

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
ROYAL BANK OF CANADA	)	
	)	
	Plaintiff	
	)	Natalie Marconi, for the Plaintiff
<b>– and –</b>	)	
	)	
TONY SILVAGGIO O/A TONY’S	)	
MOBILE REPAIRS	)	
	)	
	Defendant	
	)	Self-Represented, did not appear
	)	
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	)	
	)	<b>HEARD:</b> April 23, 2024

**J. SPEYER J**

**JUDGMENT**

A. Introduction

- [1] The defendant, Tony Silvaggio o/a Tony’s Mobile Repairs, owes money to the plaintiff (“RBC”) for unpaid credit card bills. RBC obtained default judgment against the defendant on February 4, 2022. The defendant was ordered to pay \$18,378.19 plus costs in the amount of \$351.00 to RBC. The judgment bears interest at the rate of prime plus 6.9%. The defendant has not paid the judgment.
  
- [2] The defendant owns a property situated at 21 Limerick Avenue, Toronto, jointly with Kelly Ann Silvaggio. RBC wishes to compel a sale of that property and to be paid the amount of the judgment from the proceeds of the sale. RBC filed a writ of seizure and sale on February 4, 2022.

- [3] The *Execution Act*, RSO 1990, Ch. E-24, s. 9, provides RBC with a means by which to compel a sale of the property, and to collect the amount of the default judgment from the proceeds of the sale. That process is referred to as a sheriff's sale.
- [4] RBC prefers to compel the sale by a different process. RBC moves for the appointment of a referee under Rule 54.02 of the *Rules of Civil Procedure* as a pre-requisite to obtaining an Order for sale of the land under Rule 55.06. The anticipated motion for a judicial sale was not before me. RBC submits that this process will generate a better price for the property than a sheriff's sale would achieve, and that it is an efficient process. RBC, and other creditors, have advanced this position in several cases, with mixed success.
- [5] Both the defendant and Kelly Ann Silvaggio were served with RBC's Notice of Motion and factum. Neither responded in any fashion.
- [6] It is important to set out the orders sought by RBC to evaluate RBC's submission that "a judicial sale involves two short court attendances on notice to the debtor: a motion and a reference" and that generally "the motions proceed unopposed taking up a minimum of court time". The orders sought include:
- i. An Order pursuant to Rule 54.02 directing a reference to inquire into and determine all issues relating to the conduct of the sale of the Defendant's interest in the property known municipally as 21 Limerick Avenue, Toronto, Ontario M9N 2P4 as a prerequisite to seeking an order for sale including:
    - a. The nature and the particulars of the interest of the Defendant, in the lands and of the Defendant's title thereto;
    - b. The judgments and writs of execution that bind the lands and the priorities between them;
    - c. The property or interest in the lands that is liable to be sold under the Judgment;
    - d. Any reason why it would be unjust or inequitable to require the sale of the Defendant's property or interest in the lands; and,
    - e. The manner in which the proceeds of a sale of the lands should be distributed.
  - ii. An Order severing the joint tenancy to 21 Limerick Avenue, Toronto, Ontario M9N 2P4, and that the property is owned in common by Tony Silvaggio and Kelly Ann Silvaggio.
  - iii. An Order that the parties may apply to this court for further direction from time to time.

- iv. An Order that upon the Plaintiff's filing of form 55A under the *Rules of Civil Procedure*, along with a copy of the order and requisition requesting that the reference be scheduled, the court shall respond within thirty days to advise of the date on which the reference is to be held before an Associate Judge.
- v. An Order directing the referee to report the findings of the reference to the Court.
- vi. An Order directing that the fee for issuing the Order directing a reference shall be payable when the judgment creditor schedules the initial hearing with the referee.

[7] This motion was one of three similar motions brought by RBC to be heard on my short motions list in Newmarket on April 24, 2024. Only two of those motions proceeded to a hearing because, as counsel advised me in response to my question, one of the debtors got in touch with RBC after being served with the motion materials to work out a repayment plan. The other motion is addressed in my judgment in *RBC v. Kanagaratnam*, 2024 ONSC 2850, released concurrently with this decision.

B. The legal basis for the relief sought by RBC

[8] Since the decision of Broad J. in *Canaccede International Acquisitions Ltd. v. Abdullah*, 2015 ONSC 5553, motions by creditors such as the present motion have been brought with some frequency.

[9] Decisions of this court differ as to whether the remedy sought by RBC in this case should be granted. Such motions were dismissed in: *The Bank of Nova Scotia v Robson*, 2023 ONSC 3116; *RBC v. Hammond*, 2022 ONSC 4579; *RBC v. Wong*, 2022 ONSC 54; *Bank of Nova Scotia v. Carmichael*, 2022 ONSC 4294; and *Luu v. Abuomar*, 2016 ONSC 4299. Motions for a reference and judicial sale were granted in: *Canaccede International Acquisitions Ltd. v. Abdullah*, 2015 ONSC 553; *RBC v. Shawesh*, 2022 ONSC 1399; *Royal Bank of Canada v. Newbury*, 2022 ONSC 5681; *Nissan Canada Financial Services v Walsh*, 2021 ONSC 8470; *Nissan Canada Financial Services Inc. v. Colborne*, CV-19-00141866-0000 (unreported decision of Dawe, J., as he then was, dated October 6, 2021); and *Royal Bank of Canada v. Haque* CV-17-132090-00 (unreported decision of Christie J. dated September 15, 2021).<sup>1</sup> It does not appear that any of these decisions have been appealed.

[10] I agree with and adopt the reasons of Kurz J. in *Wong* and *Hammond*, Grey J. in *Luu*, and Valente J. in *Robson*. The reasons for judgment in those cases are detailed and I agree with the reasoning and conclusions reached in those cases. More particularly, and in summary,

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<sup>1</sup> This is not a comprehensive list of this Court's decisions on this issue. See, for example, the unreported cases referred to in *The Bank of Nova Scotia v Robson*, 2023 ONSC 3116, para. 4. See also *Royal Bank v Alburn Smith*, 2023 ONSC 266, in which Associate Justice Graham describes a reference hearing conducted by him, pursuant to an Order made by Vella J. on August 12, 2022.

- (1) Broad J.’s decision in *Canaccede* was made in the context of then prevailing jurisprudence holding that the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”) prevented a mortgagee from providing a mortgage statement to a third-party judgment creditor of the mortgagor/debtor. Because the mortgagee was prevented by PIPEDA from providing such mortgage discharge statements as were required by the sheriff as a pre-condition to conducting a sheriff’s sale, there existed significant and costly impediments to the third-party judgment creditor initiating a sheriff’s sale.<sup>2</sup> Broad J. concluded that those special circumstances allowed the court to exercise its inherent jurisdiction to order a reference and judicial sale. Broad J.’s decision in *Canaccede* stands for the proposition that for the court to exercise its inherent jurisdiction to order a reference and judicial sale, there must be:
  - i. an impediment to the employment of a sheriff’s sale, which Broad J. referred to as “special circumstances”; and,
  - ii. a benefit to the employment of an equitable receiver that would make their use just and equitable.
- (2) The legislature, through statute, the *Execution Act*, chose a sheriff’s sale as the vehicle for the enforcement of a writ of seizure and sale against real property, and absent special circumstances or some other injustice, the process of the *Execution Act* should prevail over a common law process.

[11] With respect, I disagree with the reasoning of my colleagues in *Shawesh, Newbury, Walsh, Colborne*; and *Haque*. These decisions do not undertake the sort of detailed analysis undertaken in *Wong, Luu, Hammond*, and *Robson*. Some pre-date *Wong* and are one-paragraph endorsements on the back of a motion record (*Colborne* and *Haque*). Moreover, these decisions accept the uncontested affidavit evidence of Murray Nightingale, who is a partner at the law firm representing the plaintiff, and a senior member of the bar with experience in judicial sales and sheriff-conducted public auctions of properties. As I will explain, Mr. Nightingale’s affidavit does not convince me that there are advantages to a reference and judicial sale under Rule 54.02(2)(b), including that this process is more likely to secure fair market value price for the judgment debtor’s property than will a sheriff’s auction. I have the benefit of the decision of Associate Justice Graham in *Royal Bank v. Alburn Smith*, 2023 ONSC 2665, describing the process of a reference in a case such as this, which was not available to my colleagues in *Shawesh, Newbury, Walsh, Colborne*; and *Haque*.

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<sup>2</sup> After *Canaccede* was decided, the Supreme Court of Canada, in *Royal Bank of Canada v. Trang*, 2016 SCC 50, [2016] 2 SCR 412, over-ruled the decision of the Ontario Court of Appeal in *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3, 103 O.R. (3d) 241, concluding that PIPEDA does not prevent a court from making an order requiring a mortgagee to provide a mortgage discharge statement to a judgment creditor who has filed a writ of seizure and sale in relation to the mortgaged property.

C. The evidence does not establish special circumstances or that the relief sought is just and equitable.

- [12] The evidence before me, taken together with the decision of Associate Justice Graham in *Royal Bank v. Alburn Smith*, 2023 ONSC 2665, convinces me that a reference and judicial sale is a cumbersome and expensive process.
- [13] RBC relies on an affidavit by Murray Nightingale, a lawyer since 1986 and a partner in the firm the represents RBC on this motion. The affidavit generally focuses on why sheriff's sales are bad. It says little about the efficacy, efficiency, or costs of a reference and judicial sale. Mr. Nightingale states that "a judicial sale inevitably results in a successful sale at fair market value, or, a voluntary payout by the debtor"; and, "a judicial sale provides the maximum exposure to the public as a realtor advertises on the multiple listing site". I asked counsel for RBC to describe how a reference and judicial sale proceeded in those cases where RBC has been successful on a motion such as this. Counsel responded that the debtors in each of those cases engaged with RBC when faced with an Order for a reference, and repayment terms were worked out, so a judicial sale was not required. The only way to reconcile that response with Mr. Nightingale's affidavit is that his statement that "a judicial sale inevitably results in a successful sale at fair market value, or, a voluntary payout by the debtor" must be read to disregard entirely the first clause: that a judicial sale inevitably results in a successful sale at fair market value. There is no reliable evidence before me about how judicial sales are conducted or whether they result in a successful sale at fair market value.
- [14] In his affidavit, Mr. Nightingale describes a few examples of sheriff sales handled by his firm: 1) a 2016 file (the date of sale is not provided) regarding a sale in Thunder Bay; 2) a 2019 sale of a property in Toronto; and 3) a 1999 sale in what was then the City of York. This dated and small sample does not provide a sufficient basis on which to draw any conclusions about the ability of a sheriff's sale to achieve a fair price for property. Two other examples are provided where a sheriff's sale did not proceed because insufficient bids were received, both in 2019, one in Windsor and one in Oshawa. Again, this dated and small sample is insufficient to draw any conclusions about the efficacy of sheriff's sales. Mr. Nightingale does not state that all sheriff's sales in which his firm participated resulted either in no sale, or a price well below fair market value. His affidavit is silent as to any successful sheriff's sales in which his firm has participated. He states that his firm has practiced exclusively in debt collection for financial institutions, and that these five examples represent "an accurate reflection of what has actually happened on our files". A more current and geographically relevant sample is required to reliably draw any conclusions about the efficacy of sheriff's sales.
- [15] Mr. Nightingale's affidavit is silent about how judicial sales proceeded, in those cases where his firm successfully moved for an order directing such a sale. In its factum, RBC asserts that "a judicial sale involves two short court attendances: a motion and a reference". This significantly understates the nature of the procedure that RBC seeks to employ. I will explain.

- [16] In *Royal Bank of Canada v. Alburn Smith*, 2023 ONSC 2665, Associate Justice Graham described the conduct of a reference he conducted pursuant to an Order made by Vella J., like the Order sought by RBC in this case. The reference hearing consumed significant judicial resources to provide a report to Vella J., who was then required to review and confirm the report, and make a further order for a judicial sale, if appropriate. The lengthy endorsement of Associate Justice Graham confirms the observation of Gray J. in *Luu*, at para. 68, that “a judicial sale is actually a rather cumbersome and expensive process, probably more so than a sale under the *Execution Act*”. To the same effect is the view expressed in Morden and Perell, *The Law of Civil Procedure in Ontario*, 5th ed. (Toronto: LexisNexis Canada, 2024), at section 5.202, where the authors note that “[h]istorically, and up to the present, actions for foreclosure or for judicial sale have been complicated and cumbersome procedures.”
- [17] Associate Justice Graham conducted a Hearing for Directions under Rule 55.02(1) and ordered the plaintiff to file a Reference Record and to serve it on all interested parties. The Reference Record that was filed contained evidence about who owned the property, the charges against the property, and existing writs of execution. The plaintiff had all this information before the reference was heard. Associate Justice Graham made findings on the reference hearing as required by the Order of Vella J. None of those findings revealed anything that the plaintiffs did not already know. Associate Justice Graham rejected the submission of counsel for RBC that he had jurisdiction, either pursuant to the Order of Vella J. or pursuant to Rule 54.03, to order that a judicial sale occur. Associate Justice Graham ordered counsel for RBC to prepare a draft report based on the reference findings for his review and approval. Associate Justice Graham reminded counsel for RBC that Rule 54.08(1) required that the report would have to be confirmed, on motion, by the judge who ordered the reference.
- [18] I do not accept counsel’s submission that a reference and judicial sale involves only two short court attendances. *RBC v. Smith* demonstrates otherwise. Counsel for RBC before Associate Justice Graham was counsel with the firm representing RBC before me. Associate Justice Graham’s reported decision was not brought to my attention and was not mentioned in response to my direct question to counsel for RBC about how a reference and judicial sale proceeded in those cases where RBC was successful on a motion such as this.
- [19] The reference before Associate Justice Graham took about one year. Vella J. ordered on August 12, 2022, that the reference occur. Counsel for RBC appeared before Associate Justice Graham on November 28, 2022, at the Hearing for Directions, and again on May 1, 2023, at the Reference Hearing. It is not known to me when counsel completed the draft report, when it was approved by Associate Justice Graham, or when counsel was able to return before Vella J. to have the report confirmed. I estimate that those steps will have taken several months, at best. It appears to me that the reference in this case required four appearances before either a Superior Court Judge or an Associate Judge, over a period of about a year, and that the exercise did not provide counsel or the court with any information that was not readily available and already in the hands of the counsel for RBC when the process began. The reference did not serve any useful purpose. All this effort was expended

before any order for judicial sale could be obtained. The process in *RBC v. Smith* was cumbersome, inefficient, expensive, and a poor use of scarce court resources.

- [20] In considering what is just in this case, I have considered the current backlog in all areas of the Superior Court's areas of responsibility. I echo the comments of Kurz J. in *Wong*, at para. 37:

[S]ince recourse to the relief sought by RBC appears to be increasing, that this court simply cannot afford to offer additional resources to the type of endeavour that RBC calls upon it to engage. At a time when families are waiting, in some jurisdictions for up to six months for a first case conference, civil jury trials are delayed by years and courts are straining with pandemic related backlogs of criminal jury trials, our courts should not be asked to engage in the reference/judicial sale process unless the reasons for the request are exceptional and compelling. They cannot be, as many institutional litigants seem to wish them to be, routine.

- [21] To this I would add that, unlike in Toronto and Ottawa, there are no Associate Judges in the Central East Region to conduct a reference and judicial sale. This work would have to be done by a judge of the Superior Court, in circumstances where family law litigants must wait seven to eight months for a first case conference and six months to have a motion heard, civil trials (both jury and non-jury) are severely backlogged, and persons facing criminal charges often wait over a year after their matters are pre-tried to have a trial, even if they are in custody.

- [22] To be clear, my decision is not compelled by a desire to not add to this court's backlog. If the procedure sought to be employed by RBC was available at law, and special circumstances justified the use of that procedure because it was just and equitable, then there might be no good reason to deny RBC the remedy it seeks. This court's backlog is merely one factor that bears on what is just.

D. The motion to sever the joint tenancy

- [23] Finally, it seems to me that in this case RBC is seeking to do indirectly what it cannot do directly. The property at issue in this case is jointly owned by the respondent and Kelly Ann Silvaggio. Ms. Silvaggio does not owe money to RBC. RBC seeks an Order severing the joint tenancy and declaring that the property is owned in common. The likely reason for the relief sought is that an execution creditor does not have the right to apply under the *Partition Act* for a sale of land, where the land is owned jointly by the execution debtor and another person: see *Ferrier v. Civiero* (2001), 147 O.A.C. 196.

- [24] As noted by Gray J. in *Luu*, at para. 73, “[t]o give effect to the applicant’s argument would mean, in my view, that the clear holding of the Court of Appeal in *Ferrier v. Civiero* could be overcome through the back door. If an execution creditor has no right to sell jointly owned property under the *Partition Act*, it cannot achieve the same result indirectly through the device of a judicial sale.”

[25] The applicant directed no argument to, and provided no authority for, its position that this court can or should make an order severing the joint tenancy in this case. Given my conclusion as to the availability of a reference as prelude to an order for judicial sale, I need not consider this issue further.

E. Conclusion

[26] For these reasons, the motion for a reference and related relief in preparation for a motion that the property be sold by judicial sale is dismissed.

[27] There will be no order as to costs.

**Released: July 9, 2024**



**CITATION:** Royal Bank of Canada v. Tony Silvaggio O/A Tony's Mobile Repairs  
2024 ONSC 2749  
**COURT FILE NO.:** CV-22-104  
**DATE:** July 9, 2024

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ROYAL BANK OF CANADA

Plaintiff

– and –

TONY SILVAGGIO O/A TONY'S MOBILE  
REPAIRS

Defendant

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**JUDGMENT**

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The Honourable Madam Justice J. Speyer

**Released: July 9, 2024**