2026 01G 0099
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, as amended

AND IN THE MATTER OF the receivership of 15132738 Canada Inc.

BETWEEN: **JANES & NOSEWORTHY LTD. IN ITS CAPACITY AS RECEIVER OF 15132738 CANADA INC.**

APPLICANT

AND: **15132738 CANADA INC.**

RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

O'KEEFE & SULLIVAN
Solicitors for the Receiver
80 Elizabeth Ave Suite 202
St. John's, NL A1A 1W7
Attn: Darren O'Keefe
Email: dokeefe@okeefesullivan.com

TO: **The Supreme Court of Newfoundland and Labrador**
(Sitting in Bankruptcy and Insolvency)
309 Duckworth St.
St. John's, NL
A1C 1G9

AND TO: Service List at **Schedule "A"**

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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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APPLICANT

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RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

A. OVERVIEW:

1. Janes & Noseworthy Limited ("**JNL**"), in its capacity as Court appointed Receiver of 15132738 Canada Inc. (the "**Debtor**"), seeks approval to (a) distribute the proceeds realized in the receivership in accordance with the distribution framework described in the Fifth Report, (b) approve the Receiver's activities, reports, and its and its counsel's fees and disbursements, (c) authorize, but not require, an assignment in bankruptcy of the Debtor and permit JNL to act as trustee in bankruptcy, if necessary, and (d) discharge and release the Receiver upon completion of the remaining administrative matters and the filing of its discharge certificate ("**Receiver's Certificate**"), with customary protections preserved.

2. The sale transaction contemplated under the sale and investment solicitation process was approved by the Court. The Receiver has filed its certificate confirming that the Purchaser has paid the purchase price for the purchased assets to the Receiver's satisfaction in accordance with the Asset Purchase Agreement and has received written notice from the Purchaser's counsel that all closing conditions have been satisfied or waived. The Receiver's mandate is substantially complete. The proposed Distribution and Discharge Order is supported by the Fifth Report, the approved sale process, the security review, the proposed distribution

waterfall, and the remaining administrative steps required to conclude the receivership efficiently.

B. SUMMARY OF FACTS:

3. On 22 January 2026, on application by BTG Capital Inc. ("**BTG**"), JNL was appointed as interim receiver of the Debtor's assets, including the properties comprising the Stephenville Dymond International Airport, for an initial 30-day period under section 47 of the *Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, as amended, ("**BIA**").

4. On 20 February 2026, the Court extended the interim receivership to 09 March 2026.

5. On 26 February 2026, BTG obtained an order appointing JNL as receiver of the Debtor's property pursuant to section 243 of the BIA.

6. On 09 March 2026, the Court approved a Sale and Investment Solicitation Process ("**SISP**"). Phase I of the SISP was conducted in accordance with the SISP timelines. Phase II was not triggered, and BTG, as Stalking Horse Bidder, was the successful bidder.

7. By Order dated 30 April 2026, the Court approved the transaction contemplated by the Asset Purchase Agreement. BTG assigned the Asset Purchase Agreement to Stephenville International Airport Corp (the "**Purchaser**").

C. ISSUES:

8. The issues to be determined by the Honorable Court are:

   (a) whether the Court should authorize the Receiver to distribute proceeds in accordance with the distribution waterfall attached to the Fifth Report;

   (b) whether the Receiver's activities, reports, and its and its counsel's fees and disbursements should be approved;

   (c) whether the Court should authorize an assignment in bankruptcy of the Debtor and permit JNL to act as trustee if it determines that doing so is appropriate; and

(d) whether the Receiver should be discharged and released upon completion of the remaining matters and filing of its discharge certificate, with termination of these proceedings and continuation of existing protections.

D. LAW AND ARGUMENT:

Approval of Distribution of Proceeds:

9. The Receiver seeks authority to make one or more cash distributions of proceeds received from the sale transaction, in accordance with the distribution waterfall appended to the Fifth Report.[1]

10. Orders authorizing distributions are routinely granted in insolvency proceedings, including receiverships, where the receiver has realized assets, confirmed the applicable priorities, and placed before the Court a clear evidentiary basis for the proposed payment of claims. The Court's authority to grant such distributions is well established.[2]

11. BTG is the primary senior secured creditor and holds a valid and enforceable security interest against the Debtor's property. The Receiver is not aware of any secured creditor with a prior-ranking claim. As BTG credit bid its indebtedness, the proposed distribution is directed to priority claims contemplated by the Asset Purchase Agreement and the Fifth Report, including municipal tax arrears owing to the Town of Stephenville.

12. The proposed distribution is fair, reasonable, and commercially practical because it addresses known priority claims required to complete the transaction framework and permits the receivership to be concluded without preserving unnecessary estate funds.

Approval of the Receiver's Activities, Reports, and Fees:

13. The activities of the Receiver described in the Receiver's Reports were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order, the SISP Order and the Approval and Vesting Order, and were in each case in the best interests of the Debtor and its stakeholders generally.

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[1] Appendix "A" to Fifth Report of the Receiver dated July 2026 ("**Fifth Report**")
[2] ***Re Windsor Machine & Stamping Ltd.***, 2009 CanLII 39772 (ONSC) at para 13; **[TAB 1]**
See also ***Abitibibowater Inc. (Re),*** 2009 QCCS 6461 at paras 70-75 **[TAB 2]**

14. The Receiver is seeking approval of the professional fees incurred as described in the Fifth Report. Pursuant to paragraph 20 of the Receivership Order, the Receiver and its counsel are entitled to be "paid their reasonable fees and disbursements, in each case at their standard rates and charges".[3]

15. The standard to be applied is whether the compensation sought is fair and reasonable, assessed in light of the nature, extent, and value of the work performed, the complexity of the matter, the results achieved, and the benefit to the estate and stakeholders.[4]

16. The Receivership Order authorized the Receiver to engage appraisers and independent counsel where, in the Receiver's judgment, such assistance was required.[5] The Receiver engaged an appraiser to obtain an updated valuation of the property and to assist with the CRA deemed trust analysis and engaged independent legal counsel to provide an opinion on the validity and enforceability of BTG's security as against the Purchased Assets.

17. Given the Receiver's efforts to control professional costs, the complexity and urgency of the insolvency matter, the approved sale process, the security review, and the completion of the transaction, the fees and disbursements of the Receiver and its counsel, including independent legal counsel are fair and reasonable.

<u>Authority to Assign the Debtor into Bankruptcy and to Act as Trustee, if necessary:</u>

18. The Receiver seeks authority to take such steps as it considers advisable to effect an assignment into bankruptcy in respect of the Debtor, if the Receiver determines that doing so is appropriate.

19. The Court's jurisdiction to authorize a receiver to assign a debtor into bankruptcy arises from section 243 of the BIA[6], including the power to authorize a receiver to "take any other action that the court considers advisable." The requested authority is therefore discretionary, ancillary to the receivership, and must be assessed against the practical needs of this estate.

20. Granting a receiver authority to assign a debtor into bankruptcy is not extraordinary relief and has been approved by Canadian courts where it is justified by the debtor's insolvency, the

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[3] Receivership Order dated 09 March 2026 ("**Receivership Order**") at para 20
[4] ***Bank of Nova Scotia v. Diemer***, 2014 ONCA 851 at paras 44-45. **[TAB 3]**
[5] Receivership Order at para 3.4.
[6] ***Bankruptcy and Insolvency Act***, RSC 1985 c.B-3, s.243(c)

number and nature of creditor claims, and the need to avoid unnecessary duplication or delay.[7]

21. Canadian Courts have approved such relief in ***Bank of Nova Scotia v Fraser Valley Renewables Ltd***,[8] in ***RBC v Gustin***,[9] and in ***Bank of Montreal v Owen Sound Golf and Country Club***,[10] among other cases.

22. JNL submits that it should be granted such authority for the following reasons:

    a. there is ample evidence to support that the Debtor is insolvent and likely to face applications for bankruptcy in any event;

    b. There is clearly more than one creditor who would qualify to bring such a bankruptcy application so as to meet the BIA s. 42(1) test; and

    c. authorizing the Receiver to assign the Debtor into bankruptcy will promote efficiency for stakeholders by avoiding duplicative creditor-initiated proceedings and, if required, allowing a trustee to use the BIA's investigatory and avoidance tools to review and conclude the affairs of the bankrupt estate.

<u>The Receiver Should be Discharged and Released</u>

23. Pursuant to the draft Distribution and Discharge Order, JNL will be discharged as the Receiver of the Debtor's Property and released from any and all liability that it has or may have through any reason of, or in any way arising out of, its acts or omissions while acting in its capacity as the Receiver, upon the filing of the Receiver's Certificate.

24. This Court has inherent jurisdiction to discharge a Court-appointed receiver upon completion of its mandate.[11] A release in favour of the Court-appointed receiver is appropriate where the receiver has acted within its authority, completed the work required of it, and there is no evidence of improper conduct or negligence.[12]

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[7] ***Royal Bank of Canada v. Sun Squeeze Juices Inc.***, [1994] O.J. No. 567 (Gen. Div.) at paras. 6–10; **[TAB 4]**
[8] ***Bank of Nova Scotia v Fraser Valley Renewables Ltd***., 2026 BCSC 201 (CanLII) at para 99 **[TAB 5]**
[9] ***RBC v Gustin***, 2019 ONSC 5370 **[TAB 6]**
[10] ***Bank of Montreal v Owen Sound Golf and Country Club***, 2012 ONSC 557 **[TAB 7]**
[11] BIA, s.183(1). See also ***Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.,*** 2009 CanLII 55113 (ON SC) at paras 8-9 **[TAB 8]** ; ***Yukon (Government of) v Yukon Zinc Corporation,*** 2022 YKSC 58 at paras 26-28 **[TAB 9]**
[12] ***Pinnacle Capital Resources Ltd v Kraus Inc***, 2012 ONSC 6376 at para 47 **[TAB 10]**
See also ***Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.,*** 2009 CanLII 55113 (ON SC) at paras 11-14 **[TAB 8]**

25. In these circumstances, it is appropriate to discharge and release JNL in the manner proposed because: (i) upon completion of the remaining activities described in the Fifth Report, the Receiver will have no further mandate in these receivership proceedings; (ii) the proposed release is customary and consistent with model discharge order protections; and (iii) discharge upon filing of the Receiver's Certificate avoids a further Court attendance, preserving estate resources and Court time.

26. The Receiver therefore submits that the Receivership Proceedings should be terminated and the Receiver should be discharged and released following the filing of the Receiver's Certificate with the Court, certifying that it has completed the remaining activities.

E. CONCLUSION

27. For the reasons set out above, the Receiver requests an Order in the form of the draft Distribution and Discharge Order attached to the Notice of Motion, filed.

DATED at St. John's, Newfoundland and Labrador, this 09th of July 2026.

For: **DARREN D. O'KEEFE**
O'KEEFE & SULLIVAN
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Email: dokeefe@okeefesullivan.com

TO: **The Supreme Court of Newfoundland and Labrador**
(Sitting in Bankruptcy and Insolvency)
309 Duckworth St.
St. John's, NL
A1C 1G9

AND TO: Service List at **Schedule "A"**

LIST OF AUTHORITIES

TAB	CASE	CITATION
1.	*Re Windsor Machine & Stamping Ltd.*,	2009 CanLII 39772 (ONSC)
2.	*Abitibibowater Inc. (Re)*,	2009 QCCS 6461
3.	*Bank of Nova Scotia v. Diemer*	2014 ONCA 851
4.	*Royal Bank of Canada v. Sun Squeeze Juices Inc*	[1994] O.J. No. 567 (Gen. Div.)
5.	*Bank of Nova Scotia v Fraser Valley Renewables Ltd.*	2026 BCSC 201 (CanLII)
6.	*RBC v Gustin*	2019 ONSC 5370
7.	*Bank of Montreal v Owen Sound Golf and Country Club*	2012 ONSC 557
8.	*Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.* (2009)	2009 CanLII 55113 (ON SC),
9.	*Yukon (Government of) v Yukon Zinc Corporation*,	2022 YKSC 58
10.	*Pinnacle Capital Resources Ltd v Kraus Inc*	2012 ONSC 6376

SCHEDULE "A"

SERVICE LIST

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STEWART MCKELVEY 11th Floor, Cabot Place 100 New Gower Street St John's, NL A1C 5V3 **Joe Thorne** jthorne@stewartmckelvey.com *Solicitors for the Town of Stephenville*	**CANADA REVENUE AGENCY** Po Box 12075 165 Duckworth Street St John's, NL A1B 4R5 **Deanna Frappier KC** deanna.frappier@justice.gc.ca

TAB 1

COURT FILE NO.: CV-08-7672-00CL
DATE: 20090728

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Tony Reyes and Evan Cobb, for RSM Richter Inc., Monitor**

Raong Phalavong, for Saginaw Pattern

Andrew Hatnay, Andrea McKinnon and D. Youkaris, for U.A.W. Local 251

Joseph Marin, for Windsor Machine & Stamping Ltd.

D. Dowdall and J. Dietrich, for Bank of Montreal

J. Archibald, for Magna

John D. Leslie, for Ford Motor Company

P. Shea, for Johnson Controls Inc.

Jackie Moher, for Ryder Finance Corporation

HEARD &
DECIDED: MARCH 11, 2009

ENDORSEMENT

[1] On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

[2] RSM Richter Inc., in its capacity as Monitor, brought this motion for:

(a) an Approval and Distribution Order;

(b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;

(c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;

(d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;

(e) an Order approving the fees and disbursements of the Monitor and its counsel.

[3] The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

[4] I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

[5] The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

[6] The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

[7] With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

[8] The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

[9] In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

[10] It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

[11] Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

[12] Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

[13] Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[14] As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

MORAWETZ J.

DATE: Heard and Decided: March 11, 2009

Typed Reasons Released: **July 28, 2009**

TAB 2

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

CORRECTED JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

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[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

<u>ULC DIP Financing</u>

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

a) a first draw of $130 million to be advanced at closing;

b) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

c) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

> **Subrogation to ACI DIP Charge**
>
> [61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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Attorneys for Alcoa

Date of hearing: November 23, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**
20. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

1. **BOWATER CANADIAN HOLDINGS INC.**
2. **BOWATER CANADA FINANCE CORPORATION**
3. **BOWATER CANADIAN LIMITED**
4. **3231378 NOVA SCOTIA COMPANY**
5. **ABITIBIBOWATER CANADA INC.**
6. **BOWATER CANADA TREASURY CORPORATION**
7. **BOWATER CANADIAN FOREST PRODUCTS INC.**
8. **BOWATER SHELBURNE CORPORATION**
9. **BOWATER LAHAVE CORPORATION**
10. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
11. **BOWATER TREATED WOOD INC.**
12. **CANEXEL HARDBOARD INC.**
13. **9068-9050 QUÉBEC INC.**
14. **ALLIANCE FOREST PRODUCTS (2001) INC.**
15. **BOWATER BELLEDUNE SAWMILL INC.**
16. **BOWATER MARITIMES INC.**
17. **BOWATER MITIS INC.**
18. **BOWATER GUÉRETTE INC.**
19. **BOWATER COUTURIER INC.**

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 16, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

INTRODUCTION

[1] In the context of their *CCAA*[1] restructuring, the Abitibi Petitioners[2] present a Motion[3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders **("SSNs").**

[2] More particularly, the Abitibi Petitioners seek:

1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a <u>CDN$230 million super-priority secured debtor in possession credit facility</u> (the "**ULC DIP Facility**").

   The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs <u>of up to CDN$200 million</u> upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

   The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

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[1] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "***CCAA***").

[2] In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

[3] *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

> This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee **(**the **"Bondholders")** opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec **("HQ")** agreed to pay ACCC CDN$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable[4].

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;

b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;

c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **"MPCo Share Proceeds"**);

d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;

e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **"MPCo Noteholder Charge"**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;

f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the "**ULC Reserve Charge**"); and

g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

4 See Monitor's 19th Report dated October 27, 2009.

from Investissement Quebec **("IQ")** to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

THE ULC DIP FACILITY

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

[17] This amount may be used for a limited number of purposes (the "**Permitted Investments**") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor[5], the significant terms of the ULC DIP Term Sheet are as follows:

i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.

ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;

iii) **Fees** –No fees are payable in respect of the ULC DIP Facility;

iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

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5 See Monitor's 19th Report dated October 27, 2009.

vi) Use of Proceeds – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "**Budget**");

vii) Events of Default – The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;

(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) Rights of Alcoa – Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) Rights of Senior Secured Noteholders – The Senior Secured Noteholders' rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) Security – Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

THE QUESTIONS AT ISSUE

[21] In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN$230 million be approved?

2) Should the proposed distribution of CDN$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal (**"BMO"**), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor[6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

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6 See Monitor's 19th Report dated October 27, 2009.

[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US$200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

a) The period during which the company is expected to be subject to *CCAA* proceedings;

b) How the company's business and financial affairs are to be managed during the proceedings;

c) Whether the company's management has the confidence of its major creditors;

d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;

e) The nature and value of the company's property;

f) Whether any creditor would be materially prejudiced as a result of the security or charge; and

g) The Monitor’s report.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

[37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;

b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners’ need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the CDN$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada[7].

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

[7] See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.,* (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*[8], Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

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8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

<u>ULC DIP Financing</u>

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

d) a first draw of $130 million to be advanced at closing;

e) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

f) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

> Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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Date of hearing: November 9, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

21. **ABITIBI-CONSOLIDATED INC.**
22. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
23. **3224112 NOVA SCOTIA LIMITED**
24. **MARKETING DONOHUE INC.**
25. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
26. **3834328 CANADA INC.**
27. **6169678 CANADA INC.**
28. **4042140 CANADA INC.**
29. **DONOHUE RECYCLING INC.**
30. **1508756 ONTARIO INC.**
31. **3217925 NOVA SCOTIA COMPANY**
32. **LA TUQUE FOREST PRODUCTS INC.**
33. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
34. **SAGUENAY FOREST PRODUCTS INC.**
35. **TERRA NOVA EXPLORATIONS LTD.**
36. **THE JONQUIERE PULP COMPANY**
37. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
38. **SCRAMBLE MINING LTD.**
39. **9150-3383 QUÉBEC INC.**
40. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

20. **BOWATER CANADIAN HOLDINGS INC.**
21. **BOWATER CANADA FINANCE CORPORATION**
22. **BOWATER CANADIAN LIMITED**
23. **3231378 NOVA SCOTIA COMPANY**
24. **ABITIBIBOWATER CANADA INC.**
25. **BOWATER CANADA TREASURY CORPORATION**
26. **BOWATER CANADIAN FOREST PRODUCTS INC.**
27. **BOWATER SHELBURNE CORPORATION**
28. **BOWATER LAHAVE CORPORATION**
29. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
30. **BOWATER TREATED WOOD INC.**
31. **CANEXEL HARDBOARD INC.**
32. **9068-9050 QUÉBEC INC.**
33. **ALLIANCE FOREST PRODUCTS (2001) INC.**
34. **BOWATER BELLEDUNE SAWMILL INC.**
35. **BOWATER MARITIMES INC.**
36. **BOWATER MITIS INC.**
37. **BOWATER GUÉRETTE INC.**
38. **BOWATER COUTURIER INC.**

SCHEDULE "C"

18.6 CCAA PETITIONERS

17. **ABITIBIBOWATER INC.**
18. **ABITIBIBOWATER US HOLDING 1 CORP.**
19. **BOWATER VENTURES INC.**
20. **BOWATER INCORPORATED**
21. **BOWATER NUWAY INC.**
22. **BOWATER NUWAY MID-STATES INC.**
23. **CATAWBA PROPERTY HOLDINGS LLC**
24. **BOWATER FINANCE COMPANY INC.**
25. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
26. **BOWATER AMERICA INC.**
27. **LAKE SUPERIOR FOREST PRODUCTS INC.**
28. **BOWATER NEWSPRINT SOUTH LLC**
29. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
30. **BOWATER FINANCE II, LLC**
31. **BOWATER ALABAMA LLC**
32. **COOSA PINES GOLF CLUB HOLDINGS LLC**

TAB 3

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851
DATE: 20141201
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

Pepall J.A.:

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

[2] This appeal involves a motion judge's refusal to approve legal fees of $255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately $4.9 million (approximately $2 million and $2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.

- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of $8.3 million. The purchase price included 170 milking cows.

- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.

- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.

- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to $138,297 plus $9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of $338.38. The highest hourly rate charged by the Receiver was $525 per hour. Fees estimated to complete were $20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to $255,955, plus $4,434.92 in disbursements and $33,821.69 in taxes for a total account of $294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of $643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of $750.00. The rates of the other 10 people on the account ranged from $950 per hour for a senior lawyer to $195 for a student and $330 for a law clerk.

[14] Fees estimated to complete were $20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- $100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was $500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to $30,000.

Motion Judge's Decision

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately $8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of $475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at $157,500 from which the $100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of $4,434.92 and applicable HST.

Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA,* the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

[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.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, <u>all</u> the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of $5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

TAB 4

Court File No. B253/93

ONTARIO COURT (GENERAL DIVISION)
(Commercial List)

B E T W E E N:

ROYAL BANK OF CANADA Plaintiff	J.A. Carfagnini and R. Chadwick for Coopers & Lybrand Limited, Court-appointed Receiver and Manager
- and -	Paul G. Macdonald for the plaintiff
SUN SQUEEZE JUICES INC. AND BEIT-KIRUR LTD.	Edward M. Morgan for the defendants
Defendants	Ronald M. Moldaver, Q.C. for Josef Blum, majority shareholder of the defendants
	Heard: February 28, 1994

FARLEY J.:

The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately $16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court authorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately $1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

Actions have been commended and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the $75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: Re Can Corp Financial Services Ltd. (1991), 4 C.B.R. (3d) 99 (Ont. Gen. Div) at p. 107.

As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div) at p. 240; Re Brandon Packers Ltd., Ex Parte Row (1962), 33 D.L.R. (2d) 503 (Man. C.A.) at pp. 510-511 and 513; leave to appeal to SCC refused [1962] SCC ix; Prairie Palace Motel Ltd. v. Carlson (1982), 42 C.B.R. (N.S.) 163 (Sask. QB) at p. 165; Chinavision Canada Corporation et al. v. Richard H. Ling (Ont.

Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in Brandon at p. 511:

> The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the Companies Act). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded...

As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, Kerr on the Law and Practice as to Receivers and Administrators, 17th ed. (London; Sweet & Maxwell, 1989) at p. 219; Re Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264 (Alta. QB) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (CA); Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Ont. CA) at p. 111.

Freedman J.A. in Brandon, supra, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in Everex Systems Inc. v. Pride Computer Distributions Ltd. (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C.S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the Company Act, R.S.B.C. 1979, c.59.

As Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada 3rd ed., Vol. 1, (Toronto; Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-9 where it is said:

> (a) Conflict Between Assignment and Petition
>
> There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: Re Lalonde (1924), 4 C.B.R. 416 (Ont. S.C.); Re Lakeshore Golf & Country Club (1933), 19 C.B.R. 127 (Que. S.C.); Re Slavonia SS Agencies (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is that bankruptcy proceedings

> are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: Re Croteau & Clark Ltd. (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. 413 (S.C.).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in Chinavision, supra, at p. 4 as well.

Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See Prairie Palace, supra, at p. 65; Re Western Hemlock Products Ltd. (1961), 2 C.B.R. (N.S.) 207 (B.C.S.C.) at p. 210; Chinavision, supra, at pp. 4-5. Freedman J.A. in Brandon, supra, said at p. 513:

> Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case the Court directed its appointee to make an assignment in bankruptcy. It is true that the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must

> accept and fulfill its duty and give judgment "according to the very right and justice of the case".

Thus this matter boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in Kerr, Hat and Nova, supra. The question of "need" for a bankruptcy was canvassed in Prairie Palace, supra, at p. 165 and Chinavision, supra, at pp. 4-5.

Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited Re Goodis-Wolf Inc. (1990), 50 C.B.R. (N.S.) 146 (Ont. Gen. Div) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-5 that:

> The existence of a prior civil action has not always resulted in the court staying or dismissing a petition: see, for example, Re Hutchens (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and Re H.M. Simpson Ltd. (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, 246 A.P.R. 307 (sub nom. Jenkins Transfer Ltd. v. H.M. Simpson Ltd.) (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider on balance, that it is preferable that the litigation be allowed to take its course. [emphasis added].

That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the $75 million claim against the Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to s. 38 of the BIA. There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

J.M. Farley

March 16, 1994

Court File No. B253/93

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. ET AL.

ENDORSEMENT ON BANK'S MOTION FOR PAYOUT OF NET PROCEEDS BY RECEIVER

MARCH 16, 1994

FARLEY J.

See Receiver's motion and endorsement of even date for disposition of the item under relief (g) requested by Receiver. Payment to Bank of net proceeds subject to agreed Receiver holdback authorized.

Court File No. B253/93

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. ET AL.

ENDORSEMENT ON RECEIVER'S MOTION

MARCH 16, 1994

FARLEY J.

This endorsement on the Motion Record deals with all matters in the Motion except for (b) and (c), namely the issuance of the receiving order based on the proposal of the Receiver to consent to same and the proposed cause of action concerning the litigation to which Sun Squeeze and/or BKL is a party and to the extent that these clauses (b) and (c) impinge on (a), then (a) is not dealt with in this endorsement. I am handwriting out on a separate sheet my decision and reasons as to these particular clauses (b), (c) and to the extent impacted (a). The separate endorsement is subject to edit and correction on it being typed up.

There was no realist objection - in fact little or no formalistic objection by the defendants and Blum to the other relief requested except that Blum's position was as to (d) that the Receiver could come and get the truck which was said to be disabled and without keys and as to (e) he observed that it was unusual to require him to prove he or some third party owned it other than the Receiver providing some prima facie evidence of ownership by the defendants.

I am satisfied from my review and the lack of opposition on any meaningful basis that the Receiver's activities (except as impacted by (b) and (c) as set forth in the Third Report should be approved, along with the Receiver's Statement of Receipts and Disbursements as set forth therein (f) and approving of the fees and expenses of the Receiver and its counsel as set forth therein (h).

With respect to the question of payment of proceeds of the realization, namely relief clause (g) this is specifically dealt with directly as well by a Motion of the Bank for the Receiver to pay the Bank the net proceeds of realization of the receivership of Sun Squeeze and BKL, subject to the retention of an adequate reserve to provide for the Receiver's ongoing costs and expenses in an amount to be agreed by the Receiver and the Bank. There does not seem to be any dispute by the defendants or Blum that the Bank held valid security and that it was able to demand repayment having fulfilled the requirements of demand and notices - but subject to the subsequent lawsuit of the defendants. However, subsequent to the Bank's demand letter Blum, principal of the defendants, acknowledged the indebtedness of the defendants and asked the Bank to forbear acting on the demand for payment in order to afford the defendants an opportunity to submit a proposal for repayment. In the belief that Blum's request for forbearance was made in good faith and on the understanding that the defendants in fact intended to secure a repayment proposal, the Bank agreed to forbear until July 19, 1993 on the terms and conditions set out in a letter of July 8/93. One can imagine the Bank's surprise and dismay to find that its gentlemanly behaviour to the defendants was reciprocated not by similar behaviour from them but rather a lawsuit claiming $75 million instituted by the defendants and Blum the next day. No doubt some other customers of the Bank will have greater trouble in the future in attempting to convince the Bank to forbear in similar circumstances. The unliquidated damages claim for $75 million has not been particularized nor has there been any evidence presented to substantiate the allegations. The Bank for its part has had an affidavit sworn that the allegations are unfounded and without merit. The evidence has not been challenged.

In my view this very bald and bold statement of claim in these circumstances should be treated as a "stink bid" in bridge. Clearly the claimants (defendants and Blum) in that action have not taken any positive step since the issue of the Statement of Claim. The Bank's demand is for a liquidated amount with a firm underpinning. The defendants and Blum have not even taken the trouble to attempt to establish whatever basis they could to assert a claim in set-off (legal or equitable) or anything of a similar nature. I do not think that such empty audacity should be rewarded. The Bank in my view should be paid the net proceeds of realization, subject to an agreed holdback to be established by the Receiver and the Bank.

The audacity continues when Blum did not come in until the last minute (i.e. at this hearing) regarding (d) the truck - despite the Receiver showing the ownership which is clearly in the name of Sun Squeeze. The Receiver is to have the truck and, if it requires, it should have the reasonable costs of repossession reimbursed by Blum.

As for the mixing tanks - clause (e), I would observe that all the Receiver wishes is Blum to deliver to it some evidence of ownership of the tanks. I think this quite reasonable in the circumstances since the tank apparently was used in the business of the defendants and it would be inappropriate to require the Receiver to present proof of ownership of the tank when the financial records of the defendants are in such disarray with obvious gaps.

There is to be an order in the form set out in this motion record under tab 3 and to which I have put my fiat in the motion record at p.149 adjusting the hearing date. If costs are desired I can be spoken to at a convenient 9:30 on the Commercial List.

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TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Nova Scotia v. Fraser Valley Renewables Ltd.*, 2026 BCSC 201

Date: 20260211
Docket: S255551
Registry: Vancouver

Between:

The Bank of Nova Scotia

Petitioners

And

Fraser Valley Renewables Ltd., Fraser Valley Agri Waste Solutions Ltd., Huntingdon Agricultural Ltd., Matthew Blair Grier Malkin and 1315390 B.C. Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	L. Hiebert G. Nesbitt
Counsel for the Respondents:	B. La Borie
Counsel for the Receiver, PricewaterhouseCoopers Inc.:	K. Mak A. Ang C. Xu
Counsel for Brenmark Holdings Ltd. and Matway Farms Ltd.:	J. Rauch
Counsel for His Majesty the King, in right of British Columbia Attorney General:	A. Welch A. Glen
Counsel for the Attorney General of Canada:	N. Johnston A. Sabzevari

Place and Dates of Hearing:	Vancouver, B.C. November 19 and December 18-19, 2025
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, B.C. December 19, 2025
Place and Date of Written Reasons:	Vancouver, B.C. February 11, 2026

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INTRODUCTION

[1] In late August 2025, I appointed PricewaterhouseCoopers Inc. (the "Receiver") as receiver of the assets of the corporate respondents/debtors, and certain lands owned by the personal respondent.

[2] The Receiver now applies to approve a sale of certain commercial lands that remain under its administration. In addition, the Receiver has applied for other relief; most of that relief is uncontroversial, but some is opposed by the respondent debtors.

[3] On December 19, 2025, I granted orders in relation to the uncontested matters.

[4] On December 19, 2025, I also addressed certain of the contested applications. In particular, I issued orders that firstly, approved the sale, as proposed by the Receiver, and secondly, authorized the Receiver to assign any of the corporate debtors into bankruptcy.

[5] These are the reasons for my orders on the contested matters.

BACKGROUND

[6] The corporate respondents/debtors (collectively, the "Corporate Debtors") are owned and controlled by the respondent, Matthew Malkin (collectively, the "Debtors").

[7] Mr. Malkin owns the shares in the respondent, Fraser Valley Agri Waster Solutions Ltd. ("FV AWS"), which in turns owns the shares in the respondent, Fraser Valley Renewables Ltd. ("FVR"). Both companies were directly involved in organic waste conversation and complementary waste processing activities in Abbotsford, BC.

[8] Mr. Malkin owns two properties in Abbotsford: (1) 5205 Bates Road, which is the site of FV AWS and FVR's commercial operations; and (2) 5133 Bates Road, a

larger property which comprises two tenanted residences from which rent is derived (collectively, the "Bates Properties").

[9] Mr. Malkin also owns the shares in the respondent 1315390 B.C. Ltd. ("131"). 131 is the owner of lands in Abbotsford where Mr. Malkin's personal residence is located (the "131 Lands").

[10] Mr. Malkin also owns the shares in Malkin Group Holdings Ltd., which in turn owns 50% of the shares in the respondent, Huntingdon Agricultural Ltd. ("Huntingdon"). Huntingdon owns lands in Abbotsford, which is tenanted and also used to store various pieces of equipment and waste materials (the "Huntingdon Lands").

[11] The petitioner, Bank of Nova Scotia ("BNS"), holds security against all of the Corporate Debtors' assets and the Bates Properties. As of September 2025, the amount outstanding to BNS was approximately $17 million. BNS made demand in April 2025, citing defaults in the loan facilities dating back to 2024.

[12] Since April 2025, Mr. Malkin has attempted to stave off any enforcement actions by BNS, despite the defaults and the expiry of the demand period. Since April 2025, Mr. Malkin has assured BNS that refinancing efforts were underway to resolve the issues, including a refinancing of the Bates Properties and a sale of the Huntingdon Lands.

[13] Nothing has happened to enable the Debtors to repay BNS.

[14] In addition, BNS became aware of other financial pressures facing the Corporate Debtors (and perhaps Mr. Malkin), including a receivable owing to Canada Revenue Agency ("CRA") for payroll deductions and outstanding property taxes.

[15] This petition proceeding was filed in July 2025.

[16] By the return of BNS' application for the appointment of a receiver (late August 2025), no refinancing had emerged. In Mr. Malkin's Affidavit #1 affirmed

August 19, 2025 (paras. 39–44), his evidence on the refinancing efforts amounted to: (a) he was in communications with two brokers (dated from mid-August 2025) referring to various efforts to refinance the BNS debt as soon as possible; (b) he was attempting to list the Huntingdon Lands for sale; and (c) he was selling some equipment.

[17] As of late August 2025, one particular concern to BNS arose. Many months earlier, on December 3, 2024, the British Columbia Ministry of Environment and Parks (as it is now known) (the "Ministry") issued a Pollution Prevention Order ("PPO") against FV AWS and Huntingdon in respect of the Huntingdon Lands. Essentially, the PPO stated that effluent was being discharged from waste piles on the property.

[18] The PPO required compliance with certain remedial measures. As of August 20, 2025, FV AWS and Huntingdon had failed to complete some of those remedial measures from as early as May 2025. Further measures required by the PPO included the hiring of a "Qualified Professional" to undertake monitoring and sampling programs and submit various reports.

[19] On August 21, 2025, I granted the Receivership Order against the assets of the Corporate Debtors and the Bates Properties. Prior to doing so, I dismissed an adjournment application by the Debtors and rejected their stated grounds to oppose the appointment of the Receiver. The Receivership Order was generally consistent with the Model Receivership Order but, as requested by the Debtors, it also included certain unique provisions. The Receivership Order provided in part that:

a) The Receiver could immediately market all of the "Property" (i.e. as secured in favour of BNS) and apply for any vesting order for sales above certain thresholds. The only exception related to the 131 Lands, which the Receiver was not able to begin marketing until after January 1, 2026 (paras. 2(j)–(k) and 3(b));

b) Mr. Malkin was permitted to continue to seek to refinance the debt owing to BNS (para. 3(a)); and

c) a 30-day stay period was imposed in respect of the Ministry to allow the Receiver to evaluate the economic feasibility of complying with the PPO (the stay was later extended to October 6, 2025) (para. 9).

[20] On October 2, 2025, the Receiver decided to abandon and release its interest in the Huntingdon Lands in accordance with s. 14.06(4)(a)(ii) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 [*BIA*], due to what it considered were significant risks and costs associated with complying with the PPO. If the Ministry undertakes any remedial action in respect of the Huntingdon Lands, the Province will at least presumptively have priority over BNS's security on those Lands pursuant to s. 14.06(7) of the *BIA.*

[21] On November 19, 2025, the Receiver applied for further relief to be included in a proposed Amended and Restated Receivership Order ("ARRO"). The ARRO was granted on an uncontested basis. The amendments included removal of the Huntingdon Lands from the receivership proceedings and an increase in the threshold limits below which the Receiver could sell assets without court order (the latter being over the objections of Debtors' counsel).

[22] Other relief sought by the Receiver on November 19, 2025 was adjourned to December 2025 hearing dates, being an application to authorize the Receiver to assign any of the Corporate Debtors into bankruptcy and an order approving the activities of the Receiver in its First Report dated November 12, 2025 (the "First Report".

[23] At the time of November 19, 2025 hearing, Mr. Malkin also updated the Court on the status of his refinancing efforts in his Affidavit #2 affirmed November 17, 2025. He expressed concern about the sale of any equipment by the Receiver and its effect upon his refinancing and "startup" operations. At paras. 36-46, Mr. Malkin again referred to working with two brokers to secure financing and also, making

efforts to sell the Huntington Lands. At para. 47, Mr. Malkin said he expected to receive bank financing of approximately $12.1 million and an operating line and the remainder of the funds to repay BNS from the Huntingdon Lands.

[24] As of December 1, 2025, the BNS debt alone (without enforcement costs) was approximately $17.5 million.

<u>THE PRESENT APPLICATIONS</u>

[25] On December 18 and 19, 2025, I heard the Receiver’s application for the relief that had been adjourned from November 19, 2025 and also new relief under a notice of application filed December 16, 2025. As a result, on December 19, 2025:

a) I granted the uncontested relief, being the approval of the sale of certain equipment to a company controlled by Mr. Malkin (Bates Valley Holdings Ltd.) and approval of a listing protocol with respect to the 131 Lands;

b) I adjourned generally the Receiver’s application for approval of its activities in the First Report and its Second Report dated December 13, 2025 (the “Second Report”), to which the Debtors’ objected. This adjournment arose because there was insufficient court time to address that matter and the issue was not urgent;

c) I granted an approval and vesting order with respect to the Bates Properties (which included the sealing of certain materials in support); and

d) I empowered and authorized the Receiver to assign any of the Corporate Debtors into bankruptcy and act as trustee in bankruptcy.

[26] The latter two orders above in c) and d) – the approval and vesting order and the bankruptcy issue – are the subject of these reasons.

<u>BATES PROPERTIES SALE APPROVAL</u>

[27] As above, the Receiver was authorized in August 2025 pursuant to the Receivership Order to market the Bates Properties.

[28] Based on the Receiver's Reports, and as summarized below, I am satisfied that the Receiver has undertaken a fair and robust sales process that satisfies the "*Soundair Principles*" that arise from *Royal Bank of Canada v. Soundair Corp.*, 4 O.R. (3d) 1, 1991 CanLII 2727 (C.A.).

[29] The Receiver solicited proposals from various real estate brokers, ultimately choosing Colliers Macaulay Nicolls Inc. ("Colliers") for the listing.

[30] The Receiver was cognizant of the holding costs of the Bates Properties, which included ongoing monitoring and management of the environmental issues. As a result, the Receiver determined that an expedited sales process was the best course of action.

[31] The listing began in early November 2025, with 5133 Bates listed for $4.3 million and 5205 Bates listed for $2 million. Broadcasts on the MLS took place to over 1,800 parties, in addition to publications in regional print magazines, listing on various websites and signage on the Properties.

[32] Colliers addressed expressions of interest from 31 parties, conducted 17 site visits and fielded numerous enquiries.

[33] Four offers were received for 5205 Bates and one offer was received for both Bates Properties. No offers were received for 5133 Bates only. The market response clearly indicated a focus on 5205 Bates, the smaller property that was the location of the commercial operations. 5133 Bates is the larger residential property but market feedback received by Colliers was that this property could take a further 6–9 months to sell. For those reasons, the Receiver concluded that stakeholder value would be maximized by pursuing a sale of both Bates Properties at the same time.

[34] On December 8, 2025, the Receiver accepted an offer from an entity (the "Purchaser") for both Bates Properties ("the Offer"). For important reasons that are discussed below, the sale was on an "as is, where is" basis. After the subjects were removed for the Offer on December 12, 2025, the Receiver ensured that the market was well aware of the upcoming court hearing to address the sale approval.

[35] Prior to a consideration of the Offer on December 18, 2025, on the application of the Receiver, I sealed the Confidential Supplement to the Second Report dated December 13, 2025 (the "Confidential Supplement"). I was satisfied that this was appropriate after applying the principles set out in *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman*]. I concluded that a disclosure of that Confidential Supplement – principally the purchase price under the Offer – could pose serious risks to the sales process, and the object of obtaining the best possible price for the Bates Properties. In particular, those risks arose due to parties expressing an interest in attending the hearing to present offers and, also, Mr. Malkin's apparent ongoing efforts to refinance the BNS debt.

[36] As is sometimes usual in sale approval hearings, four other interested parties (who had not previously submitted offers) appeared in Court on December 18, 2025 and presented offers. In addition, the Purchaser under the Offer also tendered a revised offer.

[37] By the continuation of the hearing on December 19, 2025, the Receiver had prepared its Second Confidential Supplement to the Second Report dated December 18, 2025 (the "Second Confidential Supplement"). For the same reasons as above, I sealed this Second Confidential Supplement under the *Sherman* test.

[38] The Second Confidential Supplement revealed that only one of the "new" offers was for both Bates Properties but at prices materially below the Offer. The other three "new" offers were for only 5205 Bates but at values below what had been assigned to that property by the Purchaser in the Offer.

[39] The clear winning bid from the second round was from the Purchaser, who slightly increased its bid, again for both Bates Properties (the "Amended Offer").

[40] At the end of the day, the purchase price under the Amended Offer will yield a price that is substantially less than the outstanding debt owing to BNS. This fact, in addition to the fact that it is uncertain whether BNS will recover anything from the

Huntingdon Lands, leads me to conclude that BNS is likely to suffer a significant shortfall in the recovery of its debt.

[41] In the Confidential Supplement, the Receiver emphasized various factors leading to its recommendation to approve the sale to the Purchaser. These included that:

a) The Properties had been marketed as a court-ordered sale which typically attracts offers at discounted prices; and

b) There had been various adverse media articles regarding Mr. Malkin's operations undertaken at 5205 Bates which may have affected the market's perception of value.

[42] Another "significant concern" of the Receiver had to do with environmental risks associated with 5205 Bates. Conditions were present that required ongoing management and compliance, with heightened concerns during the rainy season (i.e. now). As a result, the Receiver considered it "crucial" that the transaction proceed expeditiously to ensure that responsibility was transferred to a purchaser who would have the financial capacity to address the environmental issues and ensure compliance in a timely manner.

[43] In my view, these environmental issues were not an illusory concern.

[44] The PPO had set out that Mr. Malkin had advised the Ministry that some of the waste found on the Huntingdon Lands, which were causing the concerns, had in fact been brought there from the Bates Properties. As stated in the Second Report, the Receiver had inspected the Bates Properties and undertaken various water management activities at 5205 Bates via contractors. In fact, on October 29, 2025, Mr. Malkin made a proposal to the Receiver for the clean-up of 5205 Bates, including covering the costs of the clean-up himself which he thought would be cheaper than the cost to the Receiver (said by Mr. Malkin to be $400,000–800,000). On November 2 and 3, 2025, the Receiver requested further information from Mr.

Malkin, including some proof that he had the financial capacity to complete the job. The Receiver received no reply.

[45] However, what was looming in the face of these clean-up efforts and potential efforts was the fact that, on November 28, 2025, the Ministry issued a draft pollution prevention order in respect of 5205 Bates (the “Draft PPO”) directed to the Receiver, FV AWS and Mr. Malkin. The Ministry referred to an inspection by Ministry officials on November 18, 2025. The Draft PPO was similar to the PPO in terms of requiring immediate action to stop discharge of effluent and also, requiring action on other remedial fronts, including covering waste piles and hiring a “Qualified Professional” to monitor and report, all by certain short deadlines.

[46] On December 5, 2025, the Receiver responded to the Ministry in respect of the Draft PPO. The Receiver said that it had determined that the estimated cost to remove the waste piles would not yield a corresponding increase in value to 5205 Bates. The Receiver however mentioned that it had initiated an expedited sales process and requested that the Ministry withhold finalization and issuance of the Draft PPO, as doing so would jeopardize the sales process and delay a sale to a purchaser who could comply by addressing the environmental issues.

[47] I consider that the Receiver was validly concerned about the environmental issues regarding 5205 Bates for obvious reasons and that it conducted the sales process and accepted the offer in that context. There were clear risks to the value of 5205 Bates if the Ministry acted upon the Draft PPO by finalizing it. The Receiver does not have the ability to address the raised concerns directly and, as such, the Receiver would have been required to engage third parties to address them. The estimated cost to comply with the Ministry’s concerns was substantial, even by Mr. Malkin’s calculation. At the far end of his estimate ($800,000), the amount well exceeded the maximum limit of the borrowings available to the Receiver under the Receivership Order ($400,000) (para. 25). As the Receiver told the Ministry, the cost of any clean up by the Receiver was not expected to yield any greater increase in value of 5205 Bates.

[48] Clearly what the Receiver wanted to and had to avoid was the situation akin to what happened with respect to the Huntingdon Lands – where the cost of the remedial action and attendant risks would potentially exceed the value of the property such it had to be abandoned.

[49] The Receiver also tendered further information which it had received from the Purchaser at the December 19, 2025 hearing. The Receiver had received this information to support the certainty of the Amended Offer closing in early January 2026. The Purchaser provided a letter from Farm Credit Canada dated December 18, 2025 confirming its financing of the acquisition and also a $200,000 facility to support the Purchaser's clean-up activities. The Purchaser also advised the Receiver that it had access to "additional family equity" to help fund the clean-up activities.

[50] The Corporate Debtors argue that the sales process was commenced "late" and only for a short time (just over a month). They argue that the land was listed at an improvident value. They also argue that Colliers was not experienced in agricultural land.

[51] I agree that the process was expeditious. Ideally, the Receiver would have exposed the Bates Properties for a longer period of time. However, the Receiver did not have the luxury of time in the circumstances. In addition, any delay, while having the theoretical possibility of yielding higher offers, also came with downsides, including the holding costs on what is a substantial debt load and other costs and risks.

[52] While Mr. Malkin offered to assist with the clean-up of 5205 Bates, there is no evidence that it was a viable offer in the sense that he had the financial capacity to undertake and complete the clean-up so as to allow a longer sales process, let alone that those efforts would have more than offset the holding costs arising from the delay.

[53] While Mr. Malkin’s offer to clean up 5205 Bates was arguably made to assist the situation, the Ministry’s counsel rightly expresses significant concerns, citing a “lengthy history” of non-compliance with sites owned and controlled by Mr. Malkin. I share those same concerns.

[54] In addition, there is no evidence that the short duration of the listing resulted in potential offers not coming forward. There is nothing to support that the listing was at an improvident value. If that were the case, no doubt many bargain hunters would have come forward. Finally, I am not aware that this is agricultural land in the classic sense. The Corporate Debtors operated a commercial enterprise on the Bates Properties, and it is beyond question that Colliers has extensive experience with this type of property.

[55] Mr. Malkin also refers to appraisal evidence of the Bates Properties, being $5.35 million for 5113 Bates and $3.63 million for 5205 Bates. However, appraisal values are nothing more than opinions of value and, particularly in a receivership context, must be put to the test by determining what the market will pay for those properties. Here, the market has clearly spoken and inherently determined what the “market value” is, as that phrase is commonly defined in real estate circles.

[56] What emerged from the sales process was an offer – the Offer – that arose from a competitive process. It also underwent a final bid process, involving not only the Purchaser, but other still interested parties and that process gave rise to the Amended Offer.

[57] Importantly, the Purchaser was aware of the environmental issues and was also aware of the Draft PPO. The Purchaser had engaged with the Ministry in advance of making the Offer or during due diligence to understand what would be involved upon a sale. What emerged was a purchaser who was comfortable with the situation and who had the financial wherewithal to address what needed to be addressed from the Ministry’s point of view. Hence, the Purchaser’s important agreement to accept the “as is, where is” status of the Bates Properties.

[58] In summary, I accept that the Receiver ran a fair and reasonable sales process in light of the challenges before it. That sales process was extensive and broadly advertised and attracted considerable interest. Overall, nine offers were received and considered by the Receiver – and this Court. I accept the Receiver's business judgment that the Amended Offer is the best opportunity for recovery in respect of the Bates Properties in the circumstances: *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406 [*Kruger*] at para. 28.

[59] I see no basis for the Debtors' argument that the Amended Offer is an improvident sale.

[60] Ultimately, I considered that Mr. Malkin's most significant opposition to the sale of the Bates Properties arose from his continuing wish to refinance the BNS debt and exercise his "right to redeem" to allow him to recover control of the lands and continue his business operations.

[61] In Mr. Malkin's response to application on behalf of himself and the Corporate Debtors, it is boldly stated:

> … the Respondents have achieved financing for not only the Bates Lands but for the other properties under the Receivership. The sale of the Bates Lands puts that refinancing at risk.

[62] In my view, nothing could be further from the truth despite Mr. Malkin's sincere wish that it was.

[63] In Mr. Malkin's Affidavit #3 affirmed December 16, 2025, he refers to various sources that give rise to this "(re)financing", including:

a) Financing of the Bates Properties at $7 million on a subject-free basis which would yield $6.75 million and close by January 30, 2026. This amount is admittedly higher than the purchase price under the Amended Offer;

b) An offer of refinance with respect to the 131 Lands for $4,250,000 with a $250,000 holdback. The closing date is no later than January 31, 2026; and

c) An offer to purchase the Huntingdon Lands for $6.25 million with a $200,000 non-refundable deposit, which is to close March 15, 2026, subject to removal of the PPO by February 15, 2026.

[64] Mr. Malkin also says that the various offers of financing and sale are of a value that will pay the BNS in full. He argues that a sale of the Bates Properties will compromise this recovery to BNS.

[65] Firstly, I will address the Bates Properties “refinancing”. There is a brief term sheet dated December 16, 2025 from Jagdip Purewal, MetroVan Development Inc., although it is not accompanied by any support as to its validity. Significantly, the security required is a “first ranking mortgage” over the Bates Properties. However, there are two other mortgages behind BNS’ mortgage and no indication how those are to be addressed. In addition, Mr. Malkin is unable to force BNS to accept this “refinancing” save as it allows for *full repayment* of its debt.

[66] The MetroVan term sheet also refers to Mr. Malkin maintaining the Bates Properties “in good standing”, presumably referring to the Draft PPO. Mr. Malkin also attaches a December 16, 2025 letter addressed to him from Terrawest Environment Inc. (“Terrawest”), presumably with the intention of providing it to the Ministry and indicative of his statement that Terrawest has the ability to clear up the Draft PPO. Adam Mabbottt of Terrawest states in that letter:

> Terrawest is actively engaged in managing the PPO file and advancing the compliance framework.
>
> …
>
> … the Bates Road PPO is under active professional management and progressing toward compliance and closure.

[67] This letter is perplexing because it is contradicted even by Mr. Malkin’s own evidence referring to another letter, also from Terrawest. Earlier in Mr. Malkin’s Affidavit #3, he attached another letter from Mr. Mabbott of Terrawest addressed to

him of that same date, seemingly to support his criticisms of the Receiver's remedial actions with respect to 5205 Bates. This letter states:

> … Terrawest and other [Qualified Environmental Professionals] have not had the opportunity to assess, manage, or mitigate site conditions since the Receiver assumed control …

[68] Secondly, I will address the purported refinancing of the 131 Lands. There is a term sheet dated December 15, 2025 from BTB Mortgage Investment Corporation as lender. The financing amount is $4.25 million with a $250,000 holdback set to close January 31, 2026. The offer is highly conditional, including due diligence relating to "property valuation" (the July 2024 assessed value was about $3.4 million). Mr. Malkin had not accepted this offer although he states that he intended to do so before the expiry on December 20, 2025.

[69] As with the Bates Properties refinancing, Mr. Malkin is unable to force BNS to accept this "refinancing" on the 131 Lands save as it allows for *full repayment* of its debt.

[70] Thirdly, I will address the potential sale of the Huntingdon Lands. Mr. Malkin has attached a purchase and sale agreement dated December 15, 2025 from Riverside Recycling Ltd. for $6.25 million on a sale to close March 15, 2026. On December 16, 2025, Mr. Malkin accepted this offer on behalf of Huntingdon. However, by December 19, 2025, there was no evidence that the $200,000 deposit had been paid, as required.

[71] As with the 131 Lands refinancing offer, this offer was also highly conditional. Conditions precedent, to be satisfied on or before February 15, 2026, included: a feasibility study, engineering and environmental assessments and, not surprisingly, a clearance letter with respect to the PPO. Again, Terrawest provided support in this regard to Mr. Malkin with another (third) letter dated December 16, 2025 indicating that the PPO was being "actively managed" and a plan was in place. Mr. Mabbott stated that he anticipated that:

> … all required actions will be completed and that a request for formal closure of the PPO will be submitted no later than April 1, 2026, subject to regulatory review timelines.

[72] Even on the face of this offer for the Huntingdon Lands, Mr. Mabbott's outside date for just the request to the Ministry (April 1, 2026) does not meet the February 15, 2026 deadline for a clearance letter regarding the PPO.

[73] As with the Bates Properties and 131 Lands refinancings, Mr. Malkin is unable to force BNS to accept a sale of the Huntingdon Lands save as it allows for *full repayment* of its debt. Having said that, since the Receiver has abandoned that property, I have no doubt that BNS would be happy to recovery something from it.

[74] Mr. Malkin cites two cases as supporting his right of redemption: *Kruger* and *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 [*Haro-Thurlow*].

[75] I accept that a debtor's interests in accomplishing a redemption before any sale of the secured assets are properly considered in this situation, as stated in *Kruger* at paras. 73–74, as I adopted in *Haro-Thurlow* at paras. 102–103.

[76] However, the context here is that Mr. Malkin has stated that he has been working on refinancing since April 2025 without any success. All of these purported transactions have only arisen on the eve of these hearings.

[77] The overall difficulty in any event with Mr Malkin's planned refinancings and sale in concluding these transactions toward a "redemption" is that they are very conditional and uncertain and Mr. Malkin does not provide any firm support that would give credence to their viability.

[78] Further, and in any event, Mr. Malkin's plan is insufficient to satisfy BNS' debt so as to allow him to regain control of the Corporate Debtors and save his home. The overall net recovery would be $16.5 million, well below BNS' debt now ($17.5 million and receivership costs). There is absolutely no evidence as to whether Mr. Malkin intends to address the outstanding loans to satisfy the two other mortgages on the Bates Properties, who are represented on this application and who say they are owed substantial funds.

[79] In addition, I can only say that these transactions *might* close, but in the meantime the other stakeholders risk the ongoing cost of $80,000 per month interest on the BNS debt and further receivership costs. I accept BNS' counsel's submissions that it will suffer material prejudice if the Amended Offer is not approved, let alone the other creditors.

[80] Having considered all of the above circumstances, including the interests of the Debtors, I conclude that the Amended Offer is fair and reasonable and should be approved.

<u>THE BANKRUPTCY ASSIGNMENT</u>

[81] The Receiver seeks an order that would authorize, but not obligate, the Receiver to assign the Corporate Debtors, or any of them, into bankruptcy. In its First Report, the Receiver seeks this relief in order to:

> 6.1.1 gain enhanced investigatory powers available to a Trustee in bankruptcy, which are necessary to thoroughly review certain pre-receivership transactions and dealings with related-party entities; and
>
> 6.1.2 reorder the priorities of the CRA deemed trust on unpaid GST amounts, which, upon bankruptcy, will be converted to an unsecured claim and rank subordinate to the security held by BNS and other creditors with valid security interests.

[82] The Receiver states that it has begun a comprehensive review of transactions and funds transferred prior to the Receivership, based on the Corporate Debtors' books and records, some of which were only recently provided by a third-party IT provider.

[83] The Receiver also says that the increased powers of a trustee in bankruptcy will allow a trustee to investigate pre-receivership dealings and, if necessary, avail itself of the remedies provided under the *BIA* to pursue preference payments or seek to recover assets that may have been the subject of any undervalue transactions that may have taken place, including, amongst other payments, certain alleged unauthorized advances to Malkin Group Holdings Ltd., Mr. Malkin's company.

[84] In its Second Report, the Receiver states that its review of transactions is still in progress. To date, the Receiver has identified 20 transactions warranting further review, with a value of approximately $1.8 million.

[85] In addition, the Receiver has identified broader concerns, including unrecorded equipment sales, missing assets, and unreconciled receivables and other transactions that are not recorded in the general ledger. In the October/November 2025 timeframe, the Receiver made various enquiries of Mr. Malkin regarding these matters, to which it has not received a response.

[86] The Corporate Debtors oppose any bankruptcy at the behest of the Receiver. They acknowledge that the Court has the authority to authorize the Receiver as requested, however, they submit that it is not appropriate to do so in this case or at least at this time.

[87] Firstly, Mr. Malkin argues that a bankruptcy is unnecessary as it will compromise his refinancing of the BNS debt. As I have concluded above, these refinancing efforts are not a viable option at this time given the overall debt and the risk to the stakeholders to delay any realization of the assets. In that same vein, a delay of the authorization to bankrupt the Corporate Debtors to January 1, 2026, as suggested by Mr. Malkin, has little utility.

[88] Mr. Malkin also argues that the Receiver has not calculated the Corporate Debtors' assets and liabilities properly in its First Report. However, the First Report was issued well before the Receiver abandoned the Huntingdon Lands and the sales process was underway for the Bates Properties. Further, it is not the role of the Receiver to independently conduct a claims process. What clearly has emerged is that BNS is not being paid, other mortgagees are not being paid, and other creditors are not being paid, the latter including an equipment financier and CRA.

[89] Under s. 49 of the *BIA*, an "insolvent person" may file an assignment in bankruptcy. Here, the evidence clearly confirms the insolvency of the Corporate Debtors, in that they are unable to meet their obligations as they generally become

due, they have ceased paying their current obligations in the ordinary course of business and, on a balance sheet basis, their debts exceed their liabilities (*BIA*, s. 2 definition of "insolvent person"). Proof of at least one unpaid creditor is sufficient to establish the failure to meet liabilities generally as they fall due: *Braich v. Clarke*, 2023 BCCA 305 [*Braich*] at para. 43.

[90] Under s. 43 of the *BIA*, any creditor has the ability to file an application for a bankruptcy order against a debtor. In doing so, the creditor must show that their debt exceeds $1,000 and that the debtor has committed an act of bankruptcy within the six months preceding the filing of the application, including ceasing to meet their liabilities generally as they become due (*BIA*, s. 42(1)(j)).

[91] In my view, it cannot be seriously contended that the Corporate Debtors are solvent in that the value of the Corporate Debtors' assets and the Bates Properties exceed the indebtedness owing to the various creditors. Further, it cannot be seriously disputed that the Corporate Debtors have failed to meet their liabilities generally as they become due and, indeed, Mr. Malkin's counsel conceded as much during his submission.

[92] In any event, the Corporate Debtors have failed to provide any "clear and independent" evidence that they are solvent or able to pay their liabilities generally as they become due: *Braich* at para. 37, citing *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1409 at para. 30.

[93] Section 243(1)(c) of the *BIA* grants the Court the power to empower a receiver to "take any other action that the court considers advisable".

[94] As the Receiver argues, granting a receiver authority to assign debtors into bankruptcy is not extraordinary and has been commonly granted by this Court and other Canadian courts: see, for example, *RBC v. Gustin*, 2019 ONSC 5370 at para. 12, citing *Royal Bank of Canada v. Sun Squeeze Juices Inc.,* [1994] O.J. No. 567 (Gen. Div.) [*Sun Squeeze ONSC*] at paras. 6–10; aff'd 1994 Carswell Ont. 310 (C.A.)

and *Bank of Montreal Owen Sound Golf and Country Club Ltd.*, 2012 ONSC 557 at para. 7.

[95] The Court is required to consider all relevant circumstances to determine whether granting such authority to a receiver is appropriate: *Sun Squeeze ONSC* at para. 11.

[96] In this case, I agree with the Receiver that a bankruptcy is appropriate for the following reasons:

a) As stated above, there is ample evidence to support that the Corporate Debtors are insolvent and likely facing applications for bankruptcy in any event;

b) There is clearly more than one creditor who would qualify to bring such a bankruptcy application so as to meet the *BIA* test: *Gustin* at para. 9;

c) It is in the interests of all stakeholders. It will avoid unnecessary and costly further bankruptcy proceedings by a creditor(s);

d) A bankruptcy will allow a trustee in bankruptcy to potentially avail itself of remedies under ss. 95–96 of the *BIA* to recover any preference payments or transfers at undervalue, again for the benefit of all stakeholders. This will allow for more efficiency and less expense than pursuing any such transactions under provincial legislation, particularly where there are issues with a debtor's cooperation: *Gustin* at para. 17; *Sun Squeeze ONSC* at para. 13. Contrary to Mr. Malkin's submissions, the Receiver is not required at this stage to identify those potential transactions in detail and engage with Mr. Malkin's potential defence in that respect;

e) It is also well-established that a reversing of priorities may itself be a sufficient cause to justify the filing of a bankruptcy by a receiver: *CIBC v. 1340182 Ontario Limited,* 2024 ONSC 3658 at para. 14. Here, CRA has advanced a claim under its statutory deemed trust for GST, a priority which would be reversed in the event of a bankruptcy. CRA takes no position in respect of this relief; and

f) There is no need to delay the matter of potential bankruptcy proceedings in these circumstances, and any such delay may in fact be prejudicial to the stakeholders. A filing or filings would have the effect of crystallizing the "look back" or "initial bankruptcy event" date for consideration of any challenge to transactions under ss. 95–96 of the *BIA*: see *BIA* s. 2 definition of "date of initial bankruptcy event".

[97] No issues arise with respect to the Receiver also acting as trustee in bankruptcy. The *BIA* permits receivers appointed in respect of a debtor to also act as trustees in bankruptcy of the debtor as long as, at the time of being appointed as trustee and at the first meeting of creditors, full disclosure of that fact and of the potential conflict of interest is disclosed (*BIA* s. 13.3(2)). In addition, the Receivership Order (para. 38) expressly provides that the Receiver is not prevented from acting as trustee in bankruptcy of the Corporate Debtors.

[98] As in this receivership, the Receiver acting as a trustee in bankruptcy would be acting not just on behalf of BNS, but on behalf of all creditors, toward maximizing value for all of the stakeholders of the Corporate Debtors. As the Receiver points out, receivers are commonly appointed as a trustee for the debtor. This makes sense in terms of efficiency and reducing costs of a bankruptcy, given a receiver's familiarity with the debtor and its affairs as gained in the receivership.

[99] Accordingly, I conclude that it is appropriate for this Court to grant the Receiver the authority to assign the Corporate Debtors into bankruptcy and to act as the trustee in bankruptcy of the Corporate Debtors and I grant the authorization sought.

"Fitzpatrick J."

TAB 6

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

ONTARIO

SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

B E T W E E N:	
MNP Limited Receiver	J. Ross MacFarlane, for MNP Limited, the Receiver
Royal Bank of Canada Applicant	Timothy C. Hogan, for the applicant, Royal Bank of Canada
- and -	
Grant Gustin Respondent	Benjamin Blay, for the respondent
	HEARD: September 13, 2019

RADY J.

Introduction

[1] MNP, the Court appointed Receiver, seeks the Approval of its first report dated August 30, 2019 and various related relief. The only controversy is whether the Court can and should order the relief sought in para. 8 of the proposed draft order. It authorizes the Receiver to file an assignment in bankruptcy on behalf of the debtor. Royal Bank of Canada supports the relief and Mr. Gustin opposes.

[2] I pause here to note that the receiver was also seeking relief against 1886890 Ontario Limited and Frank Gustin, who is Grant Gustin's father. He and the numbered company filed a responding motion record opposing some of the relief the Receiver's being requested. I am advised that the Receiver and Mr. Gustin Sr. have reached an accommodation and as a result, he did not participate in the motion.

Facts

[3] Grant Gustin has been a farmer operating a hog and cash crop farm in Petrolia on land he owned at 4715 Lasalle Line and also rented elsewhere.

[4] Royal Bank of Canada holds a mortgage on the property and a first ranking general security agreement. Mr. Gustin is in default, which led to the appointment of the Receiver. Mr. Gustin has not been cooperative, and there is evidence in the record that he has withheld relevant information and has or has threatened to remove assets from the Receiver's reach.

[5] The Receiver and Royal Bank of Canada say that he misrepresented that he was the owner of 931 hogs. The hogs may be owned by J. A. Cryderman Farms Inc. They are being managed by Scott Leystra, a business associate of Mr. Gustin.

[6] Mr. Gustin also has made eight payments totaling $242,047 to Mr. Leystra between March and May 2019. There is also an issue respecting the ownership of certain equipment and stored grain (which was the subject of Mr. Gustin Senior's response to the motion). Mr. Gustin has said some of the equipment and crops are jointly owned with or owned outright by his father.

The Law

[7] As already noted, the Receiver seeks authority from the Court to make an assignment in bankruptcy of the debtor. Obviously, it is not a creditor.

[8] It wishes to avail itself of the enhanced powers available to a trustee in bankruptcy under ss. 158 and 161-167 of the *Bankruptcy & Insolvency Act*. This is necessary given Mr. Gustin's lack of cooperation and misrepresentations.

[9] In support of the relief sought, Royal Bank of Canada submits that Mr. Gustin has committed acts of bankruptcy as defined in s. 42(1) of the *BIA* and in particular subsections (f), (g), (h) and (j). He availed himself of the provisions of the *Farm Debt Mediation Act*, thereby acknowledging his insolvency.

[10] As a preliminary matter, ss. 43-48 of the *BIA* protects farmers from creditor applications for bankruptcy orders. Section 48 provides:

> Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

[11] The Receiver and Royal Bank of Canada submit that Mr. Gustin is no longer entitled to the protection afforded by the *BIA* because he ceased being a farmer when the Receiver was appointed.

[12] There is authority supporting the Court's power to grant this form of relief in *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Gen. Div.) aff'd 1994 Carswell Ont. 310 (C.A.); and *Bank of Montreal Owen Sound Golf and Country Club Ltd.*, 2012 ONSC 557.

[13] On behalf of Mr. Gustin, Mr. Blay opposes the relief for the following reasons:

1) an assignment is premature because there is no evidence of what the creditor's position will be on liquidation;

2) Royal Bank of Canada is a single, secured creditor and as a result, must show special circumstances;

3) the cases relied upon both involved corporations rather than individuals; and

4) there are remedies available under provincial legislation for improper conveyances etc. and resort to the *BIA* is unnecessary.

Analysis

[14] I agree with the Receiver and Bank that Mr. Gustin ceased to fall within the ambit and protection of s. 48 of the *BIA* upon the appointment of the Receiver. His principal occupation and means of livelihood can no longer be said to be from active farming.

[15] Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions. There is no sound basis to distinguish the cases because the debtors were corporations. There is no legal distinction between a person and a corporation.

[16] Nor is Royal Bank of Canada a sole creditor. A list of Mr. Gustin's unsecure Creditors is found in the material filed.

[17] Finally, while there may well be remedies available under provincial statues, it is needlessly inefficient and expensive to be required to resort to them. And more importantly, it would serve to delay the orderly execution of the Receiver's undertaking.

[18] I am satisfied that the relief sought should be granted as requested and I have signed the order provided.

Justice H. A. Rady

Released: September 16, 2019

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

MNP Limited

Receiver

Royal Bank of Canada

Applicant

- and -

Grant Gustin

Respondent

REASONS FOR JUDGMENT

J.

Released: September 16, 2019

TAB 7

CITATION: Bank of Montreal v. Owen Sound Golf and Country Club, 2012 ONSC 557
COURT FILE NO.: CV-11-9306-00CL
DATE: 20120123

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Bank of Montreal, Applicant

AND:

Owen Sound Golf and Country Club, Limited and Kenneth W. Rowe Limited, Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Simpson, for the Receiver, BDO Canada Limited

Keith Hagedorn, claimant creditor in person

HEARD: January 23, 2012

REASONS FOR DECISION

I. Receiver's motion to liquidate debtor corporations

[1] Last July BDO Canada Limited was appointed receiver of the Owen Sound Golf and Country Club, Limited ("OSGCC") and Kenneth W. Rowe Limited, a wholly-owned subsidiary of the Golf Club which owned property on which a practice facility was located (the "Debtors").

[2] Pursuant to orders of this Court the Receiver sold the Golf Club and ran a claims process for creditors. As a result, last October this Court authorized the Receiver to pay out the secured creditor, BMO, as well as the Canada Revenue Agency. The claims process for the other creditors has been completed, and the Receiver seeks approval to disburse funds to those claimants.

[3] On the return of the motion Mr. Keith Hagedorn, the former chef at the Golf Club, sought leave for an extension of time in respect of the claim which he had filed with the Receiver. Mr. Hagedorn had mailed in his claim before the claims bar date, but his letter was returned due to insufficient postage. By the time he had re-sent his claim he was 10 days past the claims bar date. The Receiver did not oppose the requested extension of time, and during a break in the

proceedings the Receiver and Mr. Hagedorn settled his claim for $5,000.00. Accordingly, I formally grant Mr. Hagedorn an extension of time in which to file his claim, declare that his claim as filed was received by the Receiver within the permitted extension, and approve the Receiver paying out the agreed upon $5,000 settlement.

[4] Upon payment of the unsecured creditors the Receiver will hold surplus funds of slightly under $1 million. The Receiver moves for authorization to place both Debtors into liquidation. The Receiver gave proper notice of this motion. Although no one has appeared to oppose the relief sought, one Club member contacted the Receiver to query its jurisdiction to put the companies into liquidation.

II. Analysis

[5] Kenneth W. Rowe Limited is incorporated under the *Ontario Business Corporations Act*.[1] OSGCC owns all of the shares of that company. Section 208(1) of the *OBCA* provides that a shareholder may apply to court for a winding-up order. Paragraph 4(r) of the Appointment Order made July 15, 2011 authorized the Receiver "to exercise any shareholder…rights which the Debtors may have". Therein lies the power of the Receiver to apply to wind-up OSGCC's subsidiary, Kenneth W. Rowe Limited.

[6] OSGCC is incorporated under the *Corporations Act*.[2] A few days before the appointment of the Receiver the entire Board of Directors of OSGCC resigned. Paragraph 3(c) of the Appointment Order authorized the Receiver to "manage, operate and carry on the business of the Debtors". As Cumming J. observed in *Ravelston Corp. (Re)*: "When a court-appointed receiver is appointed in the normal course, 'the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced'…The essence of a receiver's power is to settle liabilities and liquidate assets."[3]

[7] The Receiver has sold OSGCC's assets, satisfied the secured creditors, and administered a claims process for unsecured claims. Once the unsecured claims are paid, the Receiver will be left holding surplus proceeds. The shareholders are the next group entitled to claim against those funds, and the Receiver seeks to address that stage in the corporate life of OSGCC by seeking an order to wind-up that company. Section 244(1) of the *Corporations Act* authorizes a corporation to apply to court for a winding-up order. It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.[4] In my view the same logic applies to the power of the court to authorize a court-appointed receiver to apply to wind-up a company.

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[1] R.S.O. 1990, c. B.16.
[2] R.S.O. 1990, c. C.38.
[3] *Ravelston Corp. (Re)*, [2007] O.J. No. 414 (S.C.J.), para. 61; affirmed 2007 ONCA 135.
[4] *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Gen. Div.), paras. 6 to 10.

[8] In its Supplement to the Second Report the Receiver described the work which must be done in order to identify the current shareholders of OSGCC and proposed a notice and claims bar-like process to deal with claims by shareholders. The process proposed is a reasonable one.

[9] Accordingly, I grant the Receiver's motion for orders to wind up the Debtors and to appoint the Receiver as liquidator. I approve the winding-up process it proposes. I grant an order in the form submitted by the Receiver, which I have signed.

(original signed by)
D. M. Brown J.

Date: January 23, 2012

TAB 8

COURT FILE NO.: 07-CL-6913
DATE: 2009-09-25

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

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

BEFORE: Pepall, J.

COUNSEL: L. Joseph Latham and Lauren Butti for the Receiver
Jeff Carhart for Ed Mirvish Enterprises Limited and I King West Inc.
M. Michael Title for Segura Investments Ltd.
Harry Stinson on his own behalf
Robert Verdun on his own behalf

Endorsement

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.

<u>Positions of Parties</u>

[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.

<u>Discussion</u>

[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

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

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.

Pepall J.

Released: September 25, 2009

TAB 9

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 58

Date: 20221116
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
as represented by the Minister of the Department of
Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	John T. Porter (by video) and Kimberly Sova
Yukon Zinc Corporation	No one appearing
Counsel for Welichem Research General Partnership	Forrest Finn (by video)
Counsel for PricewaterhouseCoopers Inc.	Emma Newbery

REASONS FOR DECISION

Introduction

[1] This is an application arising from the ongoing court-supervised receivership of the Wolverine Mine, located in southeastern Yukon.

[2] I granted two orders on November 1, 2022, for applications brought by the petitioner. One application was to amend the original Receivership order, dated September 13, 2019, to reflect the reduction of their activities given the transition of the care and maintenance activities to a contractor with the Yukon government effective

November 1, 2022. The other application was for approval of the activities and fees of the Receiver and their counsel. Both applications were unopposed. I advised the parties I would issue brief reasons for granting the application to amend the Receivership order, because of the significant step this represents in the history of this proceeding.

Background of Receivership

[3] The history of the Wolverine Mine (the "Mine") and its journey to receivership is set out in the *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 15, and I will not repeat it here except in summary form.

[4] Yukon Zinc Corporation ("Yukon Zinc") is a company incorporated under the British Columbia *Business Corporations Act*, SBC 2002, c. 57. Yukon Zinc's principal asset is the Mine located 282 kilometres northeast of Whitehorse, in the traditional territory of Ross River Dena Council, Liard First Nation, Dease River First Nation, and Kwadacha Nation ("the Kaska"). It is a large zinc-silver-lead mine with copper and gold by-products. It consists of 2,945 quartz mineral claims and exploration rights covering 700 kilometres.

[5] The Mine includes underground ramps, tunnels, ventilation and heating systems, a 26-kilometre access road, a 1,340-metre all-weather airstrip, a tailings storage facility, a 1,700-metric-ton-per-day processing mill and related structures, a full-service camp and administration buildings.

[6] Yukon Zinc held a quartz mining licence and a water licence issued under Yukon legislation.

[7] After exploration and development activities from approximately 2008 to 2011, Yukon Zinc began commercial production at the Mine in March 2012. The Mine

operated for approximately three years, employing 300 people at its peak. It was originally estimated to operate for nine years.

[8] However, in 2014, Yukon Zinc began to experience financial difficulties attributed to a downturn in global metal prices, the rising US dollar, and significant development, start-up and operational costs at the Mine. In November 2014, its parent company restricted borrowings and by January 2015, Yukon Zinc decided to put the Mine into care and maintenance because of insufficient funds. Ongoing lack of funds has meant the Mine has remained in care and maintenance since January 2015.

[9] The Mine's condition deteriorated after its closure in January 2015. In 2017, the underground part of the Mine flooded and contaminated underground water was piped to the Mine's tailings storage facility. This caused the tailings storage facility to fill up, with no means of water treatment or available discharge for the contaminated water. The absence of water treatment and the risk of untreated water flowing into the environment was a serious concern to the Yukon government.

[10] The deteriorating condition of the Mine led the Yukon government to increase its involvement at the Mine. Reports from multiple inspections noted concerns with inadequate water management; the inability of the company to undertake the necessary care and maintenance; and the failure to furnish the required security.

[11] Yukon Zinc's failure to rectify the deficiencies led the Yukon government to exercise their statutory authority to enter the Mine and start the necessary work to treat the water and prevent environmental damage.

[12] In July 2019, the Yukon government commenced proceedings under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and s. 26 of the *Judicature*

Act, RSY 2002, c. 128. This Court granted a Receivership order on September 13, 2019, to permit PricewaterhouseCoopers Inc. as Receiver to carry out care and maintenance activities at the Mine. This order was approved by the Yukon government.

[13] From that date to November 1, 2022, the Receiver has managed operations at the Mine on a day-to-day basis. They have been primarily concerned with preventing environmental damage caused by contaminated water at the Mine. They have ensured that water treatment has occurred and necessary equipment remained functional or was replaced.

[14] The Receiver has also carried out general receivership activities, such as engaging with stakeholders, negotiating with creditors, and developing and administering a process for selling the assets of the Mine.

[15] During this time, in its role as a court officer, the Receiver has provided a total of 12 reports to the Court, of varying lengths depending on the activities at the time.

Transition of Care and Maintenance Activities

[16] In the spring and summer of 2022, the Receiver and the Yukon government prepared a plan for the care and maintenance activities of the Mine to be transferred to a third-party contractor with the Yukon government. On October 4, 2022, as a result of a procurement process, the Yukon government awarded the care and maintenance activities contract to Boreal Engineering Limited ("Boreal"). Boreal will assume these responsibilities on November 1, 2022. Boreal has a close business relationship with Dena Nezziddi Development Corporation, the economic development corporation of the Ross River Dena Council, in whose traditional territory the Mine is located.

[17] As a result of this transition to Boreal, the Receiver's activities in relation to the Mine will be reduced. Their role will be limited to general receivership activities and assistance during the transition period.

[18] Beginning November 1, 2022, the Receiver's involvement at the Mine will consist of:

a. general administration of the receivership such as entering into contracts in the name of Yukon Zinc, maintaining the books and records, facilitating conversations with stakeholders as required, and providing a historic knowledge of the Mine; and

b. ensuring the settlement agreement among the major creditor Welichem Equipment Limited and Welichem Research General Partnership ("Welichem"), the Receiver, and the Yukon government is implemented by facilitating discussions in particular about the removal of Welichem equipment from the Mine.

[19] The Receiver will also maintain limited powers so that in an emergency it could re-assume care and maintenance activities, on application to the Court to increase its powers for that purpose.

[20] The Receiver's final operational activities will occur in November 2022 at the request of the Yukon government. They are the removal of two tailings treatment barges from the tailings storage facility and minor water testing.

[21] Boreal will be responsible for the following:

a. maintenance of the access road, air strip, and other roads around the Mine;

b. control of the water on site: that is, ground water, surface water, underground water, and the tailings storage facility;

c. treatment of the underground water and environmental monitoring and reporting as required;

d. maintenance of power generation on site to power the camp and equipment required to move and control the water;

e. repair and maintenance of equipment used to carry out the care and maintenance; and

f. provision of a continued supply of fuel for power generation, equipment operation, and camp needs.

Amendments to Receivership Order

[22] Given Boreal's assumption of these responsibilities, the Receiver asks this Court to amend the Receivership order to discharge them from the following powers related to care and maintenance:

a. to take possession and control over physical assets at the Mine that are Yukon Zinc's property including equipment, buildings, inventory, goods and other real and personal property located at the Mine;

b. to receive, preserve and protect this property by changing locks and security codes, relocating the property, hiring security, maintaining physical inventories, and obtaining insurance coverage;

c. to manage, operate and carry on the business of Yukon Zinc, including the power to enter into agreements, incur obligations in the ordinary course of business, and cease to carry on all or part of Yukon Zinc's business or perform its contracts;

d. to buy or lease any equipment, supplies, inventories, machinery or other assets to continue the business of Yukon Zinc;

e. to undertake environmental or workers' health and safety assessments of the assets, undertaking and property of Yukon Zinc, including all proceeds and operations of Yukon Zinc; and

f. to the extent authorized and approved by the Yukon government, to carry out care and maintenance activities at the Mine, and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

[23] The power set out in (f) is the power that the Receiver will seek to use in an emergency situation.

[24] The powers sought to be retained by the Receiver are set out in detail in the amended Receivership order. Essentially, they are the powers that will permit the Receiver to carry out its receivership duties and facilitate a sale if such an opportunity arises in the future. These powers include: maintain books and records, deal with debts, enter into contracts in Yukon Zinc's name, market and administer any sale of the assets and other powers associated with any sale, apply for permits, licences, approvals or permissions as required in the name of Yukon Zinc, enter into any agreements with the trustee in bankruptcy appointed in respect of Yukon Zinc, and exercise any shareholder, partnership, joint venture or other rights Yukon Zinc might have. The amended Receivership order contains the full list of retained powers.

Legal Principles

[25] Any interested party may apply to the Court to amend or vary the Receivership order (s. 35 of the order).

[26] There is no statutory authority for the discharge of all or part of a receiver's powers. Courts have therefore recognized their role in determining whether a receiver should be discharged of some or all of their powers. This is of particular interest to receivers because of the absence of statutory protection from liability for any act or default done in the administration of the bankrupt's estate, except for protections in s. 14.06 of the *Bankruptcy and Insolvency Act*, (relating to personal liability in matters related to employees, and environmental issues, in specified circumstances).

[27] The court in *Ed Mirvish Enterprises Limited v Stinson Hospitality Inc* (2009), 181 ACWS (3d) 471 (Ont Sup Ct) at para. 8, said a receiver may wish "to be discharged once it has completed the substance of its mandate", unless there is gross negligence or wilful misconduct. That court also noted that a receiver requests a full release so that it does not have to spend time and money defending an action that may be unmeritorious, especially when it cannot recover costs from the estate once discharged.

[28] Similarly, the court in *Red Ash Capital Partners II Limited Partnership v Kraus Inc*, 2012 ONSC 6376 at para. 47, stated that on completion of its mandate, a court-appointed receiver should be granted a discharge, in the absence of the evidence of any improper or negligent conduct.

[29] These principles are reflected in the Receivership order in this proceeding which states at s. 20 that the Receiver:

> … shall incur no liability or obligation as a result of its appointment or the carrying out of [the Receivership order], save and except:
>
> (a) any gross negligence or wilful misconduct on [the Receiver's] part; or
>
> (b) amounts in respect of obligations imposed specifically on receivers by applicable legislation.
>
> Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the BIA or by any other applicable legislation.

Analysis

[30] In this case, the affidavit evidence in addition to the written and oral submissions show that the Receiver has fulfilled the care and maintenance and related operational activities in its mandate as set out in the Receivership order. The transition of these activities to Boreal commenced November 1, 2022. According to the Receiver's counsel's submissions, supported by the Yukon government counsel's submissions, the transition is proceeding well, especially given the end of the current water treatment season. There is no evidence of negligence or wilful misconduct by the Receiver. It is appropriate for them to be released from the discharged powers as indicated and to focus their activities on general receivership duties as well as to provide advice and assistance in the early stages of the transition.

[31] The amendment to the Receiver's powers is an economically sound approach. It reflects the current reality of the new assumption of responsibilities at the Mine. The amendment to the Receivership order that retains the Receiver's powers to carry out receiver's duties as well as care and maintenance activities in an emergency will allow the Court to continue to obtain reports as required. The Receiver's reports to date have

provided essential information for the court supervision of this receivership. This has been a difficult receivership because of the ongoing serious environmental risks and the litigation involving the Yukon government, the Receiver, and Welichem.

[32] The transition of the care and maintenance activities to Boreal is a significant step in this receivership and the life of the Mine. Boreal's experience in the Yukon and their business relationship with Dena Nezziddi Development Corporation, are positive elements as the necessary ongoing work continues. The involvement of the Ross River Dena Council in this work represents an important opportunity for the First Nation. The continuity provided by Boreal maintaining many of the employees who were working with the Receiver will also assist in the transition and ensure the care and maintenance activities are carried on appropriately.

[33] As noted by counsel for Yukon government, the next stage will be the development of a final closure plan. It is hoped that efforts to complete this stage will be appropriately timely.

[34] My thanks to all counsel for their helpful and professional submissions and especially to counsel for the Receiver for their thorough reports and submissions during this receivership to date.

DUNCAN C.J.

TAB 10

CITATION: Pinnacle v. Kraus, 2012 ONSC 6376
COURT FILE NO.: CV-12-9731-00CL
DATE: 20121109

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: 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

BEFORE: L.A. Pattillo J.

COUNSEL: *Linc Rogers* and *Jenna Willis*, for the Receiver

Larry Ellis, for the Applicant

Raymond Slattery and *David Ullmann*, for Equistar Chemicals, LP

HEARD: November 7, 2012

ENDORSEMENT

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. C.I.B.C. Trust Corp*., 1996 CarswellOnt 2185 (O.C.J. 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. (5^{th}) 169 (Ont. S.C.J.) 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. (4^{th}) 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 (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 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.

L. A. Pattillo J.

Released: November 9, 2012