

Citation: *1470568 Ontario Limited (East Side Mario's) v. Prime Restaurants of Canada Inc.*,
2011 ONCA 9 — **Date:** 2011-01-10 — **Docket:** C51891

COURT OF APPEAL FOR ONTARIO

Weiler, Laskin and Goudge JJ.A.

Between

**1470568 ONTARIO LIMITED CARRYING ON BUSINESS AS EAST
SIDE MARIO'S**

Respondent (Appellant)

AND

PRIME RESTAURANTS OF CANADA INC.

Applicant (Respondent)

Marc A. Munro, for the appellant
Domenico Magisano, for the respondent
John Russo, for the receiver

Heard: September 23, 2010

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On appeal from the order of Justice Geoffrey B. Morawetz
of the Superior Court of Justice dated March 22, 2010.
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Goudge J.A.:

INTRODUCTION

[1] The respondent is the Canadian franchisor of the “East Side Mario’s” restaurant brand. The appellant is the franchisee of an East Side Mario’s restaurant in Brampton Ontario.

[2] On the respondent’s application, Justice Morawetz appointed a receiver of the appellant’s business on March 22, 2010. The application judge held that it was just and convenient to do so because the appellant was not making the required franchise payments to the respondent or the

required PST payments to the provincial government. He dismissed the appellant's arguments that the respondent had forgiven its material cumulative debt in letters of March 23, 2009 and November 23, 2009 and that alleged PST default could not be considered because it was not included in the respondent's notice of application.

[3] The appellant repeats these arguments in this court. For the reasons that follow I reject them, as the application judge did, and I would therefore dismiss the appeal.

THE FACTS

[4] In late 2005, the appellant took over an East Side Mario's restaurant in Brampton as a franchisee. The appellant's relationship with the respondent was governed by the Franchise Agreement and the Security Agreement between them. The Franchise Agreement required the appellant to remit franchise payments to the respondent made up of royalty and service fees of 5% of gross revenues, and advertising contributions of a further 3% of gross revenues.

[5] From the beginning, the appellant did not comply with the payment obligations required by the Franchise Agreement. When negotiations to resolve this broke down, the respondent sent a notice of default to the appellant on January 18, 2010, setting out the amounts it said were owing for royalty and service fees and for advertising contributions. Then on February 10, 2010, it commenced this application pursuant to the *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3](#) (the "BIA") to have a receiver appointed. Among other things, its supporting affidavit material also disclosed a claim against the appellant by the provincial government for PST arrears of \$101,541. On consent, an interim receiver was appointed on February 23, 2010, pending argument of the application itself. The report to the court of the interim receiver dated March 16, 2010 ascertained that the PST default in fact was \$270,657.57.