

**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 September 15, 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;<sup>1</sup>
  - (c) Requesting that the Debtor’s principals, with Receiver oversight, operate the Debtor;<sup>2</sup>
  - (d) Requesting the Receiver restructure the Debtor;<sup>3</sup>

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<sup>1</sup> Among other places, the Statement of Claim at para 30 and 32.

<sup>2</sup> Memorandum of Law of the Debtor at para 8.

<sup>3</sup> Among other places, the Statement of Claim at para 30 and 32.

- (e) Allowing Chris Fichter to mortgage the Debtor's lands;<sup>4</sup> and
  - (f) That the Receiver operate the Debtor's business absent the financial records requested and without conducting a profitability analysis of the same.<sup>5</sup>
3. With regard to the purposes of a receivership order, the Receiver will address the incompatibility of the requests made with the order, and, in an effort to be of assistance to the Court and the parties, canvass what other insolvency vehicles may be available, should the Debtor wish to make an application to the Court with respect to the same.
  4. The Receiver also notes that while the objective of finding a way to restructure the company is laudable, the process as it has unfolded to date has put the Receiver in a difficult position in attempting to meet its obligations under the order.
  5. The Receiver is, accordingly opposed to any further adjournments in this matter. In order for the Receiver, should it not be discharged, to be able to operate effectively, it requires Court approval of its actions to date and for the continuing (and continuous) threat of litigation to be dealt with.
  6. This brief is intended to be supplemental to the earlier brief filed for the appearance on September 1, 2023.

## **B. FACTS**

7. 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**") and the Supplement to the First Report of the Receiver dated August 29, 2023 (the "**Supplemental Report**"). As is generally accepted, the Receiver, as an officer of the Court, provides its information by way of report.<sup>6</sup>
8. 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.

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<sup>4</sup> First Affidavit of Chris Fichter at para 34.

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

<sup>6</sup> See *e.g. Mortgage Insurance Co. of Canada v Innisfil 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

### *General Comments on Insolvency Vehicles*

9. Many of the issues in this receivership arise from a misunderstanding as to what the mandate of the Receiver is. At the outset, it should be recalled that a receivership is a creditor driven insolvency model, conducted for the benefit of all of the stakeholders of the Debtor's estate.
10. The primary goal of the receivership is often to obtain as high a value for an assets it as it can, with a goal to maximizing the recovery for the stakeholders.<sup>7</sup>
11. Implicit in the above, the Receiver is not tasked with restructuring or monitoring the company. It is not for the Receiver to refinance or restructure the affairs of the Debtor, nor is it the Receiver's job to attempt to refinance the debt.
12. The Receiver is not required, nor able, to take direction from the directors of a corporation placed in a receivership. Rather upon issuance of the receivership order the directors' powers cease, as was confirmed by the Alberta Court of Queen's Bench:

37 The directors and legal counsel (current and former) have an obligation to provide information and cooperation to the receiver-manager. There is no provision for payment in order to obtain such information and cooperation in the "Alberta Template", although it is certainly within the power of the receiver-manager to make reasonable payment arrangements, and I accept that it is within the power of the Court to direct such payment.

38 Notwithstanding the appointment of a receiver, the directors have been held to have a continuing obligation to the shareholders and other stakeholders of the corporation to manage it prudently and to the fullest extent of their power: *Société générale (Canada) v. 743823 Ontario Ltd.*, [1989] O.J. No. 2365 (Ont. Master).

39 Despite this residual retention of power to deal with matters outside the receiver-manager's powers and authority, there is little for the directors to do during a receivership (other than to cooperate with the receiver-manager). They cannot interfere with the receiver-manager's work.

...

48 The directors and officers are already under an obligation to provide documents and information to the Receiver-Manager and to cooperate with it. To the extent the Receiver-Manager considers such documents and information to be necessary or helpful, it is within his power and authority to request it, and if necessary to enforce those obligations. I am doubtful that directors and officers, or former directors and officers, are entitled to demand payment for their cooperation and performance of court-directed obligations, but I need not decide that point. It would undoubtedly be within the Receiver-Manager's powers to make financial arrangements with any director or officer (or other person, for that matter) in a consulting role. But these are matters that should be left to the Receiver-Manager.

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<sup>7</sup> Sarra, Morawetz and Houlden, *The 2023 Annotated Bankruptcy and Insolvency Act*, (Toronto, Carswell, 2023) at 1179-1180.

**49 There is no need for the Court to require the Receiver-Manager to consult.** And the existence of their knowledge and obligation to cooperate does not bring with it an entitlement to be paid, or to retain lawyers to assist them [Emphasis Added].<sup>8</sup>

13. It is also important to note that upon issuance of a receivership order, the debtor, and its directors, power to deal with the assets of the corporation ceases as follows:

15 The law is clear that receivership divests the corporation, its board of directors, and its officers of their power to deal with the property comprised in the appointment: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at 298, 314; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at 268. In many cases, courts have articulated this principle when the corporation's directors attempt to override the receiver's powers or undertake certain duties that fall into the receiver's hands. Does this mean that the directors are dismissed? In a leading Canadian treatise, Frank Bennett, *Bennett on Receiverships*, 3<sup>rd</sup> ed (Toronto: Carswell, 2011) [Bennett], the author says the following:

The appointment of a receiver and manager, whether court or private, does not dissolve a debtor corporation but merely suspends it and deprives the debtor of all its power to enter into contracts or dispose of the property. The powers of the officers and directors of the debtor corporation are only suspended with respect to the assets, even though management and control of the assets are transferred to the receiver. The directors are not relieved of their statutory duties albeit they may be difficult to perform.

*Bennett* at 84.<sup>9</sup>

14. From the above, the following principles can be distilled with respect to the operations of a corporation while a receivership order is in place:
- (a) While the Receiver owes a fiduciary duty to the Debtor, it conducts the receivership for the benefit of all of the creditors and it is a creditor driven process. The Receiver is tasked with maximizing the recovery for the creditors of the Debtor. The Receiver is an officer of the Court and is not to prefer the interests of one party over another;<sup>10</sup>
  - (b) The Receiver is not obligated to consult the with the Debtor's principals and the Receiver is not to take direction from Debtor's principals. However, the Debtor and its principals are mandated to cooperate with the Receiver;
  - (c) Upon the issuance of the Receivership Order, the director's powers cease, except as authorized by the Receiver or the Receivership Order; and

<sup>8</sup> *Nation v Piikani Energy Corp.*, 2010 ABQB 352 at para 37-39, 48 and 49 [TAB 1].

<sup>9</sup> *National Bank of Canada v Twin Butte Energy Ltd.*, 2017 ABQB 608 at para 15 [TAB 2].

<sup>10</sup> *Philip's Manufacturing*, 1992 CarswellBC 490 at para 17, 92 DLR (4<sup>th</sup>) 161.

- (d) The Receiver is not a restructuring officer and is not tasked with reorganizing the Debtor's financial affairs or finding refinancing.

15. To conclude, the following passages are instructive:

23 A helpful and ultimately dispositive statement of the relevant principles is found in *Bank of Nova Scotia v. MacCulloch & Co.* (1983), 49 C.B.R. (N.S.) 251 (N.S. T.D.) at para. 3. The court states that "[o]nce a receiver is appointed, it is the receiver's duty to liquidate the assets, pay all costs and expenses of the receivership, and distribute the net proceeds among the creditors of the company in order of priority. A receiver owes a duty to the court that appointed it and to the creditors generally".

....

26 Put another way and as outlined at para. 6 of the Receiver's factum:

. . . a court-appointed receiver . . . is authorized and empowered to liquidate all of the assets of the debtor under the supervision of the court, to the exclusion of all others including secured creditors, whereas the stay in a bankruptcy specifically preserves the rights of secured creditors to exercise their remedies. The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors' claims should be prioritized. As is clear from the broad wording of the Appointment Order, all creditors, secured and unsecured, are stayed from exercising remedies against the insolvent person's assets in favour of a single, court-supervised liquidation process by the Receiver. . . .<sup>11</sup>

16. Of course, there are other insolvency vehicles that the Debtor could seek to implement should it wish to conclude the receivership proceedings. These insolvency procedures also require a licensed insolvency professional but, in some cases, are driven by the debtor.
17. One such option available to the Debtor would be to seek protection under the *Companies Creditors Arrangement Act* (the "CCAA"). As is set out in the *Annotated Bankruptcy and Insolvency Act*, the primary purpose of a CCAA proceeding is as follows:

The CCAA has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties should of bankruptcy, foreclosure or the seizure of assets through receivership proceedings.<sup>12</sup>

18. In striving to achieve that purpose the CCAA also serves to, as appropriate, meet, *inter alia*, the following goals while restructuring:

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<sup>11</sup> *Royal Bank of Canada v Delta Logistics Transportation Inc.*, 2017 CarswellOnt 340 (Ont. S.C.)

<sup>12</sup> Sarra, Morawetz and Houlden, *The 2023 Annotated Bankruptcy and Insolvency Act*, (Toronto, Carswell, 2023) at 1342.

- (a) To permit a company to carry on business and where possible, avoid the social and economic costs of liquidation;<sup>13</sup>
  - (b) To maintain the status quo to protect itself and retain control over the assets while gaining the approval of creditors;<sup>14</sup> or
  - (c) To permit an insolvent company to avoid bankruptcy or receivership proceedings by making arrangements with its creditors.<sup>15</sup>
19. Notably, in a CCAA, the process, unlike a receivership, is infrequently creditor-driven and for the general benefit of the stakeholders. Rather, the monitor, in a CCAA proceeding, takes instruction, at least to a certain extent, from the Debtor and its principals. The corporation seeks to restructure its affairs to resolve and/or compromise the claims of its creditors. The corporation may continue as a going concern in the interim.
20. Recently, the Ontario Superior Court confirmed that, on application, a receivership may be converted into a CCAA proceeding. As such, the Debtor has, at its disposal, the ability to seek to convert the proceedings should it wish to do so.<sup>16</sup>
21. The Debtor may also wish to seek to compromise its debts pursuant to a proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act* (the “BIA”). Again, a debtor-driven process, this allows the debtor to compromise its unsecured debts. Though the Debtor has suggested that it has the ability to meet most of its obligations, it is unclear whether the debtor would wish to pursue this course of action as a natural consequence of a failed proposal is an assignment into bankruptcy.
22. As to a potential asset sale or refinancing, the Debtor’s principals can also explore these paths forward. The Debtor cannot obtain refinancing or encumber or sell assets with prior Court approval.

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<sup>13</sup> *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 435.

<sup>14</sup> *Milner Greenhouses Ltd. v Saskatchewan* (2004), 2004 CarswellSask 280, 50 CBR (4<sup>th</sup>) 187.

<sup>15</sup> *Multidev Immobilia Inc. v SA Just Invest* (1988), 1998 CarswellQue 38, 70 CBR (NS) 981.

<sup>16</sup> *MacQuarie Equipment Finance Limited v Validus Power Corp*, et al, 2023 ONSC 4772 [TAB 3] and the subsequent, unreported decision in which the monitor was appointed.

23. Without a fulsome financial reporting from the Debtor, the Receiver is unable to advise as to what position it would take, if any, with respect to such an application. Furthermore, this brief should not be interpreted as providing advice to the Debtor on what process it may wish to pursue. Rather, the brief is intended to provide an overview of the various insolvency models that may be explored by the Debtor should it wish to terminate the receivership proceedings.


**D. CONCLUSION**

24. 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 13<sup>th</sup> day of September.

**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.

<b>Tab</b>	<b>Decision</b>	<b>Paragraph</b>	<b>Principal</b>
1.	<i>Nation v Piikani Energy Corp.</i> , 2010 ABQB 352.	37-39, 48 and 49	While directors are required to cooperate with the Receiver, there is no duty or obligation on the Receiver to take instructions from the debtor or its principals.
2.	<i>National Bank of Canada v Twin Butte Energy Ltd.</i> , 2017 ABQB 608	15	Director authority to operate the corporation and management assets during a receivership is only as is authorized by the Receivership Order.
3.	<i>MacQuarie Equipment Finance Limited v Validus Power Corp</i> , et al, 2023 ONSC 4772 and the subsequent unreported decision		Receivership proceedings may be converted to CCAA proceedings on court application.

This Brief delivered by:

ROBERTSON STROMBERG LLP  
 Barristers & Solicitors  
 Suite 600, 105 – 21<sup>st</sup> 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](mailto:mk.anderson@rslaw.com)/[t.kusch@rslaw.com](mailto:t.kusch@rslaw.com)