

COURT FILE NUMBER **KBG-RG-909-2023**
COURT OF KING’S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE **REGINA**
APPLICANT **AFFINITY CREDIT UNION 2013**
RESPONDENT **F & L CONCRETE SERVICES LTD.**

IN THE MATTER OF THE RECEIVERSHIP OF F & L CONCRETE SERVICES LTD.

SUPPLEMENTAL BRIEF OF LAW OF THE RECEIVER, MNP LTD.

(Hearing scheduled for December 13, 2023)

A. INTRODUCTION

1. On August 3, 2023, pursuant to the Order of the Honourable Justice P.T. Bergbusch (the “**Initial Order**”), MNP Ltd. (the “**Receiver**”) was appointed as the Receiver over all of the undertakings and property of F&L Concrete Services Ltd. (the “**Debtor**”).
2. Throughout the course of the proceedings, there has been a fundamental misapprehension about the Receiver’s role and powers. In many instances, the Debtor has requested that the Receiver take steps that are not typically associated with a receivership, and in many cases not actually authorized, such as:
 - (a) Requesting that the Receiver approach auction companies to seek refinancing of equipment loans;
 - (b) Requesting that the Receiver obtain an operating loan;¹
 - (c) Requesting that the Debtor’s principals, with Receiver oversight, operate the Debtor;²
 - (d) Requesting the Receiver restructure the Debtor;³

¹ Among other places, the proposed Statement of Claim at para 30 and 32.

² Memorandum of Law of the Debtor at para 8.

³ Among other places, the proposed Statement of Claim at para 30 and 32.

- (e) Allowing Chris Fichter to mortgage the Debtor's lands;⁴ and
- (f) That the Receiver operate the Debtor's business absent the financial records requested and without conducting a profitability analysis of the same.⁵

3. In September 2023 the Receiver brought an application to have its activities approved. While not directly in opposition to the Receiver's application, the Debtor brought an application seeking leave to bring action against the Receiver. The proposed claim, in large part, advanced causes of actions based on the misapprehensions referred to above.
4. Both the leave and approval applications have since been adjourned. However, the Court has now directed the issues of approval and leave be brought before the Court.
5. This brief is intended to be supplemental to the earlier briefs filed on behalf of the Receiver for the appearances on September 1 and 13, 2023.

B. FACTS

6. The facts relevant to this application are set out at length in the First Report of the Receiver dated August 15, 2023 (the "**First Report**"), the Supplement to the First Report of the Receiver dated August 29, 2023 (the "**Supplemental Report**"), the Second Report of the Receiver dated October 12, 2023 (the "**Second Report**"), the Third Report of the Receiver dated October 12, 2023 (the "**Third Report**") and the Fourth Report of the Receiver dated December 1, 2023 (the "**Fourth Report**" and collectively the "**Reports**"). As is generally accepted, the Receiver, as an officer of the Court, provides its information by way of report.⁶
7. The relevant facts will be discussed in the analysis portion of this brief but for the sake of brevity, will not be repeated in detail.

⁴ First Affidavit of Chris Fichter at para 34.

⁵ Letter from Debtor Counsel dated August 10, 2023 as found at Schedule "C" to the First Report;

⁶ See *e.g. Mortgage Insurance Co. of Canada v Innisfail Landfill Corp.*, 1995 CarswellOnt 43 at para 5, 3 OTC 23 (Ont SC); *Farber v Goldfinger*, 2011 ONSC 2044; *Stevens v Hutchens*, 2021 ONSC 3255 at pars 26-27.

C. LAW AND ANALYSIS

Leave to Commence Action Against a Receiver

8. In the interests of brevity, the Receiver does not intend to further address the test for leave to commence action against the Receiver. This was previously set out, in great detail, in paragraphs 18 to 41 of the Brief of Law dated August 30, 2023.
9. As the Debtor has not filed any additional evidence with respect to the leave application, the Receiver continues to rely on the submissions made in its previous filings.

Approval of the Receiver's Actions and Reports

10. The Receiver has already addressed the general test for the approval of its activities and Reports. The Receiver continues to maintain that it has, at all material times, acted in good faith and due diligence.
11. The Receiver submits that it is appropriate that the Court approve the efforts and actions of its officer.
12. However, there remain other important issues, including the interplay between an approval application and the rights of third parties.
13. In one of the leading decisions on the issue, Justice Morawetz, in *Target*, was faced with an interim application for the approval of the monitor's activities in the context of a CCAA Proceeding.
14. As in the matter at bar, the application in *Target* was opposed on the basis it might prejudice or limit the rights of third parties at the conclusion of the proceeding.⁷
15. Justice Morawetz, in summarizing the law, opined that there is good reason to make interim approvals, to ensure the just and efficient operation of insolvency regimes. In doing so, he noted as follows:

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

⁷ *Re Target*, 2015 ONSC 7574 at para 5 [Tab 1].

- (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.

...

[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.

16. Justice Morawetz determined that it was prudent to approve the Monitor's actions and reports to date to provide clarity and predictability to the proceedings. The limiting words ensured

that third parties would not be prejudiced down the road and implicitly, the approval could not be raised in an estoppel or *res judicata* context.⁸

17. This approach has likewise been followed in Receivership proceedings where the Receiver seeks interim approval of its actions. In *Hanfeng*, the Court was faced with an interim application for the approval of the Receiver's activities and fees to date. The Court took particular note that applications for approval of activities, whether it be a Receiver or Monitor, have the same considerations at play.⁹
18. The Court noted, in *Hanfeng*, that an approval application is a general, broad approval which would not necessarily impair the rights of third parties later on in the proceedings. In doing so, the Court noted as follows:

[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.

...

[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.¹⁰ [underline added]

19. The above wording is consistent in the principle that the approval would only limit the Receiver's liability in its personal capacity and with respect to its personal liability and would not impact its liability in its capacity as Receiver.¹¹

⁸ *Ibid* at para 14.

⁹ *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161 at para 15 [Tab 2].

¹⁰ *Hanfeng* at paras 24-27.

¹¹ *See e.g. Nordstrom Canada*, 2023 ONSC 4199 at para 22.

20. Similar wording could be used on the within application to preserve any future rights of third parties. The Receiver would be willing to amend the Draft Order filed in September to reflect the wording in *Target* and *Hanfeng* should the Court direct. However, it is clear, based on the reasoning outlined by Justice Morawetz in *Target*, that there are strong, principled reasons to approve the Receiver's actions to date. That reasoning would apply to the proceeding at bar.
21. In light of all of the above, it is appropriate the Receiver's actions, activities and Reports be approved.

D. CONCLUSION

22. Given all of the above, the Receiver advances the same position as was put forward on September 1, 2023, namely:
- (a) Its actions should be approved to date;
 - (b) The Receiver, should the receivership continue, should be allowed to carry out its duties in accordance with the Initial Order and by exercising its discretion in good faith; and
 - (c) There is no basis to commence an action against the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December 2023

ROBERTSON STROMBERG LLP

For: 
M. Kim Anderson K.C.

LIST OF AUTHORITIES

Pursuant to Rule 13-38.1, the authorities which are publicly available on CanLII have not been appended.

Tab	Decision	Paragraph	Principal
1.	<i>Re Target</i> , 2015 ONSC 7574	12-25	Sets out the principles to consider in an application to approve monitors and receivers actions.
2.	<i>Hanfeng Evergreen Inc.</i> , 2017 ONSC 7161	15, 25-27	The considerations in an application to approve a monitors actions are the same for a receivers actions. Furthermore, there is good policy reason to ensure Court Officers have Court backing.

This Brief delivered by:

ROBERTSON STROMBERG LLP
 Barristers & Solicitors
 Suite 600, 105 – 21st Street East
 Saskatoon, SK S7K 0B3

Lawyer in Charge of file: M. Kim Anderson K.C./Travis K. Kusch
 Direct Line: (306) 933-1344
 Email: mk.anderson@rslaw.com/t.kusch@rslaw.com