File No. CI 23-01-39421

THE KING'S BENCH

WINNIPEG CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

FIRST NATIONAL FINANCIAL GP CORPORATION,

Applicant,

- and -

5684961 MANITOBA LTD., 6315402 MANITOBA LTD. and K & P PROPERTIES INC.,

Respondents.

MOTION BRIEF OF THE RECEIVER
HEARING DATE: TUESDAY, SEPTEMBER 10, 2024 at 9:00 a.m.
BEFORE THE HONOURABLE MR. JUSTICE MARTIN

PITBLADO LLP
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(File No. 61972/3)

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PART I

LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Motion, to be filed;
2. Receivership Order pronounced March 17, 2023;
3. The Receiver's First Report dated April 25, 2023;
4. The Order of the Honourable Justice Martin pronounced April 28, 2023;
5. The Receiver's Second Report dated June 9, 2023 and Supplement to the Second Report dated June 29, 2023;
6. The Order of the Honourable Justice Martin pronounced July 7, 2023;
7. The Receiver's Third Report dated February 7, 2024;
8. The Order of the Honourable Justice Martin pronounced February 13, 2024;
9. The Receiver's Fourth Report dated August 28, 2024;
10. Such further and other evidence as counsel may advise and this Honourable Court may allow.

PART II

AUTHORITIES TO BE RELIED UPON

TAB

1. Court of Kings Bench Rules 2.03, 3.02, 16.04(1), 16.08(1) and 37
2. *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161
3. *Target Canada Co., Re*, 2015 ONSC 7574
4. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400
5. *Ed Mirvish Enterprises Ltd. v Stinson Hospitality Inc.*, 2009 CarswellOnt 6167 (ONSC)
6. *West Face Capital Inc. v Chieftain Metals Inc.*, 2020 ONSC 5161
7. *The Corporations Act*, C.C.S.M., c. C225, Section 95

PART III

STATEMENT OF FACTS

1. This is a motion brought by MNP Ltd., the Court-appointed receiver (the "**Receiver**") of the Respondent, 5684961 Manitoba Ltd. (the "**Debtor**"). The relevant information to be considered and the Receiver's position can be found in the Reports of the Receiver and specifically, the Fourth Report of the Receiver, dated August 28, 2024 (the "**Fourth Report**").

PART IV

ISSUES

A. Should service of the within motion and supporting materials be abridged and validated?

B. Should this Honourable Court approve and authorize a distribution and payment to the Applicant, First National Financial GP Corporation ("**FNF**"), as proposed by the Receiver in its Fourth Report?

C. Should the Fourth Report, the activities of the Receiver described therein, and the Receiver's Statement of Receipts and Disbursements be approved?

D. Should the fees, estimated fees, and disbursements of the Receiver and its legal counsel be approved?

E. Should the Receiver be discharged following distribution to FNF, completion of the administration of the receivership, and the filing of a Discharge Certificate?

PART V

ARGUMENT

A. Service of the within motion and supporting materials should be abridged and validated.

1. Notwithstanding the ordinary requirements for service pursuant to the *King's Bench Rules*, this Court has authority to abridge time requirements, validate defective service, and to dispense with service where necessary in the interests of justice.

***Court of King's Bench Rules*, ManReg 553/88**
Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended [TAB 1]

2. Paragraph 24 of the Receivership Order in this proceeding, granted by Justice Martin on March 17, 2023 (the "Receivership Order") also contemplates that creditors and interested parties may be served by prepaid ordinary mail, courier, personal delivery, facsimile or electronic transmission. Paragraphs 24, 25 and 26 of the Receivership Order provide that any court materials may be served by facsimile or e-mail upon the Service List maintained by counsel for the Receiver.

3. As such, the Receiver submits that, to the extent it may be necessary, service of the Notice of Motion and supporting materials ought to be abridged and/or validated.

B. The distribution and payment to FNF should be approved and authorized.

4. As set out at paragraphs 13 and 21 through 25 of the Fourth Report, the Receiver proposes to distribute the net proceeds of the Property to FNF, in accordance with its priority position.

5. FNF has indicated its support for the proposed distribution. The Receiver therefore submits that the distribution outlined at paragraphs 13 and 21 through 25 of the Fourth Report ought to be approved and authorized by this Court.

C. The Fourth Report, the activities of the Receiver, and the Receiver's Statement of Receipts and Disbursements should be approved.

6. The Receiver seeks approval of its Fourth Report, its activities and its Statement of Receipts and Disbursements.

7. The factors to be considered by the court when determining whether it should approve a receivers' report and activities are the same as those the court considers when determining whether it should approve the activities of a monitor pursuant to the *Companies' Creditors Arrangement Act*.

***Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161 at para 15 [TAB 2]**

8. In *Target Canada Co., Re*, the Ontario Superior Court recognized that there are good and practical policy reasons for the Court to approve a Court Officer's activities - in that case, a Monitor's activities - including, *inter alia*, that such approval:

a. Allows the Court Officer to move forward with the next steps in the proceedings;

b. Brings the Court Officer's activities before the Court;

c. Allows an opportunity for the concerns of stakeholders to be addressed, and any problems rectified; and

d. Enables the Court to satisfy itself that the Court Officer's activities have been conducted in a prudent and diligent manner.

***Target Canada Co., Re*, 2015 ONSC 7574 at paras 12 and 21-23 [TAB 3]**

9. The Receiver submits that it has conducted itself in a prudent and diligent manner, and has acted in accordance with the terms of the Receivership Order. The Receiver therefore submits that approval of its Fourth Report and activities ought to be granted by this Court in accordance with the *Target Canada* principles as outlined above.

D. The fees, estimated fees, and disbursements of the Receiver and its legal counsel should be approved.

10. Paragraph 17 of the Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements with respect to the receivership proceedings.

11. A non-exhaustive list of factors to be considered by the Court when determining whether to approve the fees of a receiver and its counsel was recently set out by the Ontario Superior Court in *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, as follows:

> The factors to be considered have been sent out by the Court of Appeal for Ontario: Bank of Nova Scotia v. Diemer, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:
>
> a. the nature, extent and value of the assets;
> b. the complications and difficulties encountered;
> c. the degree of assistance provided by the debtor;
> d. the time spent;
> e. the receiver's knowledge, experience and skill;
> f. the diligence and thoroughness displayed;
> g. the responsibilities assumed;
> h. the results of the receiver's efforts; and
> i. the cost of comparable services when performed in a prudent and economical manner.
>
> The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive ...

***Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 ("*Triple-I*") at paras 23-24 [TAB 4]**

12. The Court in *Triple-I* held that emphasis should be placed on the value of the receiver's and its counsel's services, and that the question to be answered is whether the fees sought are "fair and reasonable":

> While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership.

***Triple-I, supra*, at para 26 [TAB 5]**

13. The Receiver submits that the fees outlined in paragraphs 17 through 20 and Appendix A to the Fourth Report are fair and reasonable in the circumstances and are an accurate reflection of the efforts undertaken by the Receiver and its counsel with respect to administering the receivership proceedings, includes the closing of the Sale Agreement.

14. FNF supports the approval of the fees and disbursements of the Receiver and its counsel, without the requirement for a formal accounting thereof.

E. The Receiver should be discharged.

15. Courts have held that a receiver may seek to be discharged once it has completed the "substance of its mandate". The discharge of a receiver is further appropriate where the court is satisfied with the receiver's reports, where no party is opposed to the requested discharge, where the requested fees and disbursements appear to be reasonable in the circumstances, and where the receiver has substantially completed its duties.

***Ed Mirvish Enterprises Ltd. v Stinson Hospitality Inc.*, 2009 CarswellOnt 6167 (ONSC) at paras 8-9 [TAB 6]**

***West Face Capital Inc. v Chieftain Metals Inc.*, 2020 ONSC 5161 at para 11 [TAB 7]**

16. In this case, the Receiver submits that its requested discharge is appropriate because, the discharge is subject to the completion of the Receiver's distribution to FNF, and the substantial completion of the administration of the receivership.

CONCLUSION

17. In light of the above, the Receiver respectfully submits that the relief sought in the Distribution and Discharge Order ought to be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September, 2024.

PITBLADO LLP

Per: _____

Catherine E. Howden
Counsel for the Receiver

TAB 1

THE COURT OF KING'S BENCH ACT
(C.C.S.M. c. C280)

Court of King's Bench Rules

LOI SUR LA COUR DU BANC DU ROI
(c. C280 de la C.P.L.M.)

Règles de la Cour du Banc du Roi

Regulation 553/88
Registered December 13, 1988

Règlement 553/88
Date d'enregistrement : le 13 décembre 1988

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TABLE DES MATIÈRES

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Modification or waiver of rules

2.04 If a person acts in a vexatious, evasive, abusive or improper manner or if the expense, delay or difficulty in complying with a rule would be disproportionate to the likely benefit, a judge may, on motion by any party or on his or her own motion, without materials being filed, do one or more of the following:

(a) modify or waive compliance with any rule;

(b) make a costs award or require an advance payment against costs payable, or both;

(c) make any other order respecting a proceeding that the judge considers appropriate in the circumstances.

M.R. 130/2017

DISPENSE DU TRIBUNAL

2.03 Le tribunal peut dispenser de l'observation d'une règle seulement si cela est nécessaire dans l'intérêt de la justice.

Modification des présentes règles ou renonciation à leurs exigences

2.04 Lorsqu'une personne agit de manière vexatoire, évasive, abusive ou inappropriée ou que l'observation d'une règle entraînerait des coûts, des délais ou des difficultés dont l'ampleur serait disproportionnée face à l'avantage attendu, un juge peut, sur motion d'une des parties ou de son propre chef, et sans que des documents n'aient été déposés, prendre une ou plusieurs des mesures suivantes :

a) modifier tout droit ou pouvoir que confère une règle ou en écarter l'application;

b) adjuger des dépens et exiger un versement préalable en vue du paiement de frais exigibles, ou prendre une de ces mesures;

c) rendre toute autre ordonnance concernant une instance qu'il estime indiquée compte tenu des circonstances.

R.M. 130/2017

RULE 3

TIME

RÈGLE 3

DÉLAIS

COMPUTATION

3.01 In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;

(b) where a period of less than seven days is prescribed, holidays shall not be counted;

(c) where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) service of a document, other than an originating process, after 5 p.m., or at any time on a holiday, shall be deemed to have happened on the next day that is not a holiday.

COMPUTATION DES DÉLAIS

3.01 À moins que le contexte n'indique une intention contraire, la computation des délais prescrits par les présentes règles ou par une ordonnance obéit aux règles suivantes :

a) si le délai est exprimé en nombre de jours séparant deux événements, il se calcule en excluant le jour où a lieu le premier événement mais en incluant le jour où a lieu le second, même s'il est précisé qu'il s'agit de jours francs ou que les mots "au moins" sont utilisés;

b) si le délai prescrit est inférieur à sept jours, les jours fériés ne sont pas comptés;

c) si le délai pour accomplir un acte sous le régime des présentes règles expire un jour férié, l'acte peut être accompli le jour suivant qui n'est pas jour férié;

d) la signification d'un document, à l'exception d'un acte introductif d'instance, après 17 heures ou un jour férié, est réputée avoir été faite le premier jour suivant qui n'est pas jour férié.

EXTENSION OR ABRIDGMENT

General powers of court
3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Expiration of time
3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Consent in writing
3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

PROROGATION OU ABRÉGEMENT DES DÉLAIS

Pouvoirs généraux du tribunal
3.02(1) Le tribunal peut, par ordonnance, proroger ou abréger le délai fixé par les présentes règles ou par une ordonnance, à des conditions justes.

Expiration du délai
3.02(2) La motion qui vise à l'obtention d'une ordonnance prorogeant un délai peut être présentée avant ou après l'expiration du délai prescrit.

Consentement écrit
3.02(3) Le délai prescrit par les présentes règles pour la signification ou le dépôt d'un document peut être prorogé ou abrégé par consentement écrit.

Service at place of residence
16.03(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

and service in this manner is effective on the fifth day after the document is mailed.

Service on a corporation
16.03(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Manitoba, cannot be found at the last address recorded with the director appointed under *The Corporations Act*, service may be made on the corporation as provided in section 247 of *The Corporations Act* but such service will not be effective if there are reasonable grounds for believing that the corporation did not receive the document.

M.R. 6/98

Signification au lieu de résidence
16.03(5) Si une tentative de signification à personne au lieu de résidence échoue, le document peut être signifié :

a) en en laissant une copie à son lieu de résidence, dans une enveloppe scellée adressée au destinataire, à une personne qui paraît majeure et qui semble habiter sous le même toit que lui;

b) en envoyant par la poste, le jour même ou le lendemain, une autre copie du document au lieu de résidence du destinataire.

Cette signification est valide à compter du cinquième jour suivant l'envoi par la poste du document.

Signification à une corporation
16.03(6) Si le siège social, le bureau enregistré ou le principal établissement d'une corporation ou, s'il s'agit d'une corporation extra-provinciale, son fondé de pouvoir aux fins de signification au Manitoba, ne se trouve pas à la dernière adresse figurant dans les dossiers du directeur nommé en vertu de la *Loi sur les corporations*, la signification peut être effectuée selon les dispositions de l'article 247 de la *Loi sur les corporations*. Cependant, une telle signification ne sera pas valide s'il existe des motifs raisonnables de croire que la corporation n'a pas reçu le document.

R.M. 6/98

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made
16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

SIGNIFICATION INDIRECTE OU DISPENSE DE SIGNIFICATION

Décision du tribunal
16.04(1) Si la signification à personne ou un autre mode de signification directe d'un acte introductif d'instance ou d'un autre document est requis et que le tribunal considère qu'il est difficile de l'effectuer sans délai, celui-ci peut ordonner la signification indirecte ou, si l'intérêt de la justice l'exige, dispenser de la signification.

(b) a copy of the document may be sent by registered mail or certified mail in which case service is effective on the date the document was delivered to the person to be served as shown on the confirmation of delivery obtained from Canada Post Corporation.

M.R. 50/2001

b) une copie du document peut être envoyée par courrier recommandé ou par poste certifiée, auquel cas la signification est valide à compter de la date à laquelle le document a été livré au destinataire, telle qu'elle est indiquée sur la confirmation de livraison obtenue de la Société canadienne des postes.

R.M. 50/2001

WHERE DOCUMENT DOES NOT REACH PERSON SERVED

16.07 On a motion to set aside the consequences of default, for an extension of time or for an adjournment, a person may show that, even though served with a document in accordance with these rules, it did not come to the person's notice, or it did not come to the person's notice until some time later than when it was served or deemed to have been served.

NON-RÉCEPTION DU DOCUMENT

16.07 Dans le cadre d'une motion présentée par une personne en vue d'être relevée des conséquences du défaut, d'une motion en prorogation du délai ou d'une motion en ajournement de l'instance, la personne peut établir que même si elle a reçu signification d'un document conformément aux présentes règles, elle n'en a pas pris connaissance ou elle n'en a pris connaissance qu'à une date postérieure à la date à laquelle le document lui a été signifié ou est réputé le lui avoir été.

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

VALIDATION DE LA SIGNIFICATION

16.08(1) Si un document a été signifié d'une façon non autorisée ou irrégulière, le tribunal peut, par ordonnance, valider la signification s'il est convaincu, selon le cas :

a) que le destinataire en a pris connaissance;

b) que le document a été signifié de telle sorte que le destinataire en aurait pris connaissance s'il n'avait pas tenté de se soustraire à la signification.

R.M. 11/2018

Exception
16.08(2) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

Exception
16.08(2) Le paragraphe (1) ne s'applique pas si la signification doit s'effectuer en conformité avec la Convention Notification de La Haye.

R.M. 11/2018

PART IX

MOTIONS AND APPLICATIONS

RULE 37

MOTIONS — JURISDICTION AND PROCEDURE

Notice of motion
37.01 A motion shall be made by notice of motion (Form 37A), unless the court orders otherwise.

JURISDICTION TO HEAR A MOTION

Judge
37.02(1) A judge has jurisdiction to hear any motion in a proceeding.

Associate judge
37.02(2) An associate judge has jurisdiction to hear any motion in a proceeding, except a motion,

(a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

(b) to set aside, vary or amend an order of a judge;

(c) to abridge or extend a time prescribed by an order that an associate judge could not have made;

(d) for judgment on consent in favour of or against a party under disability;

(e) relating to criminal proceedings or the liberty of the subject;

(f) in an appeal; or

(g) for interim relief in a family proceeding in respect of parenting time, decision-making responsibility, support or property.

M.R. 31/91; 143/2023; 4/2024

PARTIE IX

MOTIONS ET REQUÊTES

RÈGLE 37

MOTIONS — COMPÉTENCE ET PROCÉDURE

Avis de motion
37.01 Sauf disposition contraire du tribunal, la motion est présentée par voie d'avis de motion (formule 37A).

COMPÉTENCE POUR CONNAÎTRE D'UNE MOTION

Juges
37.02(1) Un juge a compétence pour connaître d'une motion présentée dans une instance.

Juge puîné
37.02(2) Le juge puîné a compétence pour connaître d'une motion présentée dans une instance, sauf s'il s'agit d'une motion, selon le cas :

a) où le pouvoir d'accorder la mesure de redressement demandée est expressément conféré à un juge en vertu d'une loi ou d'une règle;

b) qui vise à faire annuler ou modifier une ordonnance rendue par un juge;

c) qui vise à abréger ou à proroger un délai prescrit par une ordonnance qui n'aurait pu être rendue par un juge puîné;

d) qui demande un jugement sur consentement en faveur d'une partie incapable ou contre elle;

e) où la liberté du sujet est en cause ou qui se rapporte à une instance criminelle;

f) présentée dans un appel;

g) qui vise l'obtention de mesures provisoires dans une instance en matière familiale à l'égard de questions relatives au temps parental, aux responsabilités parentales, aux aliments ou aux biens.

R.M. 31/91; 143/2023; 4/2024

TO WHOM MOTION TO BE MADE

To an associate judge
37.03(1) Subject to subrule 25.11(2) and subrule (2) of this rule, a motion within the jurisdiction of an associate judge shall be made to an associate judge.

M.R. 23/2016; 143/2023

To a judge
37.03(2) Where a motion is within the jurisdiction of an associate judge and an associate judge is not available at the centre at which the motion is to be heard or a judge grants leave to make the motion to a judge, the motion may be made to a judge.

M.R. 31/91; 143/2023

Referral to judge
37.03(3) A motion pending before an associate judge may be referred by the associate judge to a judge for decision and the judge may dispose of the motion in whole or in part or refer the motion back in whole or in part.

M.R. 143/2023

PERSONNES DEVANT LESQUELLES LES MOTIONS DOIVENT ÊTRE PRÉSENTÉES

Juge puîné
37.03(1) Sous réserve du paragraphe 25.11(2) et du paragraphe (2) de la présente règle, les motions relevant de la compétence d'un juge puîné sont présentées à celui-ci.

R.M. 23/2016; 143/2023

Motion présentée à un juge
37.03(2) Une motion peut être présentée à un juge si elle relève de la compétence d'un juge puîné et si aucun juge puîné n'est disponible au centre où la motion doit être entendue ou qu'un juge autorise la présentation de la motion à un juge.

R.M. 31/91; 143/2023

Renvoi à un juge
37.03(3) Un juge puîné peut renvoyer une motion dont il est saisi à un juge afin que ce dernier rende une décision à l'égard de la motion. Le juge peut statuer sur la motion en totalité ou en partie ou renvoyer tout ou partie de la motion au juge puîné.

R.M. 143/2023

PLACE OF FILING

37.04 A motion shall be filed in the administrative centre in which the court file is located.

LIEU DU DÉPÔT DE LA MOTION

37.04 Une motion est déposée au centre administratif où se trouve le dossier.

PLACE AND DATE OF HEARING

Place
37.05(1) The moving party shall name in the notice of motion as the place of hearing,

(a) where the court file is located in a judicial centre, that judicial centre; or

(b) where the court file is located in an administrative centre which is not a judicial centre, the judicial centre nearest that administrative centre.

Hearing date
37.05(2) The moving party must name in the notice of motion as the hearing date

(a) where the motion is to an associate judge or other officer, any date on which an associate judge or other officer sits to hear motions; and

(b) where the motion is to a judge, any date on which a judge sits to hear motions.

M.R. 130/2017; 143/2023

LIEU ET DATE DE L'AUDIENCE

Lieu d'audience
37.05(1) L'auteur de la motion indique dans l'avis de motion comme lieu d'audience, l'un des endroits suivants :

a) si le dossier se trouve dans un centre judiciaire, ce centre judiciaire;

b) si le dossier se trouve dans un centre administratif qui n'est pas un centre judiciaire, le centre judiciaire le plus près de ce centre administratif.

Date d'audience
37.05(2) L'auteur de la motion indique dans l'avis de motion une des dates suivantes comme date d'audience :

a) si la motion doit être entendue par un juge puîné ou un autre auxiliaire de la justice, une date à laquelle un juge puîné ou un tel auxiliaire siège pour entendre des motions;

b) si la motion doit être entendue par un juge, une date à laquelle un juge siège pour entendre des motions.

R.M. 130/2017; 143/2023

SERVICE OF NOTICE

Required as general rule
37.06(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

Notice not required
37.06(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

SIGNIFICATION DE L'AVIS

Signification obligatoire en règle générale
37.06(1) Sauf disposition contraire des présentes règles, l'avis de motion est signifié aux personnes ou aux parties sur lesquelles l'ordonnance demandée peut avoir une incidence.

Ordonnance rendue sans préavis
37.06(2) Si les circonstances ou la nature de la motion rendent peu pratique ou inutile la signification de l'avis de motion, le tribunal peut rendre une ordonnance sans préavis.

Consent order without notice of motion
37.06(2.1) The court may make an order on consent without a notice of motion being filed.

M.R. 121/2002

Ordonnance par consentement rendue sans avis de motion
37.06(2.1) Le tribunal peut rendre une ordonnance par consentement sans qu'un avis de motion soit déposé.

R.M. 121/2002

Interim order without notice
37.06(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

Ordonnance provisoire sans préavis
37.06(3) Si le délai nécessaire à la signification risque d'entraîner des conséquences graves, le tribunal peut rendre une ordonnance provisoire sans préavis.

Service of order
37.06(4) Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

M.R. 6/98

Signification de l'ordonnance
37.06(4) Sauf ordonnance contraire du tribunal ou disposition contraire des présentes règles, l'ordonnance rendue sans préavis à une personne ou à une partie qui y est visée ainsi qu'une copie de l'avis de motion, des affidavits et des autres documents utilisés à l'audition de la motion sont signifiés sans délai à la personne ou à la partie.

R.M. 6/98

Where notice ought to have been served
37.06(5) Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person.

Cas où l'avis aurait dû être signifié
37.06(5) Le tribunal, s'il est d'avis que l'avis de motion doit être signifié à une personne et ne l'a pas été peut, selon le cas :

a) rejeter la motion ou la rejeter seulement contre la personne qui n'en a pas reçu signification;

b) ajourner la motion et ordonner la signification de l'avis de motion à cette personne;

c) ordonner la signification à cette personne de l'ordonnance rendue à la suite de la motion.

Time for service
37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

Délai de signification
37.06(6) Si la motion est présentée sur préavis, l'avis de motion est signifié au moins quatre jours avant la date d'audition de la motion.

37.07 [Repealed]

M.R. 150/89; 130/2017

37.07 [Abrogée]

R.M. 130/2017

SCHEDULING OF CONTESTED MOTIONS

To be adjourned for a hearing date
37.08(1) Subject to subrule (2), where a notice of motion to a judge or associate judge has been served and it transpires that the motion is to be contested, the judge or associate judge shall adjourn the motion and the moving party may obtain a hearing date.

M.R. 130/2017; 143/2023

Immediate hearing where urgent, etc.
37.08(2) In a case of urgency or where otherwise appropriate, the judge or associate judge may proceed to hear the motion.

M.R. 130/2017; 143/2023

Moving party's brief
37.08(3) Where the motion is to a judge or associate judge and is to be contested, the moving party shall, at the time of obtaining a hearing date, file in the judicial centre in which the motion is to be heard and serve on all other parties, a brief consisting of

(a) a list of any documents specifically identified, including filing date, filed in court to be relied upon by the moving party, unless the court orders that copies of all documents be filed as part of the brief;

(b) a list of any cases and statutory provisions to be relied on by the moving party, together with a statement as to the principle being relied upon in each case; and

(c) a list of the points to be argued.

M.R. 186/96; 143/2023

Responding party's brief
37.08(4) A responding party who has been served with a brief under subrule (3) must file in the judicial centre in which the motion is to be heard and serve on all other parties, a brief consisting of,

MOTIONS CONTESTÉES — DÉTERMINATION DE LA DATE D'AUDIENCE

Ajournement et obtention d'une date d'audience
37.08(1) Sous réserve du paragraphe (2), si un avis de motion à un juge ou juge puîné a été signifié et qu'il semble que la motion sera contestée, le juge ou juge puîné ajourne la motion et l'auteur de cette motion peut obtenir une date d'audience.

R.M. 130/2017; 143/2023

Audience immédiate en cas d'urgence
37.08(2) Le juge ou le juge puîné peut entendre la motion lorsqu'il l'estime opportun, notamment en cas d'urgence.

R.M. 130/2017; 143/2023

Mémoire de l'auteur de la motion
37.08(3) Si la motion qui doit être entendue par un juge ou un juge puîné est contestée, l'auteur de la motion doit, au moment de l'obtention d'une date d'audience, déposer au centre judiciaire où la motion sera entendue et signifier aux autres parties, un mémoire constitué de ce qui suit :

a) une liste de documents portant une marque précise, y compris la date de dépôt, déposée au tribunal afin que l'auteur de la motion puisse l'invoquer, sauf si le tribunal ordonne que les copies des documents soient déposées pour qu'elles fassent partie du mémoire;

b) une liste des causes et des dispositions législatives que l'auteur de la motion entend invoquer ainsi qu'une déclaration portant sur le principe qui est invoqué dans chaque cause;

c) une liste des questions en litige.

R.M. 186/96; 44/2022; 143/2023

Mémoire de la partie intimée
37.08(4) La partie intimée qui a reçu signification d'un mémoire en vertu du paragraphe (3) dépose au centre judiciaire où la motion sera entendue et signifie à toutes les autres parties un mémoire constitué de ce qui suit :

(a) a list of any documents described in clause (3)(a), not included in the moving party's brief and to be relied on by the responding party;

(b) a list of cases and statutory provisions not included in the moving party's brief, to be relied on by the responding party, together with a statement as to the principle being relied upon in each case; and

(c) a list of the points to be argued by the responding party, not included in the moving party's brief.

M.R. 12/92; 186/96; 130/2017

a) une liste des documents visés à l'alinéa (3)a), qui ne sont pas inclus dans le mémoire de l'auteur de la motion et que la partie intimée entend invoquer;

b) une liste des causes et des dispositions législatives qui ne font pas partie du mémoire de l'auteur de la motion et que la partie intimée a l'intention d'invoquer ainsi qu'une déclaration portant sur le principe qui est invoqué dans chaque cause;

c) une liste des questions en litige que la partie intimée a l'intention de soulever et qui ne font pas partie du mémoire de l'auteur de la motion.

R.M. 12/92; 186/96; 130/2017

Bilingual statutory provisions in brief
37.08(4.1) If a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

M.R. 44/2022

Dispositions législatives bilingues dans le mémoire
37.08(4.1) La partie qui entend invoquer une disposition législative dont la loi exige l'impression et la publication en français et en anglais inclut ces deux versions dans son mémoire.

R.M. 44/2022

Waiver
37.08(5) The court may, either before or at the hearing of the motion, waive or vary the requirements of this rule where there is insufficient time to comply or where, due to the nature of the motion, a brief is not justified.

Abandon des conditions de la présente règle
37.08(5) Le tribunal peut, avant ou pendant l'audition de la motion, abandonner ou modifier les conditions de la présente règle lorsque le délai est insuffisant pour l'observation de ces conditions ou qu'en raison de la nature de la motion, un mémoire n'est pas justifié.

37.08(6) [Repealed]

M.R. 186/96

37.08(6) [Abrogé]

R.M. 186/96

Scheduling agreement
37.08.1(1) Within seven days after service of the moving party's brief, the parties may file a written agreement that establishes timelines for completion of the following preliminary steps in the motion:

(a) filing and service of affidavits by the parties, including any additional affidavits in response to affidavits filed by the responding party;

(b) scheduling and completion of all cross-examinations on affidavits;

Détermination d'un échéancier par consentement
37.08.1(1) Dans les sept jours qui suivent la signification du mémoire du requérant, les parties peuvent déposer un consentement écrit faisant état des échéances à respecter pour les étapes préliminaires à la motion suivantes :

a) le dépôt et la signification par les parties des affidavits, notamment des affidavits supplémentaires en réponse à ceux déposés par l'intimé;

b) la fixation de la date de tous les contre-interrogatoires sur affidavit et la détermination de leur durée maximale;

(c) filing and service of an additional brief by the moving party;

(d) filing and service of the responding party's brief.

M.R. 130/2017

c) le dépôt et la signification d'un mémoire supplémentaire par le requérant;

d) le dépôt et la signification du mémoire de l'intimé.

R.M. 130/2017

Filing deadline
37.08.1(2) No agreement may permit the filing of materials less than seven days before the hearing of the motion.

M.R. 130/2017

Limite
37.08.1(2) L'échéancier ne peut autoriser le dépôt d'un document moins de sept jours avant l'audition de la motion.

R.M. 130/2017

Motion to establish schedule if no agreement
37.08.1(3) If the parties are unable to reach an agreement under subrule (1), the moving party must bring a motion to establish a schedule for completion of the preliminary steps in the motion.

M.R. 130/2017

Absence de consentement
37.08.1(3) Si les parties ne peuvent s'entendre sur un échéancier, le requérant présente une motion visant l'établissement d'un échéancier à respecter pour les étapes préliminaires.

R.M. 130/2017

Who hears motion
37.08.1(4) A motion under subrule (3) must be heard

(a) by an associate judge, if the original motion is to be heard by an associate judge; or

(b) by a judge, if the original motion is to be heard by a judge.

M.R. 130/2017; 143/2023

Autorité compétente
37.08.1(4) La motion visée au paragraphe (3) est entendue par le juge ou le juge puîné qui est saisi de la motion initiale.

R.M. 130/2017; 143/2023

Amending schedule by agreement
37.08.1(5) The parties may amend a schedule established under subrule (1) or (3) by filing a written agreement that sets out new time lines for completing preliminary steps in the motion.

M.R. 130/2017

Modification de l'échéancier
37.08.1(5) Les parties peuvent s'entendre sur une modification à apporter à l'échéancier établi en vertu du paragraphe (1) ou (3) et déposer un consentement faisant état des nouveaux délais à respecter.

R.M. 130/2017

Sanctions for failure to comply with schedule
37.08.1(6) If a party has failed to comply with a schedule established under this rule, a judge or associate judge may do one or more of the following:

(a) strike out the motion, if the offending party is the moving party;

(b) adjourn the hearing of the motion;

Défaut de se conformer à l'échéancier
37.08.1(6) Si une partie fait défaut de se conformer à l'échéancier, un juge ou un juge puîné peut prendre une ou plusieurs des mesures suivantes :

a) rejeter la motion, si la contravention est commise par le requérant;

b) ajourner l'audition de la motion;

(c) order costs against the offending party;

(d) direct the hearing to proceed on the scheduled date without allowing the offending party to

(i) file or rely on any affidavit, transcript or brief that was not filed or served in accordance with the schedule, or

(ii) conduct a cross-examination on an affidavit after the expiry of the scheduled deadline for cross-examinations to occur;

(e) make any other order or give any other direction that he or she considers appropriate in the circumstances.

M.R. 130/2017; 143/2023

c) ordonner au contrevenant d'acquitter les dépens;

d) ordonner de procéder à l'audition à la date prévue sans autoriser le contrevenant :

(i) soit à déposer un affidavit, une transcription ou un mémoire qui n'a pas été déposé ou signifié en conformité avec l'échéancier, ou lui interdire de s'appuyer sur eux,

(ii) soit à procéder à un contre-interrogatoire sur affidavit après l'expiration du délai prévu par l'échéancier;

e) rendre les ordonnances et donner les directives qu'il estime indiquées dans les circonstances.

R.M. 130/2017; 143/2023

Who may impose sanctions
37.08.1(7) The sanctions set out in subrule (6) may be imposed

(a) on motion to an associate judge, if the original motion is to be heard by an associate judge;

(b) on motion to a judge, if the original motion is to be heard by a judge; or

(c) by the judge or associate judge presiding at the hearing of the original motion.

M.R. 130/2017; 143/2023

Autorité compétente
37.08.1(7) Les sanctions visées au paragraphe (6) peuvent être infligées par le juge ou le juge puîné qui est saisi de la motion initiale ou qui préside à l'audition de celle-ci.

R.M. 130/2017; 143/2023

Exception
37.08.1(8) This rule does not apply to an urgent motion, a motion under subrule (3) or (7) or a motion under subrule 38.07.1(3) or (7).

M.R. 130/2017

Exception
37.08.1(8) La présente règle ne s'applique pas à une motion urgente, une motion visée aux paragraphes (3) ou (7) ou aux paragraphes 38.07.1(3) ou (7).

R.M. 130/2017

HEARING BY TELEPHONE, VIDEO CONFERENCE OR OTHER MEANS OF COMMUNICATION

Consent
37.09(1) If all the parties to a motion consent and the court permits, a motion may be heard by telephone, video conference or other means of communication.

M.R. 121/2002

Order, no consent
37.09(2) If not all the parties consent, the court may, on motion, make an order directing the manner in which the motion is to be heard.

M.R. 121/2002

Motion to determine manner
37.09(3) The motion under subrule (2) to determine the manner of hearing a motion may be held

(a) without the necessity of filing a notice of motion or evidence; and

(b) by telephone, video conference or other means of communication.

M.R. 121/2002

Arrangements
37.09(4) Where a motion is to proceed by telephone, video conference or other means of communication under subrule (1) or clause (3)(b), the moving party shall make the necessary arrangements and give notice of those arrangements, including the date, time and manner of hearing, to the other parties to the motion and to the court.

M.R. 121/2002

AUDIENCE PAR TÉLÉPHONE, PAR VIDÉOCONFÉRENCE OU PAR TOUT AUTRE MOYEN DE COMMUNICATION

Consentement
37.09(1) Une motion peut être entendue par téléphone, par vidéoconférence ou par tout autre moyen de communication si les parties à la motion y consentent et que le tribunal l'autorise.

R.M. 121/2002

Ordonnance en l'absence de consentement unanime
37.09(2) Si certaines parties ne donnent pas leur consentement, le tribunal peut, sur motion, rendre une ordonnance indiquant la manière selon laquelle la motion doit être entendue.

R.M. 121/2002

Motion portant sur la détermination du mode d'audition
37.09(3) La motion portant sur la détermination du mode d'audition de la motion peut être entendue :

a) sans qu'il soit nécessaire de déposer un avis de motion ou une preuve;

b) par téléphone, par vidéoconférence ou par tout autre moyen de communication.

R.M. 121/2002

Prise de dispositions
37.09(4) Lorsqu'une motion doit être entendue en vertu du paragraphe (1) ou de l'alinéa (3)b) par téléphone, par vidéoconférence ou par tout autre moyen de communication, l'auteur de la motion prend les dispositions nécessaires et en donne avis aux autres parties à la motion et au tribunal, notamment en leur indiquant la date et l'heure auxquelles elle sera entendue ainsi que son mode d'audition.

R.M. 121/2002

DISPOSITION OF MOTION

37.10 On the hearing of a motion, the presiding judge or officer may allow, dismiss or adjourn the motion, in whole or in part, and with or without terms, and, in the alternative or in addition, may

(a) direct the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge;

(b) where the proceeding is an action, order that it be set down for trial forthwith or within a specified period; or

(c) where the proceeding is an application, order that it be heard at such time and place and upon such terms as are just.

DÉCISION

37.10 Lors de l'audition d'une motion, le juge ou l'auxiliaire de la justice qui préside peut accorder, rejeter ou ajourner la motion, en totalité ou en partie, avec ou sans conditions. Comme alternative ou en plus, il peut, selon le cas :

a) ordonner l'instruction d'une question en litige, avec des directives justes, et déférer la motion au juge qui préside l'instruction;

b) si l'instance est une action, ordonner qu'elle soit inscrite au rôle afin d'être instruite immédiatement ou dans une période précise;

c) si l'instance est une motion, ordonner qu'elle soit entendue au moment et à l'endroit ainsi qu'aux conditions qui sont justes.

RESCINDING OR VARYING ORDERS

Motion to rescind or vary
37.11(1) A person affected by an order made without notice, or a person who has failed to appear on a motion due to accident, mistake or insufficient notice, may, by notice of motion filed, served and made returnable promptly after the order first came to the person's notice, move to rescind or vary the order.

To original judge or officer
37.11(2) Where practicable, a motion under subrule (1) shall be made to the judge or officer who made the order.

ANNULATION OU MODIFICATION D'ORDONNANCES

Motion en annulation ou en modification d'une ordonnance
37.11(1) La personne sur laquelle une ordonnance rendue sans préavis a une incidence ou celle qui n'a pas comparu à l'audition d'une motion pour cause d'accident, d'erreur ou d'avis insuffisant peut demander, par voie de motion, l'annulation ou la modification de l'ordonnance au moyen d'un avis de motion déposé, signifié et rapportable promptement après que la personne ait pris connaissance de l'ordonnance.

Présentation de la motion
37.11(2) Une motion en application du paragraphe (1) est présentée au juge ou à l'auxiliaire de la justice qui a rendu l'ordonnance, si cela est possible.

ABANDONMENT OF MOTIONS

Abandonment of motions, where not served
37.12(1) Where a party makes a motion by filing a Notice of Motion in accordance with this rule and has not served the Notice of Motion, the party may abandon the motion by filing a Notice of

DÉSISTEMENT DE MOTION

Désistement — motion non signifiée
37.12(1) Une partie peut se désister d'une motion qu'elle a présentée par voie de dépôt d'un avis de motion conformément à la présente règle si l'avis de motion en question n'a pas été signifié. Le

Abandonment of Motion (Form 37B) and an affidavit deposing that the Notice of Motion has not been served.

M.R. 25/90

Abandonment of motions, where served
37.12(2) Where a party makes a motion by filing and serving a Notice of Motion in accordance with this rule, the party may abandon the motion

(a) by serving a Notice of Abandonment of Motion on the parties who were served with the Notice of Motion; and

(b) by filing the Notice of Abandonment of Motion along with proof of service of the Notice of Abandonment of Motion.

M.R. 25/90

Deemed abandonment of motions
37.12(3) Where a party

(a) serves a Notice of Motion on another party and, within a reasonable time after serving the Notice, does not file the Notice; or

(b) files and serves a Notice of Motion and does not appear at the hearing of the motion; the party is deemed to have abandoned the motion unless the court orders otherwise.

M.R. 25/90

Costs on abandoned motions
37.12(4) Where a motion is abandoned by a Notice of Abandonment of Motion under subrule (2) or is deemed to be abandoned under subrule (3), a party on whom the Notice of Motion is served is entitled to the costs of the motion, unless the court orders otherwise.

M.R. 25/90

désistement est fait par dépôt d'un avis de désistement de motion (formule 37B) ainsi que d'un affidavit attestant que l'avis de motion n'a pas été signifié.

R.M. 25/90

Désistement — motion signifiée
37.12(2) Une partie peut se désister d'une motion qu'elle a présentée par voie de dépôt et de signification d'un avis de motion conformément à la présente règle :

a) en signifiant un avis de désistement de motion aux parties qui ont reçu signification de l'avis de motion;

b) en déposant l'avis de désistement de motion ainsi qu'une preuve de la signification de l'avis de désistement de motion.

R.M. 25/90

Désistement réputé
37.12(3) Une partie est réputée s'être désistée d'une motion, à moins d'ordonnance contraire du tribunal, si, selon le cas :

a) elle ne dépose pas l'avis de motion dans un délai raisonnable après l'avoir signifié à une autre partie;

b) elle dépose et signifie l'avis de motion, mais ne comparaît pas à l'audience portant sur la motion.

R.M. 25/90

Dépens pour motions faisant l'objet d'un désistement
37.12(4) À moins d'ordonnance contraire du tribunal, une partie à qui a été signifié un avis de motion a droit de recevoir des dépens si la motion fait l'objet d'un désistement par voie de l'avis de désistement de motion visé au paragraphe (2) ou est réputée faire l'objet d'un désistement conformément au paragraphe (3).

R.M. 25/90

TAB 2

CITATION: Hanfeng Evergreen Inc., (Re), 2017 ONSC 7161
COURT FILE NO.: CV-14-10667-00CL
DATE: 20171130

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. c.C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

Applicant

BEFORE: F.L. Myers J.

COUNSEL: *Daniel S. Murdoch and Haddon Murray,* counsel for Ernst & Young Inc., receiver
David C. Moore and Karen M. Mitchell, counsel for the Lei Lo and Xinduo Yu

HEARD: November 20, 2017

ENDORSEMENT

[1] Ernst & Young Inc. moves for approval of its activities as receiver and manager of Hanfeng Evergreen Inc. as described in the Supplement to its First Report, its Fourth Report, and its Fifth Report. It also seeks approval of its fees and disbursements including the fees and disbursements of its counsel here and abroad.

[2] Xinduo Yu, the founder and former CEO of Henfeng Evergreen Inc. and his spouse Lei Li oppose the approval of the receiver's reports at this time. They seek, at minimum, the imposition of conditions to protect their positions in separate litigation that the receiver has brought against them. They also argue that the receiver has failed or refused to deliver sufficient evidence to support its claim for approval of its fees and disbursements. They invite the court to require the receiver to engage in a document disclosure process so as to create a sufficient factual record on which they can make submissions and the court can meaningfully assess the fees and disbursements of the receiver and its counsel.

[3] For the reasons that follow the receiver's motion is granted on the terms set out below.

Brief Background

[4] Hanfeng Evergreen Inc. is an Ontario public corporation. Henfeng was a financing vehicle to raise money from investors who were interested in investing in the fertilizer business operated by a subsidiary in the People's Republic of China. By 2014, Henfeng's sole operations were limited to the fertilizer business.

[5] When this proceeding began, Mr. Yu was a member of the board of directors of Henfeng. He was a principal contact for the receiver. He controlled Chinese management of the business.

[6] The receiver advises that in 2011, Henfeng's biggest customer was a company run by the state in China. It sought to buy 30% of the fertilizer business to ensure its control over its supply. By February, 2013, an agreement had been prepared whereby Henfeng would sell its shares in the fertilizer subsidiary to a company controlled by Mr. Yu. Mr. Yu agreed to sell 30% of that company's shares to the state actor. The transactions were expected to close in April, 2013.

[7] The deal did not close as expected. Eventually Henfeng established a special committee representing shareholders independent of management. Acrimony developed between the special committee and Mr. Yu. In December, 2013, the purchaser terminated the transaction. The board of directors proceeded to fire Mr. Yu.

[8] A proxy battle ensured. During the proxy battle, Henfeng's auditor KPMG resigned. Thereupon, the rest of the board of directors resigned. Ultimately, Mr. Yu regained control of the public corporation.

[9] In April, 2014, Mr. Yu brought forward a transaction to sell the operating subsidiary to an established third party business in China for a price of approximately $40 million. The transaction would have provided meaningful recovery to shareholders. The transaction required shareholder approval. However, without an auditor, Henfeng could not produce the material required to call a shareholders' meeting under Ontario securities laws. Therefore, this receivership was proposed as a way to convey title in a solvent transaction.

[10] Negotiations with the buyer proved difficult. The receiver retained the Mayer Brown law firm to help it obtain a deposit of approximately $2.4 million required by the agreement and to deal with some Chinese regulatory matters that arose. The purchaser was also supposed to put funds in escrow. With Mayer Brown's assistance some funds were escrowed. But then they were released back to the purchaser by the escrow agent ostensibly with Mr. Yu's cooperation. In addition, the receiver says that the buyer's name seems to have changed subtly in the documents over time. While initially Mr. Yu represented that the buyer was an established third party, the ultimate buyer may have been a company with a similar name that is actually a shell controlled by Mr. Yu. Further, the receiver alleges that while the transaction was playing out, Mr. Yu obtained very substantial loans in China on the credit of the subsidiary so that they he has effectively taken the value of the business leaving the other shareholders with nothing.

[11] The receiver has sued Mr. Yu and Ms. Li for damages exceeding $100 million.

[12] In addition, the ostensible purchaser has sued the receiver in China for the return of the $2.4 million deposit. Mr. Yu is a defendant in that case as he is a guarantor under the terms of the relevant agreement. Whether he is also behind the plaintiff/purchaser remains to be proven.

[13] The purchaser succeeded against the receiver at first instance in China. But an appellate court overruled the first decision. As of this moment therefore, the deposit has been forfeited and

is properly counted among the funds realized by the receiver. The purchaser has appealed from that decision however and the further appeal is pending.

[14] In this receivership proceeding, Mr. Yu is concerned to ensure that the receiver does not consume the deposit on its own fees and disbursements in case it is required to return the deposit to the purchaser by the ultimate appeal court in China. If the purchaser succeeds in China, there may be a priorities dispute between the purchaser and the receiver over which has a better claim to the deposit funds in the receiver's hands. In any event, Mr. Yu argues that as guarantor of the return of the deposit, he has an interest in protecting the deposit in the receiver's hands and in minimizing or delaying the receiver's use of the deposit to pay its fees and disbursements until the Chinese litigation ends.

Approval of the Receiver's Activities

[15] In *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII), Morawetz RSJ discussed the process for approval of the reports of a court officer. In that case the court dealt with a Monitor under the CCAA. The same principles apply in a receivership in my view.

[16] In *Target*, Morawetz RSJ recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. An affidavit may be delivered to support the findings or not. In either case, the court is called up to address squarely specific facts and to make specific findings that will be binding in future.

[17] However, the context of a general approval of activities, such as the motion that is currently before me, is different. As discussed by Morawetz RSJ:

> [20] The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.
>
> [21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.
>
> [22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[18] In this case, Mr. Yu and Ms. Li do not want the approval of the receiver's activities to impact on their litigation with the receiver including their desire to counterclaim against the receiver in that litigation. Apparently they have sought directions regarding a possible counterclaim although no motion for leave to proceed has been heard as yet. Regional Senior Justice Morawetz held that the general approval of a court officer's activities should not affect third party dealings generally. He accepted however that the approval of the receiver's activities does affect the court officer's own status. For example, there is case law suggesting that a stronger showing on the merits is required to obtain leave to sue a receiver in respect of activities that have been approved than for unapproved activities.[1]

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[1] Compare and contrast for example, *Bank of America Canada v Wilann Investments Ltd.* (1993), 23 CBR (3d) 98 (Ont. Gen. Div) with *GMAC Commercial Credit Corporation - Canada v.*

[19] Mr. Yu and Ms. Li argue that if they are prejudiced by the approval of the receiver's activities, then they would be required to contest in this motion the substance of their concerns in order to protect themselves in their other litigation. I agree that it is not the purpose of this summary proceeding to engage in fact finding that might prejudge or affect the fact finding process in other litigation. As such, there is no need to delve deeply into the concerns raised by the objectors with the receiver's characterization of their behaviour or the other details of specific issues of fact that may become the subject matter of proceedings later. There will be no findings of contested facts that might bind Mr. Yu or Ms. Li elsewhere.

[20] The receiver argues that it seeks broad, general approval for its decisions to bring litigation against Mr. Yu and Ms. Li and to defend the litigation in China. It notes that its prior activities have already been approved in relation to the approval of its earlier reports.

[21] Under the terms of its appointment order, the receiver is already authorized to litigate on behalf of the debtor generally. As such, Mr. Yu and Ms. Li argue that it does not need any further approval of its litigation activities. But, I agree with Morawetz RSJ that there are additional proposes to a court officer's reporting and the court's approval functions such as those listed in para. 23 of T*arget* above. In this case for example, concerns of stakeholders can be considered and addressed in real time rather than waiting until matters are concluded some years hence. Moreover, stakeholders are given an opportunity to bring to the fore any concerns with the receiver's prudence and diligence in the issues under consideration. Here, for example, no one – not even Mr. Yu or Ms. Li - contest the prudence of the receiver's decisions to defend the deposit in China or to commence the litigation here against Mr. Yu and Ms. Li.

[22] The receiver also argues that is wants its activities approved so as to protect it from personal liability for costs in the event that it is later determined that the deposit must be returned to the purchaser with the result that the receiver may not have any assets left in the estate to fund any costs liability that it may incur. The receiver refers to the decision of Pattillo J. in *Essery Estate (Trustee of) v Essery*, 2016 ONSC 321. At para. 72 of that decision, Pattillo J. wrote:

> [72] In receiverships, the general rule is that costs are awarded against a receiver personally in rare cases. Where a receiver engages in litigation in its capacity as receiver in the normal course of the receivership, is it is subject to the costs in accordance with s. 131 of the CJA and Rule 57.01. To the extent that costs are awarded against a receiver they are normally covered by receivership funds or by an indemnity agreement with a

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T.C.T. Logistics Inc., 2006 SCC 35 (CanLII). See also: Houlden, Morawetz & Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters, Toronto) at L§26. Whether *Wilann* remains good law after *TCT* is an issue that is not before the court today.

> secured creditor. It is only when the receiver embarks on a course of action extraneous to the credit-driven relationship which effectively undermines its neutral position as an officer of the court and turn itself into a "real litigant' [*sic*] that a receiver exposes itself to costs personally: see *Akagi v Synergy Group (2000)*, 2015 ONCA 771 (Ont. C.A.), at para. 18.

[23] In my view, the receiver reads too much into this quotation. I do not read *Essery* as altering the receiver's risk of personal liability for costs. Rather, Pattillo J. explains the court's historic hesitation to award costs against receivers because they can bear personal liability for costs. In my view *Essery* does not create any special protection for receivers' costs liability. Neither does the approval of a receiver's activities provide it with any special protection in relation to costs awards in subsequent litigation. That is the reason that Pattillo J. noted that before undertaking litigation, receivers typically will consider the sufficiency of the assets under their charge to meet a costs award or obtain an indemnity from a creditor to protect themselves from the risk of adverse costs.

[24] It is clear therefore that in approving the receiver's general activities broadly and summarily in this motion, I am not finding any facts beyond expressing satisfaction with the general scope and direction of the receiver's activities as set out in the three reports that are before me. However, if the law post-*TCT* still provides that the approval of a receiver's conduct raises the bar for those who seek to sue a receiver, as referenced in the footnote above, that is indeed a consequence of approval and nothing I say or do not say should affect that outcome. The fact that approval may have some effect is not a basis to withhold or deny approval. Rather it reflects the intention of the law as it applies in circumstances where the court is satisfied with the activities undertaken by its officer and with the protections that the law affords court officers in such circumstances as discussed by Morawetz RSJ above.

[25] I also do not see the existence of an outstanding appeal in China as a basis to defer or withhold approval of the receiver's activities, especially its activities in defending and participating fully in that case. Approval does not affect the ongoing litigation in China. Neither does it affect the priorities in the deposit or authorize or embolden the receiver to distribute to itself or to its counsel funds that it currently holds. If the court in China rules that the funds are a deposit that are to be returned to the purchaser, legal results flow. As noted above, if that creates a priority issue here, that issue may have to be determined.

[26] As argument of this aspect of the motion was drawing to a close, it appeared that counsel might be able to agree upon language to resolve the issues in dispute. I invited them to advise me within 48 hours if they reached agreement. On November 22, 2017, counsel advised that while they had not agreed to resolve the objections of Mr Yu and Ms. Li, they had agreed upon some language to limit the relief granted should I determine to approve the receiver's activities.

[27] The term agreed upon by counsel reflects the limitations that I have discussed above as follows:

> THIS COURT ORDERS that the approval of the Fourth Report and the Fifth Report shall be without prejudice to any of the procedural or substantive rights of the Receiver, Xinduo Lu and Lei Li in respect of Action No. CV-16-11325-00CL, and, without limiting the generality of the foregoing, shall be deemed not to constitute any finding or determination of any kind whatsoever in respect of any allegations, issues or defences in said Action.

[28] While this term does not satisfy all of the concerns of Mr. Yu and Ms. Li, it does satisfy mine. Accordingly, it is appropriate to approve the activities of the receiver as set out in the three reports that are before the court on the term set out in the immediately preceding paragraph.

Receiver's Fees

[29] In accordance with the principles set out in *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), the receiver delivered affidavits supporting its fees and disbursements including those of its counsel. Cross-examinations ensued. Mr. Yu and Ms. Li argue that there is insufficient disclosure of information to enable the court to determine the reasonableness of the receiver's fees and disbursements. They say they have delivered letter after letter for months seeking production of documents relating to matters set out in the receiver's invoices so as to be able to understand the work performed by the receiver and to make proper submissions on the fees and disbursements sought in relation to the work. In addition, the receiver delivered dockets (belatedly in some cases) that are heavily redacted to prevent disclosure of the subject matter of much of the work that is the subject of the docket entries.

[30] The receiver argues that the scope of its discussions with its counsel and the work being performed by its counsel on its behalf are privileged – both under lawyer client privilege and litigation privilege. I agree. Disclosing the subject matter of a meeting is essentially disclosing the communication from client to lawyer (or vice versa) concerning the topic on which advice was being sought or given. That does not mean however that the receiver is entitled to approval of its fees or disbursements without providing proper supporting evidence. If the claims of privilege prevent the court from making the assessment required, then the motion will not succeed until sufficient evidence is duly adduced to meet the required standard.

[31] In *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), the Court of Appeal discussed the test for assessment of a receiver's fees as follows:

> [32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:
>
> > The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such

> person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[32] The Court of Appeal also noted in *Diemers* that while the calculation of billable hours times hourly rates is not the most desirable metric for conducting this review, it is the predominant methodology in the case law. Moreover, while counsel for Mr. Yu and Ms. Li submitted that this is not to be a mathematical exercise, the bulk of their complaints are essentially directed to the question of whether there has been duplication in the dockets or, more specifically, whether the claims of privilege prevent them and the court from determining with any degree of precision whether there is duplication in the dockets that ought to be excluded from the value calculus. While I certainly do not dismiss the risk of duplication in an assessment of the reasonableness of the fees, it is but one factor and not an especially important one in my view. Duplication might suggest a lack of value-added but not necessarily so in a holistic review. If an issue takes time to resolve, there may be several docket entries that look similar. That does not make them duplicative. More than one person may be involved providing different services and docket to the same issue – either at different levels of seniority or different subject matters. Reading brief docket descriptions years after complex work is performed is a poor method to learn precisely what was accomplished by any single person on any given day. A full assessment of the file accompanied by oral narrative is required to assess professional accounts. That is what

assessment officers routinely do in formal cost assessment hearings. But that is not what is anticipated or even desirable in fee approval hearings of this type.

[33] It is not lost on me that what was also at play on Mr. Yu's side of the table is possibly a desire for discovery in the other litigation or at least opening up a threat to the receiver's remuneration as a strategy to provide bargaining leverage. Thus, rather than responding to the receiver's request for the specifics of documents required or bringing their own motion (or 9:30 appointment) seeking production of documents that they actually need, Mr. Yu and Ms. Li were content to make request after request and then graciously offer to allow the receiver an adjournment to give it time to make yet further production. I have little doubt that were any further documents produced, Mr. Yu and Ms. Li would just ask for more. After all, if you want to assess what every person acting for counsel and the receiver have done every day, then every draft of every document and communication is ostensibly relevant. The eight, non-exhaustive *Belyea* factors do not require or anticipate a full fee assessment process. Mr. Yu and Ms. Li's digging for more and ever more documents ostensibly to allow them to review in minute detail the receiver's fees was misdirected from the outset.

[34] Mr. Yu and Ms. Li make much of the fact that the receiver's Ontario counsel had 27 billers on the file over a period of three years. Counsel for the receiver took me through each biller's name and role. Apart from a few students, there was one partner and an associate in each relevant area at each time. The associate generally performed the bulk of the work. As the project evolved from a consensual corporate transaction to contested litigation, the identities and focus of the partners involved changed. There is nothing untoward or even suspicious in the identification of the lawyers engaged despite the effort to evoke an emotional reaction to the overall number of billers. I am perfectly satisfied that given the complexity and evolution of the matter over time, staffing raises no significant concerns. Given the limited numbers of people involved in each specialty area, and the swing from corporate to contested litigation, duplication is not a significant issue in my view.

[35] The receiver has not provided docket level evidence of activities from its litigation counsel in China. However that lawyer was retained on a fixed fee of $100,000. The litigation involved securing the receiver's right to keep the deposit of approximately $2.4 million. A fee of 4% of the fund whose preservation is in issue strikes me as quite reasonable. Dockets would not assist the understanding of the flat fee account in this circumstance.

[36] Other counsel were retained for other specific purposes. Each had to be briefed so, once again, it is not surprising to see docket entries where people discuss similar things. They are instructing or reporting back to each other. Mr. Yu and Ms. Li pointed to docket entries in which telephone inter-firm communications are set out but only by one firm. The unstated implication is that unless both sides docketed the call, then the docket that was recorded is suspect and may be fraudulent. I do not know a more innocent word to characterize a docket of a call that did not happen. But Mr. Yu and Ms. Li forgot to account for the International Date Line. When one looks to see if telephone calls from this side of the globe were docketed in China on the next day, many of the calls were indeed recorded. I cannot draw an inference of fraud, or even suspicion from noting that a firm did not record every single telephone call it ostensibly received or made.

Docketing practices can differ. I did not look to see if the calls that were not recorded by both sides were recorded as being short or long duration for example. In any event, I do not see how a few calls has much impact on the assessment of the *Belyea* factors.

[37] The receiver's counsel has provided a lengthy assessment of the *Belyea* factors in para. 60 of its factum. Again, without making findings of fact on the level of cooperation or the lack thereof by Mr. Yu and Ms. Li, in my view in para. 60 the receiver provided a very fair analysis of the relevant factors and I adopt it in full.

[38] In all, I am satisfied that the fees and disbursement of the receiver, including those of its counsel, are fair, reasonable and ought to be approved as sought.

[39] Costs should be agreed upon. Barring exceptional circumstances, I would expect them to follow the event on a partial indemnity basis. If counsel cannot agree on costs then they should exchange Costs Outlines and schedule a telephone case conference through my Assistant for oral argument of costs.

F.L. Myers J.

Date: November 30, 2017

TAB 3

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> ...
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ....
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> ...
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.,* 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

TAB 4

CITATION: Triple-I Capital Partners Limited v. 12411300 Canada Inc., 2023 ONSC 3400
COURT FILE NO.: CV-22-00684372-00CL
DATE: 20230606

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

RE: Triple-I Capital Partners Limited, Applicant

AND:

12411300 Canada Inc., Respondent / Debtor

BEFORE: Peter J. Osborne J.

COUNSEL: Kevin Sherkin and Monica Faheim, for Crow Soberman Inc., Receiver

Hans Rizarri, for Crow Soberman Inc., Receiver

Avi Freedland, for the Respondent / Debtor

HEARD: June 6, 2023

ENDORSEMENT

1. Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.

2. The Respondent, 12411300 Canada Inc. (the "Debtor"), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the "Applicant"), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3. The Applicant advanced to the Debtor $6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.

4. The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the "Receivership Order"). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.^{2}.

5. As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of $6,865,154 plus additional interest and accrued expenses.

6. Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed $2 million, although on October 10 the Debtor made a payment to them in the amount of $410,000, with the result that the principal amount owing to them was in the amount of $1,590,000. There were no other significant creditors.

7. After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.

8. The Receiver then brought a motion for approval of a sales process.

9. Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.

10. On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.

11. That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.

12. On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.

13. On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.

14. That same day, funds in the amount of $6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.

15. The payment was made in two tranches given the dispute that underlies this motion. The first tranche of $6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of $396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16. The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.

17. The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

18. Today, the Receiver seeks approval of fees of $106,722.25 plus disbursements of $32,851.56 and HST in the amount of $17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of $91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to $247,953.15.

19. The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.

20. The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.

21. The Respondent submits that this Court ought to approve 50 percent of total fees ($53,361.13 instead of $106,722.25) and 80 percent of disbursements ($26,281.25 instead of $32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent ($45,507.47 instead of $91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to $125,149.85.

22. The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23. The factors to be considered have been sent out by the Court of Appeal for Ontario: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:

    a. the nature, extent and value of the assets;

    b. the complications and difficulties encountered;

    c. the degree of assistance provided by the debtor;

d. the time spent;

e. the receiver's knowledge, experience and skill;

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

h. the results of the receiver's efforts; and

i. the cost of comparable services when performed in a prudent and economical manner.

24. The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer*, at para. 33, citing with approval *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.

25. The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.

26. While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer*, at para. 45).

Application of the Test to This Case

27. In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.

28. The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.

29. The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.

30. The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the

fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31. The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.

32. The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.

33. The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.

34. Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.

35. At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.

36. The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.

37. The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the

time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38. As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.

39. The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed $5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.

40. The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.

41. The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.

42. Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.

43. In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.

44. The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45. The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46. The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or "workdays" when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).

47. Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver's work over that period of time [late July and early August, see para. 18 of the Debtor's factum] "brought no value to the Corporation or its creditors, including the Second Mortgagees". I cannot give any weight to this submission based on that evidence.

48. The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.

49. The Debtor made vigourous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.

50. The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

> Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.
>
> The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51. The source for this submission is the lawyer's own affidavit at paragraphs 29 – 32 (CaseLines B-1-17).

52. The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of …. the work …..".

53. In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court

to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54. Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.

55. Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately $248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately $6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately $125,000.

56. Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.

57. Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigourously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.

58. I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59. The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas,

effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60. In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.

61. As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.

62. The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.

63. As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.

64. The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of $247,953.15.

Approval of the Third Report and Activities

65. While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66. The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67. The Third Report and the activities described in it are approved.

Costs

68. Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of $18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of $10,719.18 on the same basis.

69. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70. Having considered the factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is $12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.

71. Order to go in accordance with these reasons.

P.J. Osborne J.

Date: June 6, 2023

TAB 5

2009 CarswellOnt 6167
Ontario Superior Court of Justice [Commercial List]

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.

2009 CarswellOnt 6167, [2009] O.J. No. 4265, 181 A.C.W.S. (3d) 471

Ed Mirvish Enterprises Limited and 1 King West Inc. v. Stinson Hospitality Inc., Dominion Club of Canada Corporation and Harry Stinson

Pepall J.

Judgment: September 25, 2009
Docket: 07-CL-6913

Counsel: L. Joseph Latham, Lauren Butti for Receiver
Jeff Carhart for Ed Mirvish Enterprises Limited, I King West Inc.
M. Michael Title for Segura Investments Ltd.
Harry Stinson for himself
Robert Verdun for himself

Subject: Insolvency; Civil Practice and Procedure
Headnote
Bankruptcy and insolvency --- Receivers — Miscellaneous

***Pepall J.*:**

Relief Requested

1 Ira Smith Trustee & Receiver Inc. ("ISI"), the court appointed receiver and manager of Stinson Hospitality Inc., Dominion Club of Canada Corporation, The Suites at 1 King West ("the Suites") and 2076564 Ontario Inc. (the "Receiver"), requests an order: approving its 13th Report and its fees and activities that are detailed in that Report; approving a final distribution of proceeds to secured creditors in the amount of $907,137.91 and to unsecured creditors of Suites in the amount of $122,854; approving an assignment of the Receiver's rights under certain cost awards against Robert Verdun to Segura Investments Ltd.; and discharging the Receiver and releasing the Receiver and its counsel. The motion is supported by all those appearing except Mr. Verdun and Mr. Stinson. They are unopposed to all the relief requested except for the scope of the requested release.

Backround Facts

2 The Receiver was appointed receiver and manager of the debtors on August 24, 2007. The receivership was complex and involved numerous stakeholders with differing interests including many individual condominium owners. Ultimately the subject property was sold and interim distributions were made to secured creditors. The Receiver reported regularly on its activities and proposed fees to the Court and on notice to interested parties. Twelve Receiver Reports have been approved as have the requested fees. Indeed, no one ever opposed the fees requested by the Receiver and its counsel.

3 The Receiver had particular problems with one of the condominium owners, Mr. Verdun. He was insulting and abusive of the Receiver and its counsel, distributed inflammatory correspondence and lodged complaints with the Superintendent of Bankruptcy, the Institute of Chartered Accountants of Ontario, and with the Law Society. All professional complaints have either been dismissed by the governing body or no action is being taken by the governing body with respect to the subject complaint. After having had numerous opportunities to take issue with the secured parties' security, very late in the proceedings, he chose to challenge it but then abandoned his motion. At that time the Receiver requested costs on a full indemnity basis.

While I had considerable sympathy for the Receiver, for the reasons set forth in my endorsement, I awarded costs on a partial indemnity scale against Mr. Verdun. Rouleau J.A. also made a costs order against Mr. Verdun in favour of the Receiver.

4 Pursuant to a Court order, the Receiver conducted a call for creditor claims against the debtors and for claims against the Receiver and its counsel. Notices of determination dismissing the claims were sent to claimants but no appeals were initiated.

5 Administration of the estate has largely been completed. With the exception of the costs owing by Mr. Verdun, all of the undertaking, property and assets of the debtors have been collected and sold by the Receiver. The only task remaining is for the Receiver to issue the final approved distributions and respond to Mr. Verdun's leave to appeal costs motion. It therefore recommends that it be authorized to make those final distributions and assign its interest in its two cost awards to Segura Investments Ltd. and then be discharged. In view of the litigious nature of the proceedings and the claims filed as part of the claims process, the Receiver requests the following provisions in the discharge order:

> 10. THIS COURT ORDERS that notwithstanding its discharge, the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of ISI in its capacity as Receiver.
>
> 11. THIS COURT ORDERS AND DECLARES that, effective upon the filing with this Court of the Certificate of the Receiver referred to in paragraph 9 above, ISI, in its capacity as both Monitor and Receiver, and all of its directors, officers, employees and agents, and Goodmans LLP and all partners and employees thereof (collectively the "Receiver Parties"), are hereby released and discharged from any and all liability that the Receiver Parties now have or can, may or shall have hereafter by reason of, or in any way arising out of, or in connection with the Receiver Parties' conduct, involvement or duties with respect to the Debtors or in any way in connection with these proceedings. Without limiting the generality of the foregoing, the Receiver Parties are hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in these proceedings.

Positions of Parties

6 As mentioned, no one except Mr. Verdun and Mr. Stinson takes issue with the proposed order. They are unopposed to the order requested but submit that the release should exclude gross negligence and willful misconduct on the part of the Receiver Parties as they are defined in the proposed order.

Discussion

7 The issue raised by this motion often arises on a motion to discharge a receiver.

8 A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.

9 Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act*[1] provides that the discharge of a trustee discharges him from all liability in respect of any act done or default made by him in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.

10 The Commercial List Users' Committee had occasion to examine this issue when preparing a standard template or model discharge order. That order includes a provision comparable to paragraph 10 before me that continues the protections provided in the initial receivership order and an optional paragraph that contains a general release comparable although not identical to that contained in paragraph 11 before me.

11 Dealing firstly with the substance of paragraph 10 of the proposed discharge order, the model order appointing a receiver provides that the receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the order, save and except for any gross negligence or willful misconduct on its part. In addition, the order states that nothing in it derogates from the protections afforded the receiver by section 14.6 of the BIA or any other applicable legislation. Furthermore, no proceeding shall be commenced or continued against the receiver except with the written consent of the receiver or with leave of the Court. Similarly, subject to certain exceptions, all rights and remedies against the receiver are stayed and suspended except with the written consent of the receiver or leave of the Court.

12 In the explanatory notes accompanying the model receivership order, the subcommittee observes that it is unaware of any case law guidance on the question of why a receiver who has been found to have committed deliberate misconduct or to have been grossly negligent ought to be protected from an award of damages that reasonably flow from its misconduct.

13 Turning to the substance of paragraph 11 of the proposed discharge order that includes a general release, the explanatory notes that accompany the model discharge order state: "The model order subcommittee was divided as to whether a general release might be appropriate. On the one hand, the receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the receiver likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity, as the Court's officer, so the Court may find that it is appropriate to insulate the Receiver from all liability, by way of a general release. Some members of the subcommittee felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership. The general release language has been added to this form of model order as an option only, to be considered by the presiding Judge in each specific case."

14 It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions. That said, post discharge, a claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.

15 In this case no one took issue with the order requested by the Receiver except for Mr. Verdun and Mr. Stinson who questioned the scope of the proposed release in paragraph 11 and asked that the release be amended to exclude gross negligence and willful misconduct. For the reasons given, this is a reasonable position. I am granting the order requested but amended so that the words "save and except for gross negligence or willful misconduct" are added to the first and second sentences of paragraph 11.

Footnotes

1 R.S.C. 1985, c.B-3.

End of Document

TAB 6

CITATION: West Face Capital Inc. v. Chieftain Metals Inc., 2020 ONSC 5161
COURT FILE NO.: CV-16-11511-00CL
DATE: 2020-10-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WEST FACE CAPITAL INC., AS AGENT

AND:

CHIEFTAIN METALS INC. AND CHIEFTAIN METALS CORP.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Mark Laugesen* and *Danish Afroz*, for the Receiver Grant Thornton Limited

Roger Jaipargas, for West Face Capital Inc., as Agent

Colby Linthwaite and *Aaron Welch*, for the Her Majesty the Queen in right of the Province of British Columbia

Robin Dean and *Robert Janes,* for Taku River Tlingit First Nation

Erin Gray, for Rivers Without Borders

HEARD by ZOOM CONFERENCE: August 11, 2020

ENDORSEMENT

[1] Grant Thornton Limited ("GTL") as court-appointed receiver and manager (the "Receiver"), of the assets, undertakings and property (the "Property") of Chieftain Metals Inc. ("CMI") and Chieftain Metals Corp. ("CMC" and, together with CMI, the "Companies" or "Chieftain") brings this motion for an order (the "Discharge Order"):

(a) approving the Third Report of the Receiver dated June 17, 2019 (the "Third Report"), including the actions and activities of the Receiver referred to therein;

(b) approving the Receiver's final Statement of Receipts and Disbursements;

(c) approving the fees and disbursements of the Receiver and its legal counsel, Bennett Jones;

(d) approving the anticipated further fees and disbursements of the Receiver and Bennett Jones, estimated not to exceed $25,000 to complete the

administration of the receivership (the "Receivership") in the context of these proceedings (the "Receivership Proceedings");

(e) approving the repayment to the ranking secured creditor West Face Capital Inc. as Agent ("West Face") of any monies remaining in the hands of the Receiver after payment of the fees and disbursements;

(f) sealing Confidential Appendix 1 to the Third Report;

(g) subject to the possible revival of the Receivership and re-appointment of the Receiver in the Receivership Proceedings as set forth in (i) immediately below, terminating the Receivership and discharging GTL as Receiver;

(h) releasing GTL while acting in its capacity as Receiver, save and except for gross negligence or wilful misconduct;

(i) providing for the possible revival of the Receivership and the re-appointment of GTL as Receiver of the Companies in the Receivership Proceedings on the same terms as provided for in the Appointment Order, with any such revival and re-appointment to become effective on the date and time of the filing by GTL of a certificate with the Court (the "Re-appointment Certificate"), for the general purpose of implementing a transaction in connection with the Property; and

(j) providing that, if the Re-appointment Certificate is not filed with the Court within two years from the date of the Discharge Order, the Receivership Proceedings shall be terminated.

[2] Since the date of the Third Report there have been extensive discussions among the Receiver, West Face, and various departments of the Government of British Columbia, including the Ministry of Energy and Mines and Petroleum Services, the Ministry of the Environment, the Ministry of Forests, Land and Natural Resources, the Ministry of Indigenous Relations and Reconciliation and Ministry of the Attorney General (collectively, the "Province").

[3] The Receiver subsequently filed a Supplement to the Third Report (the "Supplementary Report") to support the Receiver's request for a revised form of discharge order (the "Revised Discharge Order", substantially in the form attached to the Supplementary Report.

[4] Subject to certain exceptions noted below, the relief sought in the Revised Discharge Order mirrors that in the Discharge Order.

[5] The requested Revised Discharge Order provides at paragraph 14:

> [14] THIS COURT ORDERS that this Order, including the discharge of the Receiver as Receiver of the Property of Chieftain granted hereunder, shall be without prejudice to West Face's right to bring a motion before this Honourable Court to seek the appointment of a receiver and/or manager of the Companies and the Property pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B – 3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, in the within receivership proceedings, bearing Court File Number CV–16–11511–00CL, and any such motion shall be served on Her Majesty the Queen in right of the Province of British Columbia.

[6] The Receiver reports that by late January 2020, there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project (the "Project") on terms which would be acceptable to the Receiver and West Face.

[7] The Receiver also reported that a draft Closure and Reclamation Plan for the Project was finalized on April 24, 2020.

[8] During the first months of 2020, the Receiver determined that the most prudent course of action was to amend the relief sought in the Discharge Order in an effort to eliminate or reduce the issues of concern to the Province.

[9] In the Supplementary Report, the Receiver reports that, with one remaining exception, all issues in the proposed form of Revised Discharge Order have been settled among the Receiver, West Face and the Province.

[10] The unresolved issue concerns the proposed paragraph 14 of the Revised Discharge Order.

[11] Having reviewed the record and, in particular, the Third Report and the Supplementary Report, I am satisfied that with the exception of the sole issue in dispute, the relief requested by the Receiver is appropriate in the circumstances and is granted. In arriving at this conclusion, I have taken into account that no party is opposed to the requested relief. The requested fees and disbursements appear to be reasonable in the circumstances. In addition, I am satisfied that the requested sealing order provision is appropriate as the disclosure of the information in Confidential Appendix I to the Third Report could be harmful to stakeholders. The *Sierra Club* principles have been taken into account.

Issue for Determination

[12] The Receiver takes the position that it should be discharged at this time. The Receiver has concluded that incurring the cost necessary for the continuation of the receivership is no longer beneficial to the stakeholders of the Companies, including the secured creditor West Face. With no credible and interested parties willing to pursue a transaction to acquire the Project, the

further costs of administering the Receivership cannot be justified at this time. West Face intends to continue in its efforts to find or develop a private-sector solution.

[13] West Face wants the Receiver to be discharged at this time and accepts the terms set forth at paragraph 14 of the Revised Discharge Order.

[14] The Province wants the language in paragraph 14 of the Revised Discharge Order augmented to provide that, "should West Face fail to bring the said motion to seek the appointment of a receiver and/or manager not later than two years from the date of this order, it may not do so thereafter without first obtaining the express written consent of Her Majesty the Queen in Right of the Province of British Columbia".

[15] The Taku River Tlingit First Nation ("TRTFN") does not oppose the discharge of the Receiver but submits that the Receiver should be discharged without the benefit of the proposed "without prejudice" provision and that the court should not exercise its discretion so as to give the secured creditor rights that it would not normally have under the BIA, particularly given the prejudiced innocent third parties like the TRTFN. Nor does the TRTFN agree with the additional wording proposed by the Province.

[16] The original version (paragraphs 12 – 14 of the Discharge Order) provided that the Receivership shall be revived and the Receiver re-appointed in the within Receivership Proceedings, in both cases effective on the filing of the Re-appointment Certificate. If the Re-appointment Certificate was not filed within two years, the Receivership Proceedings were to be terminated. No court order would be required to revive the Receivership Proceedings.

[17] The proposed Revised Discharge Order provides for a different path to revive the Receivership Proceedings. It requires West Face to bring a motion for the appointment of a receiver in the Receivership Proceedings on Notice to the Province. The two-year period within which to revive the Receivership Proceedings as set out in the Discharge Order is no longer referenced.

Analysis

[18] In its factum, counsel for West Face submits that the Province is requesting that the court take the extraordinary step of restricting the ability of West Face to move for the appointment of receiver over the Property to a two-year period and that it is the Province that is requesting that the court grant relief that is of an injunctive nature for which there is no authority to support such request.

[19] In my view, such a submission is misguided.

[20] In the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That is not the situation in these Receivership

Proceedings. This is not a case of ancillary work that remains to be completed. A court supervised sale transaction involving the Project is the fundamental purpose of the Receivership Proceedings.

[21] West Face is the party that initiated the Receivership Proceedings in 2016. The Receiver has been attempting to find a commercial resolution, satisfactory to West Face and other stakeholders since that time but has been unable to do so. It is understandable that West Face does not wish to continue to fund the Receivership Proceedings without any commercial resolution being implemented. West Face now proposes that its exposure in continuing to fund the Receiver should come at an end while the same time, it can continue to pursue, outside of the Receivership Proceedings, potential commercial transactions and, if a suitable transaction can be agreed upon, the Receivership Proceedings can be revived to provide a vehicle to complete the transaction.

[22] In seeking to preserve a route to revive the Receivership Proceedings, it is West Face and not the Province that is requesting extraordinary relief. In my view, the onus is on West Face to justify whether such relief is appropriate in the circumstances.

[23] West Face references that a re-appointment of a trustee in bankruptcy, is expressly contemplated in S. 41(11) of the BIA, which provides:

> 41(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appointed a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

[24] Counsel to West Face submits that courts have interpreted this this provision to mean that the "door is not closed on the administration of an estate by the simple fact of a trustee's discharge", as the trustee may be reappointed to deal with assets which have not been realized or distributed. As such, courts have recognized that "it cannot be said that the trustee's powers end permanently and unequivocally following discharge or that the bankrupt's assets are unavailable."

[25] In considering this submission, it is necessary to take into account two points. First, bankruptcy proceedings differ from receivership proceedings. In a bankruptcy scenario, the assets of the bankrupt vest in the trustee in bankruptcy (s. 71 of the BIA). This is to be contrasted with a receivership scenario where there is no statutory vesting of assets in the receiver. Second, the re-appointment of a trustee is specifically provided for in the BIA.

[26] Section 41(11) of the BIA should not be read in isolation. Section 40 and 41 address issues relating to the discharge of the trustee and the treatment of remaining assets. In particular, section 40 deals with disposal of property and s. 41(10) provides that notwithstanding the discharge, the trustee remains trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

[27] There are no corresponding provisions to sections 40 and 41 in Part XI of the BIA which deals with secured creditors and receivers, other than perhaps, s. 247(b) which requires the receiver to deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

[28] In my view, the authorities referenced by counsel to West Face which reference s. 41(11) of the BIA and the realization and distribution of assets are of limited assistance.

[29] However, I am satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances. I arrive at this conclusion for two reasons. First, *Re Grand River Railway Co. Limited* [1933] O.J. 151, at para. 19 a decision of the Court of Appeal for Ontario, provided for the re-appointment of a receiver. Second, there is no express prohibition in the BIA that would prevent the court from re-appointing a receiver.

[30] In my view, the court does have the jurisdiction to reappoint a receiver in appropriate circumstances. The question is whether I should exercise my discretion to include a provision in the Revised Discharge Order that could result, at some future date, in a motion for the appointment or re-appointment of the receiver.

[31] The Province submits that if West Face is granted an unlimited time within which to move for the re-appointment of a receiver for the purpose of selling the Project, the Province will be required to run an unlimited risk that any costs it incurs and resources it expends with respect to the remediation of the Project will (i) be made redundant, or (ii) be for the benefit of West Face. The Province contends that West Face is content for the Province to solve the problem, while it retains its rights forever. In such circumstances, the re-appointment of a receiver, at some future time for the purpose of completing a sale of the Project would be convenient for West Face, but it would certainly not be just.

[32] Counsel to the Province references *Bank of Nova Scotia* v. *Freure Village on Clair Creek*, [1996] 40 C.B.R. [3rd] 274 [Ont. Commercial List] for the proposition that the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This involved an examination of all the circumstances, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[33] The Province submits that in this case, the "potential cost" to the Province is the time, effort and money expended upon work towards the development and implementation of a final remediation and closure plan that is ultimately for the benefit of West Face and its buyer.

[34] The Province contends that there should be some time limit imposed on West Face's ability to bring a motion to request the re-appointment of the Receiver and that the issue to be determined is what time limit should be imposed. The Province contends that it should be no

longer than two years and that the consent of the Province should be a precondition to bring such a motion.

[35] Counsel to the TRTFN detailed that since the 1990s, the TFTFN has taken considerable steps to protect its lands and that the protection and stewardship of the TRTFN territory is fundamental to the TRTFN way of life. The TRTFN is opposed to the project as it views the Project as a threat to their lands and waters as well as to their way of life.

[36] With respect to the issue of the discharge of a Receiver, counsel to TRTFN submits that the BIA makes no provision for without prejudice discharge of a receiver and if there is any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding, it lies in the discretionary power of the court in managing insolvency proceedings. I agree.

[37] Accordingly, in the exercise of its discretion, counsel submits that the court should take into account all interests of innocent third party such as the TRTFN. The TRTFN submits that permitting West Face to move for the re-appointment of a receiver will have a chilling effect on the remediation plan and the Province will be reluctant to engage in an expensive environmental cleanup to benefit West Face and future purchasers.

[38] It is clear that West Face is not satisfied with the status quo. It does not wish to maintain the receivership and accept the costs and responsibilities associated with the Receivership Proceedings, including the ongoing supervision by the court. West Face desires an outcome which limits their ongoing financial exposure, but at the same time, preserves their ability to seek a satisfactory commercial resolution which may include the use of Receivership Proceedings to consummate a future transaction. West Face does not want a termination of the Receivership Proceedings. It is conceivable that there may be limitation period consequences to West Face if this course of action is implemented and West Face wanted to initiate a second receivership proceeding. While I acknowledge the practical concerns of West Face, the solution proposed by West Face results, in my view, in an unwarranted transference of risk and uncertainty to other parties.

[39] The Province raises legitimate concerns. In my view, the Province should not be faced with an unlimited period of time of uncertainty. There are environmental concerns with the Project which will have to be addressed. It has proposed a two-year period during which West Face can explore the possibilities of a commercial transaction. However, beyond that period, the Province quite properly put forward the position that it should have some certainty in the outcome.

[40] The TRTFN has also raised legitimate concerns and want these Receivership Proceedings to be dealt with in a definitive manner.

[41] In my view, the Province and the TRTFN are entitled to certainty of outcome. The only question to be addressed is whether West Face should have a defined period of time to bring a motion to revive the receivership proceedings, and if so, whether that time period shall be extended only with the consent of the Province.

Disposition

[42] In balancing the interests of the Receiver, the secured creditor West Face, the Province and TRTFN, I have concluded that the Receiver is to be discharged at this time, without prejudice to the right of West Face to bring a motion to seek the appointment of a receiver in these proceedings no later than August 11, 2022, this date being two years from the date of this hearing. This gives West Face adequate time to assess its options.

[43] I have also concluded that it is not appropriate, in the circumstances to include a provision that would potentially extend the timeline beyond August 11, 2022. To do so would just prolong a period of uncertainty that could be detrimental to the TRTFN and the Province. If circumstances are such that require this issue to be revisited on or before August 11, 2022, it is open to West Face to bring its motion in the Receivership Proceedings and, if reappointed, the Receiver can seek further direction from the court.

[44] An order shall issue to give effect to the foregoing.

Chief Justice Geoffrey B. Morawetz

Date: October 8, 2020

TAB 7

MANITOBA

THE CORPORATIONS ACT

C.C.S.M. c. C225

LOI SUR LES CORPORATIONS

c. C225 de la *C.P.L.M.*

As of 4 Sept. 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 4 sept. 2024. Son contenu était à jour pendant la période indiquée en bas de page.

(b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.

Directions given by court

95 Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve the person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager;

(e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

Duties of receiver and receiver-manager

96(1) A receiver or receiver-manager shall

(a) immediately notify the Director of his appointment or discharge;

(b) take into his custody and control the property of the corporation in accordance with the court order or instrument under which he is appointed;

(c) open and maintain a bank account in his name as receiver or receiver-manager of the corporation for the moneys of the corporation coming under his control;

b) gérer, conformément aux pratiques commerciales raisonnables, les biens de la corporation qui se trouvent en sa possession ou sous son contrôle.

Directives du tribunal

95 À la demande du séquestre ou du séquestre-gérant, conventionnel ou judiciaire, ou de tout intéressé, le tribunal peut, par ordonnance, prendre les mesures qu'il estime pertinentes et notamment :

a) nommer, remplacer ou décharger de leurs fonctions le séquestre ou le séquestre-gérant et approuver leurs comptes;

b) dispenser de donner avis ou préciser les avis à donner;

c) fixer la rémunération du séquestre ou du séquestre-gérant;

d) enjoindre au séquestre, au séquestre-gérant ainsi qu'aux personnes qui les ont nommés ou pour le compte desquelles ils l'ont été de réparer leurs fautes ou les en dispenser, notamment en matière de garde des biens ou de gestion de la corporation, selon les modalités qu'il estime pertinentes, et d'entériner les actes du séquestre ou séquestre-gérant;

e) donner des directives concernant les fonctions du séquestre ou du séquestre-gérant.

Obligations du séquestre et du séquestre-gérant

96(1) Le séquestre ou le séquestre-gérant doit :

a) aviser immédiatement le directeur tant de sa nomination que de la fin de son mandat;

b) prendre sous sa garde et sous son contrôle les biens de la corporation conformément à l'ordonnance ou à l'acte de nomination;

c) avoir, à son nom, et en cette qualité, un compte bancaire pour tous les fonds de la corporation assujettis à son contrôle;