

BPHL HOLDINGS INC.

Applicant

-and-

2058756 ONTARIO LIMITED and MALIK SAJJAD KHALID,  
as Trustee of THE M.S. KHALID FAMILY TRUST

Respondents

Court File No. CV12-9818-00CL

6 Jan 15

Reasons released today as  
per attached handwritten  
enclosure - order to go as per  
more reasons. *MC E*

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

Proceedings commenced at Toronto

MOTION RECORD

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Lawyers for Taggart (Gardiners) Corporation

6 Jan 15

BPHL Holdings Inc v. Khalid  
# CV-12-1818-00CL

M. Keri - DTCL  
R. English - Taggart  
A. Apps - Khalid  
M. Faista - Queen  
J. Wylie - First Receiver  
C.B. Moran - Second Receiver

Taggart brings this motion seeking a declaration that the Nantel Indemnities, as described in the motion materials, vested in Taggart pursuant to orders made in this proceeding including the Approval and Vesting Order - as well as the 2013 transaction Taggart entered into with the Second Receiver.

Since there is urgency surrounding this dispute I am providing my reasons by way of a handwritten endorsement.

Currently, Taggart has entered into an agreement with Nantel and its court-appointed Monitor, subject to Court approval, in full and final settlement of any claim that Taggart may have in relation to environmental indemnifications provided in the past by Nantel - the aforementioned Nantel Indemnities.

Over time the Nantel Indemnities, and the property to which they are attached ("the Kingston property"), became owned by 2058756 Ontario Limited ("205"), in 2005.

In 2011, the MOE issued a remediation order - subsequent to this 205 began to experience financial difficulties and two Receivers were appointed.

The First Receiver, A. John Page + Associates, was appointed by order of D. Brown J. dated June 21/12. The First Receiver was appointed receiver of all assets, undertakings and properties of 205 save and except for the Kingstar property, including all proceeds therefrom (amongst other orders).

Campbell J, on Oct 10/12, appointed the Second Receiver Schwartz, Levitsky Feldman Inc as receiver of the Kingstar property including all assets, undertakings, businesses, leases and receivables and choses in action specifically relating thereto, (amongst other orders)

D. Brown J, on July 18/13, approved the 2013 Agreement of Purchase and Sale between the Second Receiver and Taggart delivering 205's right, title and interest in the Kingstar property as defined in the APS.

A dispute has arisen between Taggart and the Khalid Respondents ('Khalid') as to who owns the Nortel Indemnities and whether they were subsumed in the order of Brown J appointing the First Receiver or whether they were subsumed in the second order of Campbell J. appointing the Second Receiver.

At the hearing of the motion the MOE (Qwee), Nortel and the Monitor supported Taggart's position. BPHL supported Khalid's position.

(3)

The Receivers took no position although the First Receiver submitted that it understood that the Nortel Indemnities were part and parcel of its mandate.

The Second Receiver did not provide its position at the motion. Since I thought it important to obtain its view I ordered it to provide same, which it did by way of a Fourth Report. I then allowed interested parties to provide further submissions in writing, which they have done.

I have reviewed all of the original and supplementary submissions.

For the reasons below I dismiss the motion.

Both parties - Taggart and Khalid - agree that the Nortel Indemnities are an asset. Taggart also concedes that they do not automatically run with the land and that the terms of both the D. Brown  $\nabla$  and Campbell  $\nabla$  orders would include the Nortel Indemnities.

Taggart essentially submits, however, that while the D. Brown  $\nabla$  order would have "covered" the Nortel Indemnities it did not impede the ability of the Courts to grant the relief in the Campbell  $\nabla$  order and the ensuing vesting order which Taggart submits includes the Nortel Indemnities. Taggart's primary reasoning is that when one looks at the business efficacy of what

was being attempted in the Orders it would make no sense for Taggart to obtain an environmentally-challenged property without the rights associated with it.

Taggart further submits that 205, being in receivership, cannot trigger the indemnity; that the First Receiver would only be holding the Nortel Indemnities to sell them to someone who would do the actual cleanup; and, therefore if 205 retained the indemnities it would not necessarily result in the remediation of the Kigata property but rather an opportunity for 205 to "shake down" Taggart.

Khalid essentially takes the position that Taggart cannot sell what it never had and the First Receiver is the receiver of the Nortel Indemnities. It also submits that the First order was made on notice to all parties and there was no opposition. It further submits that the Nortel Indemnities are a valuable asset and thus of import to 205.

As noted, the First Receiver was of the view that it was to deal with the Nortel Indemnities. Significantly, in my view, the Second Receiver in its Fourth report is of the same view. The Second Receiver, in the report, <sup>in also</sup> sets out the context in which the APS with Taggart was negotiated.

The Second Receiver is of the opinion that it did not acquire the Nantel Indemnities. It is of the view that they were within the jurisdiction of the First Receiver; that they were not sold to Tappant; and that they were not discussed prior to the issuance of the Vesting Order. The Second Receiver further advises that the Nantel Indemnities were not marketed by it, nor were any proceeds allocated to the Nantel Indemnities.

In all of the above circumstances I do not find that there was any uncertainty between the Receivers as to the ownership of the Nantel Indemnities as alleged by Tappant.

I am also of the view that there is no conflict between the orders of D. Brown J and Campbell J. In light of their wording they can live together harmoniously with the Nantel Indemnities remaining with the First Receiver.

I do not deny that, overall, it would be practical to have the Nantel Indemnities subsumed in Campbell J's order as it would aid in remediation. The terms of ~~the~~<sup>the</sup> initial order of D. Brown J, however, capture the Nantel Indemnities and they are not later released in the subsequent orders. This is in keeping with the belief of both Receivers, and  $\therefore$  there is no ambiguity as submitted by Tappant.

(b)

Further, although perhaps somewhat cumbersome to deal with, the Nortel Intellectual are an asset of some value, perhaps significantly so, to 205.

For all these reasons, the motion is dismissed. Given the novel issue involved there shall be no order as to costs.

McEwen