

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

and

**NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES INC.,
NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATIONS INC.,
2242462 ONTARIO LIMITED and WATER FILTER CART INC.**

Respondents

FACTUM OF THE BANK OF NOVA SCOTIA

**KRONIS, ROTSZTAIN,
MARGLES, CAPPEL LLP**
11th Floor, 25 Sheppard Avenue West
Toronto, Ontario
M2N 6S6

Ron Aisenberg (LSO # 25221K)
Tel: (416) 218-5616
Email: raisenberg@krmc-law.com

Lawyers for The Bank of Nova Scotia

TO: THIS HONOURABLE COURT

AND TO: THE SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

and

**NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES INC.,
NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATIONS INC.,
2242462 ONTARIO LIMITED and WATER FILTER CART INC.**

Respondents

FACTUM OF THE BANK OF NOVA SCOTIA

1. The Receiver has *rightfully* determined that The Bank of Nova Scotia (“Scotiabank”) has priority over National Bank for 10 vehicle liens (“Scotiabank’s Liens”).
2. The Receiver has *wrongfully* determined that only \$39,130.34 should be distributed for Scotiabank’s Liens.¹ The total payout amount for Scotiabank’s Liens is \$108,217.73.² The distribution, if approved, would result in an unjust enrichment to National Bank at the expense of Scotiabank in the amount of \$69,087.39.

¹ Schedule “A”, Draft Distribution Order, at page 119 of Receiver’s Motion Record, Tab 3 – total of the amounts corresponding to Scotiabank under “Distribution” column.

² Schedule “A”, Draft Distribution Order, at page 119 of Receiver’s Motion Record, Tab 3 – total of the amounts corresponding to Scotiabank under “Debt owing” column; Affidavit of Stephon Mark, at para. 2, and Exhibit “A” – Motion Record of The Bank of Nova Scotia, Tab 1, pages 3-4 and 6.

3. Scotiabank first learned of this proposed distribution, and the “Vehicle Allocation” of \$200,000 (discussed below) upon receiving the Receiver’s Motion Record dated January 12, 2021.

The Vehicle Allocation is not contained in the Stalking Horse Asset Purchase Agreement, or in any previous motion material.

4. The Vesting and Appeal Order states at paragraph 5:

THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver’s Certificate **all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased 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.** (emphasis added)

5. Thus, Scotiabank’s Liens should have the same value and effect as if there had been no sale. Similarly, National Bank should not gain to the detriment of Scotiabank as a result of the sale.

6. There are 39 vehicles in total which were sold (“the Sold Vehicles”).³ The Receiver is basing its proposed distribution amounts on an allocated amount selected by the Purchaser *on closing*: \$200,000.⁴ The Purchaser likely based its allocation that suited it for tax purposes.

7. There were no valuations conducted for the Sold Vehicles. No analysis whatsoever. The Vehicle Allocation is \$5,128 per vehicle (\$200,000/39). On first impression, this cannot be right. And it isn’t.

³ Appendix “A” to Third Report of the Receiver – Receiver’s Motion Record, Tab 2, page 30.

⁴ Third Receiver’s Report, at para. 17 – Receiver’s Motion Record, Tab 2, page 23.

8. Scotiabank has done valuations of the 10 vehicles secured by Scotiabank's Liens. The Black Book valuations for the vehicles total \$232,050 (\$23,200/vehicle).^{5 6}

9. The Receiver's position (as understood by Scotiabank) is that:

- (1) the amount allocated by the Purchaser, on closing, whether it be \$10 or \$200,000, is the amount to be used for calculating distribution to the vehicle lienholders;
- (2) the Receiver need not do any valuations for the vehicles; and that,
- (3) Scotiabank, and other creditors, cannot challenge the \$200,000 Vehicle Allocation.

It is a fait accompli.

10. The Receiver has not fairly considered the interest of Scotiabank, and there has been unfairness in the working out of the process, contrary to the principles of *Soundair*.⁷

11. The Receiver estimates that under the current distribution plan, National Bank would suffer a deficiency of \$151,231.53 on \$12,326,909.86, a loss of 1.2%. Yet Scotiabank, which ranks ahead, should be expected to take a loss of \$69,087.39 on \$108,217.33, a loss of 63.8%. This would be an unjust result.

12. The only evidence of value for the Scotiabank vehicles is that they are worth \$232,050. Scotiabank should receive a distribution amounting to a full payout of \$108,217.73.

⁵ Affidavit of Stephon Mark, at para. 2, and Exhibit "A" – Motion Record of The Bank of Nova Scotia, Tab 1, pages 3-4 and 6.

⁶ Courts across Canada have accepted Black Book Values as evidence in determining a vehicle's value." per Price J. sitting as a Divisional Court judge in [Simpson v. 603418 Ontario Inc., 2018 ONSC 5156, at para. 71](#), citing eight decisions at paras. 71-75.

⁷ [Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 \(ON CA\)](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2022.

“Ron Aisenberg”

Ron Aisenberg

**KRONIS, ROTSZTAIN,
MARGLES, CAPPEL LLP**
11th Floor, 25 Sheppard Avenue West
Toronto, Ontario
M2N 6S6

Ron Aisenberg (LSO # 25221K)
Tel: (416) 218-5616
Email: raisenberg@krmc-law.com

Lawyers for The Bank of Nova Scotia

IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

NATIONAL BANK OF CANADA
Applicant

-and- **NIMBUS ENVIRONMENTAL SOLUTIONS INC.**
Respondents

Court File No. CV-21-00667395-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE BANK OF NOVA SCOTIA

**KRONIS, ROTSZTAIN,
MARGLES, CAPPEL LLP**
11th Floor, 25 Sheppard Avenue West
Toronto, Ontario
M2N 6S6

Ron Aisenberg (LSO # 25221K)
Tel: (416) 218-5616
Fax: (416) 225-2593
email: RAisenberg@krmc-law.com

Lawyers for The Bank of Nova Scotia

Our File No. 129087