract of sale was entered into under a mistake and that the sale was approved under a misapprehension as to the facts. Since a suit for specific performance at the instance of the plaintiffs would fail, there were grounds to set aside the sale.

24 Similarly, in Reed v. Renton, [1924] W.W.R. 881 (Alta.S.C.), it was held that the description of what is being sold should be reasonably definite and if not then confirmation of sale may be denied. Here, the description is defective since the four vehicles were not available for sale.

25 All this is not to say that I am convinced of the importance of these vehicles to Lessard in making its bid. It may be nothing more than a convenient escape hatch since there is evidence of some collateral negotiations between Lessard and some of the defendants over matters not related to this sale. Be that as it may, these are only suspicions whereas the lack of vehicles is a reality.

26 Can the court, as urged by counsel for the defendants, modify the terms of sale so as to account for the missing items? I think not.

27 On a judicial sale, the contract is between the court and the tenderer. The court, in the absence of a willing-to-negotiate purchaser, cannot remake the bargain:

**The order confirming sale in a foreclosure action effects a contract of sale ... The offer that the court purports to accept must be the offer that was made by the tenderer. The court cannot impose different terms on the tenderer.**

Price & Trussler, Mortgage Actions in Alberta (1985), page 227.

28

Therefore, based on the facts of this case, I conclude that it would be appropriate to allow Lessard to withdraw its tender and to recover its deposit.

29

The only thing remaining, therefore, is to decide whether the tender of Toonoonik Sagoonik should be accepted. I am satisfied that this bidder is, as noted before, ready, willing and able to complete this transaction. Nothing has been raised so as to question the integrity of the bid. Their tender is accepted and I hereby direct a sale of the leasehold interest and chattels to Toonoonik Sagoonik.

30

There is one final issue that I must address.

Counsel for 167684 Canada Inc. requested me to consider extending the redemption period to the actual date of closing of the sale. This request was based on s.30 of the Judicature Act, R.S.N.W.T. 1988, c.J-1:

**30. When**

- (a) **default is made in payment of money due under a mortgage, whether made before, on or after March 15, 1971, or in the observance of a covenant contained in the mortgage, and**
  - (b) **under the terms of the mortgage by reason of the default the payment of other portions of the principal money is accelerated and those portions presently become due and payable,**
- the mortgager may, notwithstanding any provision in the mortgage to the contrary and at any time before sale or before the grant of a final order of foreclosure, perform the covenant or pay the arrears that are in default, with costs to be taxed, and the mortgager shall thereupon be relieved from immediate payment of so much of the money secured by the mortgage as may not have become due and payable by lapse of time.**

32 I have concluded that I am unable to make the order requested.

33 The use of the distinction between "sale" and "final order of foreclosure" in section 30 suggests to me that it relates to first a private sale and second a judicial sale. In the event of a judicial sale the right of redemption extends only to the grant of a final order.

34 This interpretation accords with the case law that holds that generally the order for sale irrevocably terminates the equity of redemption as of the date of the order: Pew v. Zinck, [1953] 1 S.C.R. 285; and Marahrens v. Oluk, [1974] 3 W.W.R. 300 (Alta.C.A.). There is no right to redeem unless the order contains an express provision staying the operation of the order or if the order is set aside on appeal: Morguard Mtg. Invt. Ltd. v. Faro Dev. Corp. Ltd., [1975] 1 W.W.R. 737 (Alta.C.A.).

35 There have been no special circumstances shown to me to warrant granting a stay for any period of time. In any event, the debtor may apply to the court for relief (possibly under s.28 of the Judicature Act) if it wishes to redeem at any time prior to the actual closing. There is authority affirming that redemption can take place, in appropriate circumstances, at the discretion of the court even after a final order for foreclosure has been granted. See, for example, Northguard Acc. Corp. v. Kurtz (1977), 3 Alta.L.R. (2d) 172 (C.A.).

36 In conclusion, I order as follows:

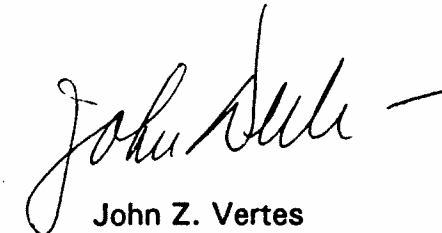
1. The tender of Toonoonik Sahoonek Co-Operative Limited, in the amount of \$650,000, for the leasehold interest in the mortgaged lands, as set out in the plaintiff's Notice of Motion filed on April 12, 1994, and chattels, is accepted.
2. All other tenders are rejected and the clerk is directed to return all deposits relating to the rejected tenders.
3. The consequential relief requested in clauses (e), (f), (g) and (h) of the plaintiff's Notice of Motion is granted.
4. The plaintiff's claim for judgment against the defendants, whether by way of deficiency after sale or otherwise, is adjourned sine die returnable on 5 days' notice.
5. The proceeds of sale shall be paid into court and shall not be paid out without further order of this court. The plaintiff shall give all parties appearing at this hearing 5 days' notice of any application for directions as to distribution of the proceeds.
6. At any hearing to determine distribution of sale proceeds, Roch Lessard Inc. will have leave to apply for a determination of the

priority claim of its mechanics' lien. If it wishes to have that issue determined, Roch Lessard Inc. shall:

- (a) file a Notice of Motion setting out the relief it seeks;
- (b) serve all parties (including all encumbrancers of the mortgaged lands) with no less than 5 days' notice of its application;
- (c) file and serve all supporting affidavits and other materials along with its Notice of Motion;
- (d) set the return date of its motion as the same return date as the application for directions as to distribution of sale proceeds; and
- (e) have leave to consolidate any aspect of the proceedings in action number CV 03552 with this motion.

7. The plaintiff shall have its costs of this application to be taxed on a solicitor-and-client basis as against the defendant 167684 Canada Inc. All other parties shall bear their own costs.

If counsel require further directions, they may make arrangements to see me in chambers.

  
 John Z. Vertes  
 J.S.C.

Counsel for the Plaintiff:	Garth Malakoe
Counsel for the Defendants, Construction J.C. Cote Ltee., 151930 Canada, Inc., Jean Claude Cote, and Lise Cote:	Garth Wallbridge
Counsel for the Defendants, 167684 Canada Inc., Guy Berube, and Jean Vallee:	Lloyd W. Stang
Counsel for Roch Lessard Inc.:	Ian W. Blackstock
Counsel for Toonoonik Sahoonek Co-Operative Ltd.:	Geoffrey P. Wiest



CV 04680

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