Court File No. CV-20-00000008-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE COURT-APPOINTED RECEIVERSHIP OF STUART W. LACKEY AND CATHERINE A. LACKEY of the Town of Almonte, in the Province of Ontario

BETWEEN:

THE BANK OF NOVA SCOTIA

Applicant

- and -

STUART W. LACKEY AND CATHERINE A. LACKEY

Respondents

FACTUM OF THE COURT-APPOINTED RECEIVER

(Receiver's Distribution and Discharge Motion)

SOLOWAY WRIGHT LLP
Lawyers
700-427 Laurier Avenue West
Ottawa, ON K1R 7Y2

André A. Ducasse (44739R)
aducasse@solowaywright.com
613-236-0111 Telephone
613-238-8507 Facsimile

Lawyers for the Court-Appointed Receiver, MNP Ltd.

INDEX

PART I – OVERVIEW

1. This is a motion by MNP Ltd. in its capacity as the Court-Appointed Receiver (the "**Receiver**") of the assets, undertakings and properties (the "**Property**") of the Respondents, Stuart W. Lackey and Catherine A. Lackey (the **"Debtors**"), for an Order, *inter alia*:

a) If necessary, dispensing with service and/or declaring that service of this motion has been validly affected on all necessary parties and declaring that this motion is properly returnable on May 12, 2022 at 11:30 a.m. or as soon after that time as the motion can be heard;

b) Approving the Receiver's third and final report to the Court dated April 14, 2022 (the "**Final Report**"), and the activities and conduct of the Receiver and its legal counsel as described therein;

c) Approving the fees and disbursements of the Receiver, including the fees and disbursements of its legal counsel, all as particularized in the Final Report and an Order directing and authorizing the Receiver to pay all such fees and disbursements from available receivership funds;

d) Approving the Receiver's final statement of receipt and disbursements (the "**Final SRD**");

e) Authorizing and directing the Receiver to make a final distribution to the Bank of Nova Scotia ("**BNS**") in the amount of $10,499.00 from available receivership funds on account of its secured claim;

f) Discharging and releasing the Receiver following the payment by the Receiver of the foregoing amounts and distribution.

PART II – FACTUAL SUMMARY

2. The relevant facts are fully detailed in the Final Report. For convenience, defined terms herein not otherwise defined have the same meaning as defined terms in the Final Report.

3. The Receiver was appointed as the receiver of the Debtors' Property by the Orders of the Honourable Justice Johnston on October 23, 2020 (the "**Receivership Order**").

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, paras. 17-18, Appendices 1-2.

4. The Debtors were the registered owners of the property municipally known as County Road 43, Township of Montague, Ontario (the "**Montague Properties**") and the property municipally known as 2312 Ramsay Road, Concession 8, Mississippi Mills, Ontario (the "**Mississippi Mills Property**") (all properties collectively known as the "**Real Property**"). The Debtors manage various farmland, including cash crops and livestock.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, paras. 30-33.

5. The Receiver filed its First Report with the Court, dated March 3, 2021 (the "**First Report**") and a supplemental report dated March 18, 2021 (the "**Supplemental Report**"). The purpose of the First Report and the Supplemental Report was to obtain Court approval for the sale of the Montague Properties and to pay municipal tax arrears on closing.

Motion Record of the Court-Appointed Receiver, Tab B, paras. 19-20, Appendices 3-4.

6. Pursuant to the Orders of the Honourable Justice Michelle O'Bonsawin dated April 9, 2021, (the "**Approval Orders**"), the Receiver was authorized to proceed with the completion of the Sales Transaction (as defined below) for the sale of the Montague Properties and to make a payment to the Township of Montague in the amount of $1,813.64 to pay municipal tax arrears.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 21, Appendix 5.

7. The Receiver filed its Second Report with the Court, dated September 14, 2021 (the "**Second Report**"). The purpose of the Second Report was to obtain Court approval for the distribution of funds to BNS in the amount of $750,000.00 on account of its secured claim.

Motion Record of the Court-Appointed Receiver, Tab B, para. 22, Appendix 6.

8. Pursuant to the Order of the Honourable Justice H.J. Williams dated October 1, 2021, (the "**Distribution Order**"), the Receiver was authorized to make an initial distribution to BNS in the amount of $750,000.00 on account of its secured claim.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 23, Appendix 7.

9. On December 1, 2021, the Receiver accepted the final offers to purchase the Montague Properties (the "**Sales Agreements**"), which provided for a combined deposit of $20,000.00, that they were binding, and that the closing (the "**Sales Transactions**") was subject to the approval of the Court. On April 28, 2021, the Receiver closed the Sales Transactions pursuant to the Sales Agreements and the Approval Orders.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, paras. 32-33.

A. PRIORITY AND SECURED CLAIMS

10. As of January 29, 2021, the tax arrears for the Montague Properties totaled $1,813.64. The tax arrears owed to the Township of Montague have been fully paid by the Receiver.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 51.

11. The Receiver obtained a legal opinion regarding the validity and enforceability of BNS's security. Based on the legal opinion, BNS's security was valid and enforceable as against the proceeds of sale of the Montague Properties. As noted above, the part of the indebtedness owing to BNS was paid by the Receiver following the Approval Orders. The Receiver is not aware of any other priority claim.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, paras. 53-55.

B. DEBTORS' FUNDING OF THE REMAINING INDEBTEDNESS

12. Following the closing of the Sales Transaction, the Receiver canvassed with Debtors' legal counsel the possibility of the Debtors financing or liquidating specific assets in order to fund their shortfall owing to BNS. Proceeding in this manner would avoid the Receiver realizing on the Debtors' remaining Property, including the farming equipment and the Mississippi Mills Property. There ensued numerous discussions and communications between counsel for the Receiver and Debtors' counsel throughout April 2021 to November 2021 on the Debtors' efforts to secure financing to pay the shortfall, and by the end of November 2021, the Debtors had been able to fund the said shortfall.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, paras.34-48, Appendices 9-15.

C. FUNDS AVAILABLE FOR DISTRIBUTION

13. The Receiver's Final SRD confirms that gross receipts total $925,100.00. Of this amount, $752,460.00 have to date been paid to priority and secured creditors. After payment of various fees, insurance, utilities, and professional and other fees, there is currently an excess of receipts over disbursements in the amount of $10,499.00. In light of the foregoing, the Receiver recommends making a final distribution to BNS in the amount of $10,499.00 on account of its secured claim.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 56 and Appendix 16.

D. PROFESSIONAL FEES

14. The total fees and disbursements of the Receiver for the period from October 23, 2020 to April 14, 2022 are $46,591.60, plus HST of $6,056.91 for a total of $52,648.51. The Receiver estimates that its provisional fees and disbursements to finalize the receivership will total $3,000.00 plus HST.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 59 and Appendix 17.

15. The total fees and disbursements incurred by the Receiver for the period up to and including April 8, 2022, for services provided by Soloway Wright LLP, amount to $40,182.46, inclusive of HST. Counsel for the Receiver estimates that its provisional fees and disbursements to finalize the receivership will total $5,000.00 plus HST.

Motion Record of the Court-Appointed Receiver, Final Report, Tab B, para. 60 and Appendix 18.

PART III – ISSUES AND LAW

A. The Court's Procedural Powers

16. The Court may by order, extend or abridge any time prescribed by the *Rules* on such terms as are just. Further, the Court may dispense with compliance with any *Rule* at any time where and as necessary in the interest of justice. Finally, the Court may dispense with service where it is impractical to effect prompt service and/or it may validate service where it is satisfied that the document came to the notice of the person to be served.

Rules 2.03, 3.02, 16.04 and 16.08, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

B. Approval of the Receiver's Activities

17. This Court has the jurisdiction to approve such activities. The "court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver" and "it would be unusual and illogical [if] the receiver could come to court prior to approval but not post approval."

***Bank of America Canada v. Willann Investments Ltd.* (1993) 20 CBR (3d) 223 (ONSC), at paras. 3-4.**

18. All of the Receiver's activities in this matter were conducted in a manner consistent with the powers granted by the Receivership Order and each of the activities were necessary to ensure that the receivership proceedings were as orderly, effective and fair to all stakeholders as possible. The Receiver therefore respectfully submits that its activities to date should be approved by this Court.

C. The Proposed Distribution Should be Approved

19. Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings and receiverships.

***Re Abitibibowater Inc.*, 2009 QCCS 6461 (QC. Sup. Ct.) ("*Abitibi*"), at paras. 70-75.**

20. While *Abitibi* dealt with an interim distribution pursuant to a proceeding under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, Justice Gascon considered several factors in assessing whether to approve an interim distribution that are equally applicable to a receivership proceeding, including whether:

a) The payee's security is valid and enforceable;

b) The amounts owed to the payee exceed the distribution; and,

c) The distribution would result in significant interest savings.

Abitibi, supra, at para. 75.

21. The Receiver has confirmed that BNS's security is valid and that the Debtors remained indebted to its. As a result, the Receiver recommends making a final distribution to BNS in the amount of $10,499.00, being the remaining proceeds available in the Debtors' receivership estates.

D. The Receiver's Fees and Counsel Fees Should be Approved

22. Pursuant to paragraph 19 of the Receivership Order and to section 243(6) of the *BIA*, the Court may make any order respecting the payment of fees and disbursement of the Receiver that it considers proper.

Section 234(6), *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Schedule B.

23. The Receiver respectfully submits that the Receiver's fees and disbursements and those of its counsel as detailed in the Final Report should be approved. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable and take into consideration, *inter alia*, the factors set out in *Bank of Nova Scotia v. Diemer*.

***Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras. 33 and 45.**

24. It is the Receiver's submission that the fees and disbursements of the Receiver and its Counsel were incurred at the respective party's standard rates and charges, and that they are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and its counsel in connection with the receivership.

E. The Discharge and Release of the Receiver

25. The Receiver has substantially completed its mandate as contemplated by the Receivership Order, the previous Orders in this matter, and under the *BIA*. Accordingly, the Receiver respectfully submits that it should be discharged and released, following its administration of the estate (including paying the distribution to BNS, and the Receiver's fees and counsel's fees), and the activities necessary to conclude the receivership proceedings have been completed.

26. The Receiver also seeks a release from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of the Receiver while acting in its capacity as Receiver, save and except for any gross negligence or willful misconduct on the part of the Receiver.

27. The release is a standard term and mirrors the language used in the Commercial List model discharge order. The Court has stated that "in the absence of any evidence of improper or negligent conduct, the Release should issue." There is no evidence of improper or negligent conduct in this case. Thus, the Receiver submits that the release should be granted.

***Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt. 14138 (ONSC [Commercial List]), at para 47.**

PART IV – ORDER REQUESTED

28. The Receiver therefore respectfully recommends and requests an Order:

a. If necessary, dispensing with service and/or declaring that service of this motion has been validly effected on all necessary parties and declaring that this motion is properly returnable on May 12, 2022 at 11:30 a.m. or as soon after that time as the motion can be heard;

b. Approving the Final Report, and the activities and conduct of the Receiver and its legal counsel as described therein;

c. Approving the fees and disbursements of the Receiver, including the fees and disbursements of its legal counsel, all as particularized in the Final Report and an Order directing and authorizing the Receiver to pay all such fees and disbursements from available receivership funds;

d. Approving the Receiver's Final SRD;

e. Authorizing and directing the Receiver to make a final distribution to BNS in the amount of $10,499.00 from available receivership funds on account of its secured claim; and

f. Discharging and releasing the Receiver once the above-noted amounts are paid by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 29th day of April, 2022.

André A. Ducasse

SOLOWAY WRIGHT LLP
700-427 Laurier Avenue West
Ottawa, ON K1R 7Y2

André A. Ducasse (#44739R)
aducasse@solowaywright.com
613-236-0111 Telephone
613-238-8507 Facsimile
Lawyers for the Court-Appointed Receiver, MNP Ltd.

SCHEDULE "A" – AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Re Abitibibowater Inc.*, 2009 QCCS 6461 (QC. Sup. Ct.)
3. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
4. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt 14138 (ONSC [Commercial List])

SCHEDULE "B" – STATUTES, REGULATIONS, AND BYLAWS

Rules 2.03, 3.02, 16.04 and 16.08, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

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.

EXTENSIONS OR ABRIDGMENT

General Powers of Court

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

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

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court

Consent in Writing

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

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 under these rules, the court may take an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, 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.

Section 243(6), *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

Orders respecting fees and disbursements

243 (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

1993 CarswellOnt 216
Ontario Court of Justice (General Division)

Bank of America Canada v. Willann Investments Ltd.

1993 CarswellOnt 216, [1993] O.J. No. 1647, 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223, 41 A.C.W.S. (3d) 662

BANK OF AMERICA CANADA v. WILLANN INVESTMENTS LIMITED and CRANBERRY VILLAGE, COLLINGWOOD INC.

Farley J.

Judgment: June 28, 1993
Docket: Doc. B22/91

Counsel: *Harry Underwood*, for receiver, Coopers & Lybrand Ltd.
Stephen Schwartz, for Prenor Trust Co. of Canada.
Frank Bennett and *John Spencer*, for Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in Right of Ontario.

***Farley J.*:**

1 This was a motion for an order approving the receiver's activities and fees (including the fees of its counsel) as set out in the receiver's sixth report (covering the period October 1, 1992 to April 19, 1993) and seventh report (April 20, 1993 to June 13, 1993). At a previous hearing on May 14, 1993 the Crown had asked for an adjournment concerning the sixth report (the only report outstanding at that time) for the specific purpose of conducting consensual cross-examinations. Mr. Bennett who was fresh on the record (as of mid-morning today with no advance notice to other counsel) raised an objection as to my jurisdiction to hear the motion indicating that there was nothing in Blair J.'s original order establishing the receivership to allow for after-the-fact approval of the receiver's activities. His position was that the only jurisdiction I had was to pass the accounts of the receiver and approve its fees. He maintained that there was an inherent difference between passing of accounts and approval of activities.

2 I dealt with this general area in my earlier endorsement in this relating to previous reports (endorsement of May 2, 1993: see pp. 16-18). I again note that Mr. Bennett in his own text: F. Bennett, *Receiverships* (Carswell: Toronto, 1985), said at p. 297:

> One of the purposes of passing accounts is to afford the receiver judicial protection in carrying out his powers and duties. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities to date.

In reply Mr. Bennett referred me to p. 298 of his text without specifying what was contained there; he gave me a copy of that page after the hearing concluded. I could find nothing of assistance on that page. In my view Mr. Bennett's own text supports the position of the receiver that I have jurisdiction. It seems to me that the nature of a specific approval hearing is much better to review conduct than a passing of accounts which focuses on receipts and disbursements.

3 It does not seem to me that approval of the activities of the receiver, a court appointee and therefore an officer of the court, requires specific words of authorization in the original order. To the extent that certain approval activities are mentioned in that order, I would regard these references as merely examples of what may take place. In my view this court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver. I note here that in this instance the activities were well summarized in the two reports; however, such approval (if given) would be to the extent that the reports accurately summarized the material activities of the receiver. As to

inherent jurisdiction, see *80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd.* (1972), 25 D.L.R. (3d) 386 (Ont. C.A.), at pp. 389-390.

4 I pause to note that it would be unusual and illogical that the receiver could come to court for prior approval but not post approval. If that were the case, one might well expect the courts to be inundated with prior approval requests for virtually any activity.

5 It seems to me that a receiver should be able to come to court and bare its breast. Having done so, it has exposed itself to the sword of any interested party which may feel aggrieved of any action by that receiver. However, if the court feels that the receiver has met the objective test required of it, then the court may bestow a shield to the receiver for that reviewed and approved activity. If the activity is disapproved, then the receiver is in the unenviable position of watching itself be disembowelled in court with sanctions then or to be dealt with in accordance with arrangements then worked out.

6 I would therefore dismiss the Crown's objection to my jurisdiction (now raised as to the sixth and seventh report but apparently the subject of appeal as to earlier approvals).

7 Having come to that conclusion, I have also concluded that the receiver has met the objective test and that its activities and fees for the period covered by the sixth and seventh report should be approved. I note in this respect while all concerned acknowledged that the fees were "expensive" that Prenor Trust, which will ultimately bear the cost, was supportive of the receiver. While "expensive", I found the fees in line with the complications and protractions of this receivership.

8 Costs were asked for in this instance. Mr. Bennett submitted that a cost award against the Crown would discourage creditors in general from appealing and objecting. That should of course be avoided where creditors have taken a reasonable position; in other words, the mere fact that a creditor is not successful in persuading a court of the rightness of its position should not subject that creditor to a costs sanction. However, I view this day's events in a different light. In my view much time was wasted in the Crown's several requests for a further adjournment and there was no advance notice that jurisdiction would be challenged. I would also observe that the scheduled time for this matter was therefore greatly exceeded. Counsel on all sides of a matter owe a duty to ensure that the court office is kept up to date with a realistic estimate of time required. This will, of course, require the cooperation of counsel amongst themselves. (In speaking of cooperation, I note in passing that this motion was merely one of six motions dealt with today concerning this project.) Unfortunately none of the counsel involved in these six motions (there being other counsel with respect to the other five) was mindful of the practice directions' request that in a continuing complex or multiple motion file there be a sorting through and grouping of the materials to be dealt with the next day. In the present situation, this meant that several motion records had to be retrieved from the office once all the files were sorted out. There were as well the to-be-discouraged late filings. I note that Mr. Bennett indicated that his client never gave him a copy of the seventh report to review and that he had only reviewed the sixth report some 5 or 6 weeks ago for another purpose. His submissions with respect to the actual activities being reviewed were therefore rather limited in extent and time. Costs are awarded against the Crown payable forthwith to the receiver in the amount of $1500 and Prenor Trust $500.

Order accordingly.

2012 ONSC 6376
Ontario Superior Court of Justice [Commercial List]

Pinnacle Capital Resources Ltd. v. Kraus Inc.

2012 CarswellOnt 14138, 2012 ONSC 6376, [2012] O.J. No. 5301, 221 A.C.W.S. (3d) 853

Pinnacle Capital Resources Limited in its capacity as general partner of Red Ash Capital Partners II Limited Partnership, Applicant and Kraus Inc., Kraus Canada Inc., Strudex Fibres Limited and 538626 B.C. Ltd., Respondents

L.A. Pattillo J.

Heard: November 7, 2012
Judgment: November 9, 2012
Docket: CV-12-9731-00CL

Proceedings: additional reasons at *Pinnacle Capital Resources Ltd. v. Kraus Inc.* (2013), 2013 CarswellOnt 891, 2013 ONSC 674 (Ont. S.C.J. [Commercial List])

Counsel: Linc Rogers, Jenna Willis, for Receiver
Larry Ellis, for Applicant
Raymond Slattery, David Ullmann, for Equistar Chemicals, LP

***L.A. Pattillo J.*:**

Introduction

1 This matter involves two motions.

2 The first is by PricewaterhouseCoopers Inc. (”PwC”) in its capacity as Court-appointed receiver (the “Receiver”) of the respondents Kraus Inc. (”Kraus”), Kraus Canada Inc. (”Kraus Canada”), Strudex Fibres Limited (”Strudex”) and 538626 B.C. Ltd. (collectively, the “Companies”) for, among other things, an order discharging it and releasing it from any and all further obligations as Receiver, upon filing its discharge certificate.

3 The second is a motion by Equistar Chemicals, LP (”Equistar”) for a) An order varying paragraph 8 of the Sale and Approval and Vesting Order dated June 11, 2012 by unsealing the confidential appendices; b) An order directing PwC to provide answers to questions posed by Equistar; and c) An order directing PwC to pay Equistar $35,425.25.

Background

4 Red Ash Capital Partners II Limited Partnership was a secured creditor of the Companies.

5 The applicant Pinnacle Capital Resources Limited, in its capacity as general partner of Red Ash Capital Partners II Limited Partnership (”Red Ash”), obtained an order of the Court dated May 28, 2012 appointing PwC Interim Receiver of Kraus, Kraus Canada and Strudex (collectively the “Operating Companies”) In that capacity, PwC filed two reports, the first dated May 29, 2012 and the second June 10, 2012.

6 On June 11, 2012, again on Red Ash’s application, PwC was appointed trustee in bankruptcy of each of the

Operating Companies. On the same day, and pursuant to Red Ash's receivership application, PwC was appointed as Receiver of the Companies.

7 Also on June 11, 2010, the Court issued a Sale Approval and Vesting Order approving a going concern sale transaction (the "Sale Transaction") of substantially all of the assets of the Companies (the "Purchased Assets") contemplated by an asset purchase agreement between the Receiver and Kraus Brands LP (the "Purchaser"), a party related to Red Ash, dated as of June 11, 2012 (the "Sale Agreement").

8 Paragraph 8 of the Sale Approval and Vesting Order provides that the documents marked as Confidential Appendices A, B and C to the Receiver's First Report contain confidential information and shall remain confidential and shall not form part of the permanent court record pending further order of the Court.

9 The Sale Transaction closed on June 11, 2012.

10 The reasons for the interim receivership were set out in the material filed in support of the initial application. The Interim Receiver monitored the receipts and disbursements of the Companies but did not take possession of the assets of the Operating Companies nor did it manage or operate their businesses. The Interim Receivership ended when the Receivership Order became effective on June 11, 2012.

11 Pursuant to the Receivership Order, the Receiver had a very narrow mandate. It was appointed specifically to complete the Sale Transaction in accordance with the Sale Agreement and convey the Purchased Assets "without taking possession or control thereof".

12 During the period of the Interim Receivership, and as suppliers received notice of the application to appoint a receiver of the Companies, the Interim Receiver and/or the Companies received claims for the repossession of property pursuant to s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). As at June 11, 2012, the date of the Sale Approval and Vesting Order became effective, a total of nine claimants, including Equistar, had delivered 81.1 claims totalling $2,248,734.

13 Because certain of the Purchased Assets were subject to the s. 81.1 claims (the s. 81.1 Assets), the Sale Approval and Vesting Order provided in paragraph 6 thereof that the s. 81.1 Assets do not vest in the Purchaser until such time as the applicable s. 81.1 claim is determined by agreement of the parties or by further order of the Court. The Sale Approval and Vesting Order further provides that, notwithstanding the foregoing, the Purchaser is entitled to use and consume any s. 81.1 Asset, provided the Purchaser pays to the Receiver, in trust, the invoice amount of any s. 81.1 Asset used and consumed by the Companies or the Purchaser.

14 Paragraph 6 of the Sale Approval and Vesting Order required that the Receiver file a report advising as to the s. 81.1 Assets in the possession of the Companies as at June 11, 2012 and "to the extent ascertainable, as at May 28, 2012."

15 In satisfaction of the requirement in paragraph 6 of the Sale Approval and Vesting Order, the Receiver filed its Third Report dated June 14, 2012. The Third Report contained a list of the s. 81.1 claimants, the steps by the Receiver to determine the s. 81.1 Assets in the possession of the Companies on June 11, 2012, the steps taken to segregate and preserve those assets and the inspections by s. 81.1 claimants. It also detailed the Receiver's attempts to determine the s. 81.1 Assets in the possession of the Companies on May 28, 2012.

Equistar's s. 81.1 Claim

16 On June 8, 2012, the Receiver received a s. 81.1 claim in the amount of $551,951.00 from Equistar. Equistar supplied poly resin to the Companies.

17 On June 12, 2012, a representative of Equistar attended at Strudex's premises and was shown the silos where Equistar's goods were normally delivered. The representative did a visual inspection of the goods remaining in the applicable silo and was provided production records for that silo. A digital meter reading of the silo was also taken in the presence of Equistar's representative.

18 Subsequently, the Receiver assessed the s. 81.1 claims using the criteria set out in s. 81.1 of the BIA. The Receiver assessed the eligible value of Equistar's claim to be $35,425.25. On June 19, 2012, the Receiver advised Equistar of its assessment.

19 On July 31. 2012, Equistar's US attorney sent a letter to the Receiver taking issue with the Receiver's determination of value. Equistar's position was that its claim should include all goods Equistar delivered within 30 days prior to May 28, 2012. It took issue with the challenges the Receiver reported it had faced in respect of assessing the status of the s. 81.1 Assets as at May 28, 2012 and requested further analysis.

20 The Receiver responded to Equistar's attorney's letter on August 7, 2012. It provided further details as to Strudex's inventory system, records, tracking, etc. as well as specific detail in respect of the use of product supplied by Equistar to Strudex in the period between May 28 and June 11, 2012, according to the records available to the Receiver. The letter further stated that if Equistar wished to conduct further investigation of the matter, the Receiver would attempt to facilitate such investigation with the Purchaser. The Receiver heard nothing further from Equistar.

21 In the period since June 11, 2012, the Purchaser used or consumed the s. 81.1 Assets subject to Equistar's claim that were in the Companies possession on June 11, 2012. In accordance with paragraph 6 of the Sale Approval and Vesting Order, the Purchaser paid to the Receiver, in trust, the invoice amount of the s. 81.1 Assets subject to Equistar's s. 81.1 claim that it used or consumed subsequent to June 11, 2012 in the amount of $35,425.25. The Receiver continues to hold such funds in trust pending agreement amongst the Purchaser and Equistar or further order of the Court.

Equistar's Motion

22 The Receiver's discharge motion was originally returnable on October 16, 2012. At the request of counsel for Equistar who were retained on October 9, 2012, the motion was adjourned to November 5, 2012 "to permit further review by creditor". Equistar had been previously represented in the receivership proceedings.

23 On October 24, 2012, Equistar's counsel sent a letter to the Receiver's counsel enclosing a list of 114 questions "for response by the Receiver in connection with the Receiver's impending motion for discharge."

24 The questions cover a very broad range of topics, including:

a. the relationship between the Receiver and Red Ash and the extent of Red Ash's control over the actions and decisions of the Receiver and the funding of the receivership;

b. information available to proposed purchasers about the existence of s. 81.1 claims and the goods supplied by them;

c. the extent of the relationship between PwC and the Companies and the extent of control exercised by PwC in that capacity prior to its appointment;

d. the extent of PwC's control over the sale process;

e. any advice given by PwC to the directors and officers of the Companies related to their obligations with respect to trading while insolvent;

f. the decision to sell the cash gleaned from suppliers products as part of the assets on closing;

g. the Liquidation Analysis (Confidential Appendices C) and whether or not the Receiver considered the impact on unsecured creditors in evaluating same;

h. the decision to use the interim receivership structure and its impact on suppliers;

i. forecasts of consumption of supplier goods available to or relied upon by the Receiver; investigations conducted

by the Receiver, as described in the Third Report, which relate to the extent of goods supplied by Equistar;

j. specific questions related to the quantities of the goods supplied by Equistar;

k. general questions about how the Receiver perceived the treatment of unsecured creditors and the suppliers, and what steps, if any it took to advise the relevant parties in connection with same.

25 On October 31, 2012, the Receiver replied to the October 24, 2012 letter and advised that it had reviewed and considered Equistar's questions and in the Receiver's view, the questions were inappropriate, irrelevant to Equistar's s. 81.1 claim, had been dealt with in the Receiver's prior communications with Equistar and/or related to activities already approved by the Court. Accordingly, it advised that it would not be answering any of the questions.

26 On November 5, 2012, the Receiver's discharge motion was put over to November 7, 2012 to enable Equistar to bring its motion to obtain the answers to the questions and unseal the Confidential Appendices. It further amended its notice of motion to also seek payment of $35,425.25

Law and Analysis

(a) The Questions

27 A court-appointed receiver is an officer of the court and is in a fiduciary capacity to all stakeholders: *Nash v. CIBC Trust Corp.*, 1996 CarswellOnt 2185 (Ont. Gen. Div.) at para. 6. The fact that the receiver owes fiduciary duties to stakeholders does not, however, entitle a stakeholder to go on a fishing expedition for information: *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009), 81 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) at para. 18.

28 A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues. In addition, and as noted by Farley J. in *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]) at para. 9, the objectivity and neutrality of the officer of the court is also a factor to consider.

29 Equistar submits that it is entitled to the answers to its questions in order to determine the correct amount of its s. 81.1 claim; who the directing minds were that caused the claim to arise; and whether or not any claim exists against any of the parties, including the Receiver for their actions in creating an unpaid debt owing to Equistar.

30 The vast majority of the 114 questions relate to the Receiver's relationship with Red Ash and the Companies prior to and during the receivership as well as various steps during the receivership. Those questions have nothing to do with Equistar's s. 81.1 claim. Those questions are nothing more, in my view, than a fishing expedition to see if Equistar can uncover some sort of impropriety which it suspects may have occurred but of which it has no proof. In that regard, it is instructive that Equistar has provided no evidence of impropriety before or during the receivership. All it has are suspicions of impropriety which is not sufficient to elevate its questions into the reasonable category.

31 Questions 12 and 13 and 75 to 97 relate for the most part to Equistar's s. 81.1 claim. The problem is that the Receiver has already answered Equistar's questions concerning its claim and provided it with all of its information. The Receiver duly and thoroughly investigated and provided all relevant facts it was able to obtain to Equistar. I would have thought that if Equistar had any follow up questions, it would have contacted the Receiver directly with them. Equistar provided no evidence that it requires further information or that to its knowledge, the information is available and the Receiver has failed to provide it. In fact, it is a reasonable inference from a number of the questions that Equistar already knows the answer.

32 The Receiver has no further information or documents relating to Equistar's claim. In my view, in responding as it has to Equistar's questions relating to its s. 81.1 claim, the Receiver has acted reasonably and in accordance with its duty. In the circumstances, it is not required, in my view, to answer Equistar's further questions which in the

circumstances, are either irrelevant or unreasonable and in most cases, both.

33 Equistar's motion in respect of the 114 questions is therefore dismissed.

(b) Unsealing the Confidential Appendices

34 Equistar also seeks an order unsealing the Confidential Appendices as provided in paragraph 8 of the Sale Approval and Vesting Order.

35 The First Report describes the three Appendices. Appendix A is a Confidential Information Memorandum prepared by PricewaterhouseCooper Corporate Finance with the assistance of the Companies management for the sale process in the fall of 2011. It describes the Companies business in significant detail. Appendix B is a detailed summary of the four highest offers received in December 2011 and the three revised offers received in January 2012 in respect of the sale of the Operating Companies. Appendix C is a Liquidation Analysis of assets and business of the Companies based on net book values as of March 31, 2012.

36 In the First Report, the Receiver requested the sealing of the three Appendices from the public record until after closing of the Sale Transaction or further order of the court. As noted, paragraph 9 of the Sale Approval and Vesting Order provides that the Appendices contain confidential information and shall remain confidential and shall not form part of the permanent record pending further order of the court.

37 Equistar submits that because the Sale Transaction is complete, there is no reason to continue with the sealing order and the documents should be unsealed. It submitted that the two circumstances justifying a sealing order as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) are no longer present here.

38 Counsel for Red Ash opposed Equistar's request to unseal the documents. It submits that given the Court determined, as part of the Sale Approval and Vesting Order, that the Appendices were confidential, Equistar's motion for unsealing should fail as it has not established that the documents are no longer confidential. In the alternative, it submits that the documents remain confidential. In respect of that submission, because it was only served with Equistar's motion material on the eve of the motion, Red Ash requests an adjournment in order that it can file material to establish that the documents in question still remain confidential.

39 As Newbould J. pointed out in *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17, it is often the case that on the Commercial List sensitive documents concerning an asset sale are sealed in order to protect the sale process. Once that process has been completed, it follows that the information in the documents is no longer confidential.

40 I am mindful of the importance of public disclosure in the courts as discussed in *Sierra Club*. I therefore think, given the circumstances in which the Appendices were sealed, that Red Ash should be required to establish that the documents in issue still remain confidential. Accordingly, I intend to adjourn that portion of Equistar's motion, to be brought back on with proper notice to Red Ash in order to allow it to properly respond.

(c) The $35,425.25

41 The final relief requested by Equistar is the payment by the Receiver of the $35,425.25 it is holding in trust in respect of its s. 81.1 claim.

42 The Sale Approval and Vesting Order provide in paragraph 6(b) that a s. 81.1 claim is to be determined "by court order or by agreement amongst the Receiver, the applicable claimant to the s. 81.1 Asset and the Purchaser". Paragraph 6 (e) provides that where the Purchaser pays the Receiver in trust for the s. 81.1 assets its used or consumed, the cash payment "shall stand in place and stead of the s. 81.1 Asset, with such cash to be disposed of in accordance with" the determination as provided in paragraph 6(b).

43 There has been no court order or agreement with respect to Equistar's s. 81.1 claim. Equistar has not yet sought such determination. Accordingly, pursuant to paragraph 6 of the Sale Approval and Vesting Order, the $35,425.25 being held by the Receiver in trust cannot be disposed of until such determination.

44 Equistar's request for payment of $35,425.25 is therefore dismissed.

The Receiver's Motion

45 The Receiver's appointment was for the narrow purposes of completing the sale of the assets of the Companies and certain miscellaneous post-closing matters and reporting on the s. 81.1 assets in possession of the Companies at the time of its appointment and if possible, on May 28, 2012. Those purposes have been completed.

46 All s. 81.1 claims except for Equistar's have been resolved. The Receiver proposes that it pay the $35,425.25 it is holding in trust on account of Equistar's s. 81.1 claim to be paid to the Trustee in Bankruptcy of the Operating Companies to permit Equistar's claim to be settled or resolved by court order in the bankruptcy. In my view, given that PwC is also the Trustee, this is a reasonable solution.

47 The Receiver seeks a release and discharge from any and all claims arising out of its actions as Receiver save and except for gross negligence or wilful misconduct on its part. It is that request which prompted Equistar's list of questions. The release is a standard term in the Commercial List model order of discharge. In my view, in the absence of any evidence of improper or negligent conduct on the part of the Receiver, the release should issue. A receiver is entitled to close its file once and for all. There is no such evidence here.

Conclusion

48 Based on the material filed, the discharge order as requested by the Receiver should issue.

49 Equistar's motion is dismissed except for the portion relating to the unsealing of the Confidential Appendices which shall be adjourned to be brought back on, if so desired, on proper notice to Red Ash and the Receiver.

50 There will be no order of costs in respect of the Receiver's discharge motion. The Receiver is entitled, however, to costs in respect of Equistar's motion. In the absence of agreement, brief submissions of no more than two pages along with a cost outline shall be made by the Receiver within ten days. Equistar shall respond within ten days of receipt of the Receiver's submissions.

Order accordingly.

THE BANK OF NOVA SCOTIA
Applicant

- and -

STUART W. LACKEY and CATHERINE A. LACKEY
Respondents

Court File No.: CV-20-00000008-0000

ONTARIO SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE COURT-APPOINTED RECEIVERSHIP OF STUART W. LACKEY AND CATHERINE A. LACKEY, of the Town of Almonte, in the Province of Ontario

Proceedings commenced at Perth, Ontario

FACTUM OF THE COURT-APPOINTED RECEIVER (Receiver's Distribution and Discharge Motion)

SOLOWAY WRIGHT LLP
Lawyers
700-427 Laurier Avenue West
Ottawa, ON K1R 7Y2

André A. Ducasse (#44739R)
aducasse@solowaywright.com
613-236-0111 telephone
613-238-8507 facsimile

Lawyers for the Court-Appointed Receiver, MNP Ltd.