File No. CI20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

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

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC.

Applicant

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., and NYGARD ENTERPRISES LTD.

Respondents

AND

Estate Nos: 31-2627758, 31-2627760, 31-2627764, 31-2627767, and 31-458926

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF NYGARD PROPERTIES LTD., NYGARD ENTERPRISES LTD., NYGARD INTERNATIONAL PARTNERSHIP, 4093879 CANADA LTD., AND 4093887 CANADA LTD.

MOTION BRIEF OF THE RESPONDENTS

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MOTION BRIEF OF THE RESPONDENTS

PART I - LIST OF DOCUMENTS AND AUTHORITIES

1. Notice of Motion of the Respondents, filed September 7, 2021;
2. Affidavit of Greg Fenske, affirmed September 7, 2021;
3. The Receivers' Reports, including the 12th Report;
4. *Montor Business Corp. (Trustee of) v. Goldfinger,* 2011 ONSC 2044;
5. *Martellacci, Re,* 2014 ONSC 5188; and
6. *Bell Canada International Inc., Re* [2003] O.J. No. 4738.

PART II – OVERVIEW AND THE FACTS

OVERVIEW

1. A receiver filed a report to the Court as its evidence in support of the receiver's motion for a rare and very significant order. The parties that would be directly affected by that order sent a series of questions to the receiver concerning the content of its report. The receiver refused to answer any of the questions. The parties alerted the receiver to the jurisprudence on the point, which holds that receivers should answer questions from interested parties, and that if they do not, they may be cross-examined. The receiver again refused to answer any of the questions. The parties were therefore required to bring this motion, for an order compelling the receiver's representatives to appear for cross-examination on its report.

THE FACTS

2. On June 4, 2021, Richter Advisory Group Inc., in its capacity as receiver of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard International Partnership, Nygard Properties Ltd., 4093879 Canada Ltd. and 4093887 Canada Ltd. (the "**Receiver**"), brought a motion in this proceeding, which motion is returnable November 5, 2021 (the "**Receiver's Motion**"). The plea for relief in the notice of motion extends past four pages, but the primary relief sought is as follows.

> *(b) [An order] [d]eclaring that:*

(i) *each of the Debtors [the Respondents] are jointly liable for the debts and liabilities (the "**Common Liabilities**") of each of the other Debtors, and the Debtors are joint debtors with respect to the Common Liabilities;*

(ii) *the assets (the "**Common Assets**") of each of the Debtors shall be treated as "common assets" subject to the Common Liabilities; and*

(iii) *each of the Debtors is an insolvent person as defined in the BIA;*

(c) [An order] [d]eclaring that, accordingly, the assets and liabilities of the Debtors are properly to be substantively consolidated for purposes of addressing the claims of creditors of each of the Debtors;

(d) [An order] [a]uthorizing the Receiver to:

*(i) make assignments ("**Bankruptcy Assignments**") in bankruptcy in the locality of Winnipeg, Manitoba in respect of the property of each of the Debtors for the general benefit of each of the Debtor's creditors, including in relation to the Common Liabilities […]*[1]

3. If the order sought by the Receiver is granted, the result for the Respondent Nygard Properties Ltd. ("**NPL**") will be that it will be assigned into bankruptcy not because it is insolvent but because other Respondents, the relevant debts of which NPL has not guaranteed, are insolvent. NPL's assets will then be liquidated and the proceeds paid to the unsecured creditors of other Respondents. NPL will, therefore, strenuously oppose the motion.

4. In support of its motion, the Receiver filed the Twelfth Report of the Receiver dated

[1] Affidavit of Greg Fenske sworn September 7, 2021 (the "**Fenske Affidavit**") at paragraph 2 and Exhibit

June 4, 2021 (the "**Twelfth Report**"), which consists of 79 pages exclusive of appendices, and 683 pages inclusive of appendices. The Twelfth Report was signed by Adam Sherman ("**Sherman**") and Eric Finley ("**Finley**") of the Receiver.[2]

5. In the view of the Respondents, the Twelfth Report contains a number of assertions and assumptions which require clarification, expansion, or challenge.

6. The law is that Court-appointed receivers are obliged to answer questions concerning their reports. The practice is that those questions are to be provided in writing, or to be asked orally in the context of an interview, which may be recorded. (On which more below). In this case, the Respondents sent a list of questions for the Receiver respecting its Twelfth Report, (the "**Questions**"), on July 16, 2021.[3]

7. On July 30, 2021, counsel for the Receiver, Bruce Taylor, ("**Taylor**"), advised that the Receiver would not answer any of the Questions.[4]

8. On August 4, 2021, counsel for the Respondents, Fred Tayar ("**Tayar**"), wrote a long, detailed letter to Taylor in which he alerted Taylor to the guiding jurisprudence and

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"A"
[2] Fenske Affidavit, at paragraph 3 and Exhibit "B"
[3] Fenske Affidavit, at paragraph 5 and Exhibit "C"
[4] Fenske Affidavit, at paragraph 6 and Exhibit "E"

asked Taylor whether the Receiver would reconsider its refusal to answer any questions.[5]

9. On August 11, 2021, Taylor replied to iterate the Receiver's refusal to answer any of the Questions.[6] He continued: *"Your client is at liberty, of course, to bring this matter (by motion) before Mr. Justice Edmond for his consideration."*

PART III – THE ISSUES AND THE LAW

10. The issue before this Honourable Court is whether Sherman or Finley should be ordered to attend for cross-examination on the Twelfth Report, or whether the Receiver should be ordered to answer the Questions in writing.

THE LAW

11. Receivers cannot simply refuse to answer questions about their reports to the Court. They must reply to inquiries from interested parties.

> *First, common practice permits a party to raise questions about the statements in the report, and ask the Trustee to respond to those questions.* ***The Trustee is obliged to respond.*** *Courts have developed a process to permit this, and, in some circumstances, to permit a representative of the Trustee to be cross-examined. [citations omitted].*[7]

12. Justice Newbould, later head of Toronto's Commercial List, is of the same view:

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[5] Fenske Affidavit, at paragraph 7 and Exhibit "F"
[6] Fenske Affidavit, at paragraph 8 and Exhibit "G"
[7] Tab 1, *Montor Business Corp. (Trustee of) v. Goldfinger*, 2011 ONSC 2044 (Commercial List), at

> *21 The general practice accepted in Ontario is that if a party has questions regarding a report of such a court officer, those questions should be put to the court officer.* ***Generally in my experience, the court officer will answer the questions fully and any follow-up questions that may arise and cross-examination is not necessary. If there is some good reason to cross-examine the court officer, it can be ordered.*** *I do not agree that a person has a prima facie right at large to cross-examine a court officer such as a trustee and I would not extend the practice in that way. See Farley J. in Bell Canada International at paras. 8 and 9 and his discussion of the limits on cross-examination of a court officer. I agree with his comments.*[8]

13. In this case, the Receiver has twice flatly refused to answer the Respondents' written questions. The second time, the Receiver did so *after* having been advised of the guiding jurisprudence, thus making clear that it was indifferent both to that jurisprudence and to the rights it had evolved to protect.[9] Justice Farley, originator of the Commercial List and one of the most influential business-law judges in Canada's history, held (in *Bell Canada*, the case cited by Justice Newbould), that such a refusal justifies an order for the cross-examination of the receiver:

> 9 *As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances.* ***It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested.*** *Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that* ***woe betide any officer of the court who did not observe his duty to be neutral and objective****). […]*[10]

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paragraph 27, emphasis added

[8] Tab 2, *Martellacci, Re,* 2014 ONSC 5188 (Commercial List), at paragraph 21, emphasis added

[9] Fenske Affidavit, at Exhibits "D"-"G"

[10] Tab 3, *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Commercial List), at paragraph 9, emphasis added

14. The Receiver has brought a motion that, if granted, will have substantial negative consequences for the Respondents. It is, by its refusal to answer any questions concerning its Twelfth Report, attempting to have its evidence on that motion placed before the Court without challenge. The moving party is a stakeholder in this proceeding, to which the Receiver owes a fiduciary duty. Rather than observe that duty, the Receiver is seeking to avoid performance of a basic obligation to the stakeholders, being to answer questions concerning a report to the Court.

15. The position the Receiver has taken is improper and contrary to the law of receiverships. It should therefore be required to produce one of the two representatives who signed the Twelfth Report for cross-examination on that Report or, in the alternative, to answer the Questions put to it, and all follow-up questions, within 15 days.

PART IV – ORDER SOUGHT

16. The respondents seek:

1. An order that Sherman or Finley of the Receiver attend for a cross-examination on the Twelfth Report, on a date to be agreed upon, or failing that on a date to be set by the Court;

2. In the alternative, an order directing that the Receiver answer the questions arising out of the Twelfth Report, attached as Schedule “A” to the within notice of motion, in writing, within 15 days, as well as all follow-up questions, within 15

days of the Receiver's receipt of those questions; and

3. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF SEPTEMBER, 2021.

LEVENE TADMAN GOLUB LAW CORPORATION

WAYNE M. ONCHULENKO

Lawyer for the Respondents

CITATION: Farber v. Goldfinger, 2011 ONSC 2044
COURT FILE NO.: 10-8629-00CL
DATE: 20110331

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: A. FARBER & PARTNERS INC., the trustee of the bankruptcy estates of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., on its own behalf and on behalf of all the creditors of Summit Glen Brantford Holdings Inc., Annopol Holdings Limited and Summit Glen Waterloo/2000 Developments Inc., Applicant

A N D:

MORRIS GOLDFINGER, GOLDFINGER JAZRAWY DIAGNOSTIC SERVICES LTD., ANNOPOL HOLDINGS LIMITED, SUMMIT GLEN BRANTFORD HOLDINGS INC., SUMMIT GLEN WATERLOO/2000 DEVELOPMENTS INC., SUMMIT GLEN BRIDGE STREET INC., MAHVASH LECHCIER-KIMEL AND JACK LECHCIER-KIMEL, Respondents

APPLICATION pursuant to the *Business Corporations Act,* R.S.O. 1990, c. B.16, the *Fraudulent Preferences Act,* R.S.O. 1990, c. F.29 and the *Assignments and Preferences Act,* R.S.O. 1990, c. A.33

BEFORE: MESBUR J.

COUNSEL: Milton A. Davis and Ben Hanuka for the moving parties Morris Goldfinger and Goldfinger Jazrawy Diagnostic Services Ltd.

Melvyn L. Solmon for the moving party Jack Lechcier-Kimel

P. Shea for the responding party, A. Farber & Partners Inc.

HEARD: March 28, 2011

E N D O R S E M E N T

Background to this motion to expunge a Trustee's report:

[1] This is a motion to strike or expunge a Trustee's report to prevent its use on a pending motion to removal the Trustee. A. Farber & Partners Inc. (Farbers) is the

Trustee in bankruptcy of the estates of various corporate entities listed as applicants in the title to these proceedings. In its capacity as Trustee, Farbers has brought this application to set aside various transactions involving the respondents Dr. Morris Goldfinger, his corporation Goldfinger Jazrawy Diagnostic Services Ltd. and the respondent Mr. Lechcier-Kimel as improper conveyances and preferences. The application also seeks relief under the oppression provisions of the OBCA. In support of the application, the Trustee filed an affidavit.

[2] In the context of this application, Dr. Goldfinger and Mr. Lechcier-Kimel have brought a motion to remove Farbers as Trustee for the various corporations. Although the removal motion is not brought in the individual bankrupt estates, but rather in this application, it is founded on s. 14.04 of the *Bankruptcy and Insolvency Act* which is the section that governs the removal and replacement of trustees.

[3] Section 14.04 permits the court, on the application of any "interested person" to remove a trustee "for cause", and appoint another trustee in that trustee's place. The issues on the removal motion, therefore, are first, whether the moving parties are "interested persons", and second, in the context of this case, whether Farbers is in a position of conflict that constitutes "cause" under the provision of the section.

[4] Farbers responded to the removal motion by filing a report. The moving parties objected, suggesting the proper course was to file an affidavit in response. They complained about their inability to cross-examine on a report, as opposed to an affidavit.

[5] Newbould J made an order permitting cross-examination, but only on the issues of Farbers' alleged conflict and the issue of whether the moving parties are "interested parties" in the context of a removal motion under section 14.04.

[6] For various reasons, the moving parties chose not to exercise their right to cross-examine. They did not seek leave to appeal Newbould J's order, nor did they apply to amend or expand any of its terms. Instead, they have launched this motion to expunge or strike out the Farbers report. They say the report does not constitute admissible evidence on their motion to remove Farbers as trustee of the various estates.

Discussion:

[7] Counsel tell me there is no reported case directly on point. That is to say, they could not refer me to any case in which a Trustee responded to a motion for its removal with an affidavit and the court commented on the use of the affidavit. They also could not refer me to any case in which a Trustee responded to a motion for its removal with a report, and the court commented on the use of a report. They could point to no case in which the court determined which procedure is appropriate. I suspect this is because

no one has objected before to the form in which an impugned trustee has responded to a removal motion. I must therefore approach my task by way of analogy, and by applying first principles.

[8] The real question is whether this case (that is the motion to remove the Trustee) is one of the circumstances where the court can and should accept the Trustee's report as admissible evidence. This is only a threshold issue. I need only determine whether the report should be struck, or whether it should constitute admissible evidence. My role is not to determine what weight, if any, should be given to it. That is the task of the judge who hears the removal motion itself.

When have reports been accepted?

[9] The *Bankruptcy and Insolvency Act* sets out particular circumstances where a Trustee is required to file a report. Counsel for Dr. Goldfinger has helpfully outlined them in Schedule C to his factum. A motion to remove a Trustee is not one of the particular circumstances where the Trustee is required to file a report. That said, these are not the only circumstances in which Trustees have filed reports, and the courts have accepted them as evidence.

[10] Trustees and Receivers are officers of the court with particular duties of impartiality and fair dealing. When someone acts as a Trustee of a bankrupt estate, additional obligations are imposed by the terms of the *Bankruptcy and Insolvency Act* and the overriding supervisory status of the Superintendent of Bankruptcy.

[11] Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA,* routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act.*

[12] For example, in a case related to this one, *Re Bankruptcies of Jack and Mahvash Lechcier-Kimel* [1] on a motion under s. 43(13) of the *Bankruptcy and Insolvency Act* the court relied on the Trustee's reports in coming to its conclusion that various parties, including the Trustee itself, should be added as creditors. There, the Trustee was seeking to be added as a creditor. It filed two reports as the evidence to support its position. The respondents were permitted to cross-examine. The court accepted and relied on the reports, even though s. 43(13) does not make specific reference to a Trustee's delivering a report in those circumstances. Interestingly, s. 43(3) requires that on an application for a bankruptcy order itself, the applicant is required to support the application with an affidavit. Nevertheless, in *Lechcier-Kimel*

[1] 2011 ONSC 1859 (S.C.J.)

(Re), the court accepted the Trustee's report as sufficient evidence to support the relief sought.

[13] Trustees' or Receivers' reports have been accepted as admissible evidence on motions by an interim receiver for a finding of contempt against a shareholder of the debtor.[2] Courts have accepted reports as evidence in opposed motions by a Chief Restructuring Officer to file a CCAA plan[3], opposed motions seeking approval to make payments[4] or to sell property[5], and responding to opposed motions for leave to take proceedings against a receiver[6]. Other instances are set out in Farbers' factum.

[14] From these cases I conclude it is entirely proper for the Trustee to submit its evidence on this motion in the form of a report.

Is the report admissible evidence?

[15] Although it is clear the courts have accepted Trustees' reports as admissible evidence, the case law does not articulate particularly well the basis on which the reports are admissible. The moving parties attack the Farbers report's admissibility on various fronts. First they say that the *Rules of Civil Procedure* set out the material to be used on a motion. They infer that as a result, affidavits are required to respond to motions, and therefore a report is an inadmissible response.

[16] Second, they say an affidavit is required in response to a motion to ensure procedural fairness, which includes the right to cross-examine.

[17] Third, they suggest the report is hearsay, does not meet any of the hearsay exceptions, and thus is inadmissible.

[18] Fourth, they say the report should not be admitted because it is neither balanced nor neutral.

[19] Last they take the position the nature of the motion itself requires an affidavit, and is not the type of motion in which a Trustee's report is permitted.

[20] I will deal with each of these arguments in turn.

Are affidavits required to respond to motions?

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[2] *New Solutions Financial Corp. v Jennart International Inc.,* 2011 CarswellOnt 238 (S.C.J.)
[3] *HSBC Bank Canada v. Bear Mountain Master Partnership,* [2010] B.C.J. No 1346 (S.C.)
[4] *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.,* 2007 CarswellOnt 5799 (S.C.J.)
[5] *Big Sky Living Inc. (Re),* 2007 CarswellAlta 25 (Q.B.)
[6] *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.,* 2007 CarswellOnt 4896 (S.C.J.)

[21] The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the *Rules of Civil Procedure,* and absent any contrary provision under the Bankruptcy Rules, the general *Rules of Civil Procedure* must apply. They say Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.

[22] They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.

[23] I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.

[24] As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.

[25] It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the *Rules of Civil Procedure, prima facie* admissible.

Does procedural fairness require the right to cross-examine?

[26] Dr. Goldfinger and Mr. Lechcier-Kimel also attack the report on the basis that it deprives them of the right to cross-examine its maker. They say the report is not signed by an individual, and as a result, they do not know whose knowledge forms the basis of the statements in the report, and they are not able to cross-examine to test the accuracy of the statements in the report.

[27] This argument carries no weight. First, common practice permits a party to raise questions about the statements in the report, and ask the Trustee to respond to

those questions. The Trustee is obliged to respond. Courts have developed a process to permit this, and, in some circumstances, to permit a representative of the Trustee to be cross-examined.[7]

[28] Second, and more importantly, here the court made an express order permitting cross-examination. The moving parties take issue with the scope of the cross-examination, and the fact they could not choose who would be presented for cross-examination. They took no steps to seek leave to appeal Newbould J's order. They did not seek to vary it when they encountered what they characterized as difficulties with the person Farbers proposed as the examinee. Having failed to avail themselves of the substantive rights they were given to cross-examine, they can hardly say they have been deprived of procedural fairness.

[29] Even where a court's officer (for example, a court-appointed Chief Restructuring Officer) files an affidavit, the right to cross-examine is not automatic. For example, in *Starcom International Optics Corp. (Re)*[8] the court refused to permit cross-examination because it found there were no issues with the evidence in the affidavit.

Is the report is hearsay and inadmissible on that basis?

[30] At the heart of the moving parties position is their submission the report is hearsay. They say the report does not meet any of the exceptions to the hearsay rule, and therefore it is inadmissible.

[31] Farley J dealt with this in *Bell Canada International Inc. Re*[9], the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but … to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."

[32] In support of this proposition, Farley J quoted approvingly from Wigmore[10] which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:

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[7] see, for example, *Anvil Range Mining Corp. (Re),* 2001 CarswellOnt 908 (S.C.J.); *Ravelston Corp. (Re),* [2007] O.J. No. 4414 (S.C.J.), aff'd, 2007 CarswellOnt 1115 (O.C.A.)
[8] [1999] B.C.J. no. 2125 (S.C.)
[9] 2003 CarswellOnt 4537 (S.C.J.)
[10] Wigmore, John Henry, *Evidence in Trials at Common Law*, Little Brown & Company, Toronto & Boston: 1974, at pages 791-6

a) they are made by a public official – trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;

b) the Trustee makes the report in the discharge of a public duty or function – the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;

c) the reports are made with the intention they serve as a permanent record – as part of the court record, reports are permanent; and

d) the report is available for public inspection – as part of the court record, the report, like the court file, is open to public viewing.

[33] In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies*[11] which states that officers of the court (which would include Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex. p James [(1874) 2Ch. App 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably."

[34] Trustees, as the court's officers, operate under these obligations. In addition, they are subject to the provisions of the *Bankruptcy and Insolvency Act,* including following the prescribed Code of Ethics referred to in s. 13.5 of the *Act*. In looking at a Trustee's obligations, it is important to look at the entire scheme of the *BIA* in relation to a Trustee's duties and continued representation of an estate. For example, section 14 gives the creditors the right to substitute one Trustee for another. Most importantly, the Superintendent has broad powers to deal with a Trustee who has acted improperly. These include revoking the Trustee's licence, requiring the Trustee to make restitution, limiting the Trustee's ability to practice, or doing anything else the Superintendent considers appropriate and the Trustee agrees to. Thus, unlike a Receiver, whose role derives solely from the court order appointing it, the Trustee is subject to the additional duties imposed by the *Bankruptcy and Insolvency Act* itself, and the additional supervision of the Office of the Superintendent.

[35] On the issue of hearsay, the *Rules of Civil Procedure* also set out what may be included in affidavits that are admissible on motions. On an interlocutory motion, an affidavit may be made "on information and belief". What this means is that hearsay evidence is admissible on a motion if the deponent sets out the source of the hearsay evidence and expresses a belief in its truth. It is always up to the court to

[11] Sir Gavin Lightman and Gabriel Moss, (3rd ed., 2000; Sweet & Maxwell, London) at p 115

determine the weight to be given to such evidence. Believing something to be true, however "reliable" the source, and however fervently one believes in the truth does not, of course, make it true. While the Trustee's report may contain hearsay, or indeed be hearsay, given the safeguards imposed by the Trustee's being the court's officer, I conclude the hearsay contained in a Trustee's report is no less admissible on this interlocutory motion than if it had been contained in an affidavit stated to be "on information and belief."

[36] As a result, I conclude a Trustee's report constitutes an exception to the hearsay rule, in the same way as an official statement is excepted. I also conclude the report, insofar as it contains information from others is admissible in the same way as an affidavit containing similar information.

Is the report not balanced or neutral?

[37] Both Dr. Goldfinger and Mr. Lechcier-Kimel take the position the report is not balanced and neutral, but rather it advocates a position on behalf of the estate of Montor. As a result, Mr. Lechcier-Kimel submits the report should be expunged on the basis that it is not a neutral and impartial statement of facts.

[38] It seems to me the question of whether the report is neutral or balanced goes to the weight the court should give the report, if it is admitted. That is not the threshold issue before me; rather, it is a question for the motions judge to decide on the removal motion. I do not see it as a basis to expunge all or part of the report on this motion, although the moving parties will no doubt quite appropriately renew that argument on the removal motion.

Does the nature of the motion require an affidavit?

[39] Dr. Goldfinger and Mr. Lechcier-Kimel rely on the Court of Appeal's decision in *Re Confectionately Yours* [12] to support their position that this motion requires an affidavit from the Trustee. That case arose out of an appeal from the assessment of a receiver's and its counsel's fees. An outline of the receiver's fees had been contained in its report, as opposed to being verified by affidavit. The court held that this resulted in "insulating them from the far-ranging scrutiny of a properly conducted cross-examination." The court determined that a receiver should verify the remuneration it claims by affidavit. Doing so ensures the veracity of the time spent, and provides an opportunity to cross-examine. As a result of this decision, it is now common practice for Trustees/Receivers and lawyers to verify their accounts with brief affidavits stating the hours were spent and the rates are commensurate with rates

[12] 2002 CarswellOnt 3002 (O.C.A.)

charged by other firms doing the same kind of work. It is rare, however, for either a Trustee or a lawyer to be cross-examined on one of these affidavits.

[40] Mr. Lechcier-Kimel takes the position that a similar analysis to that in *Re Confectionately Yours* is necessary here. He suggests the purpose for which the report is proffered should determine whether the contents should be provided by affidavit instead. He reasons that if the Trustee is trying to protect its own position or its own interests on this motion it is in the same position as when it is seeking approval of its own fees. Since in those circumstances the Trustee is required to file an affidavit in support, Mr. Lechcier-Kimel infers this is a similar situation that requires an affidavit.

[41] I disagree. The issue of Trustee remuneration (or for that matter the remuneration of its counsel) is something that benefits only the Trustee. Here, the question to be ultimately determined is the removal of the Trustee. Under section 43(9), the court in making a bankruptcy order must appoint a Trustee. The court is to do so having regard to the wishes of the creditors, to the extent the court considers just. Generally, therefore, it is the creditors who choose the Trustee, whose role, among others, is to administer the estate for the benefit of the creditors. Under section 14 of the *Bankruptcy and Insolvency Act* the creditors are free to remove a Trustee and replace it with another of their choosing. Thus, the creditors' interests must be considered in the context of a removal motion. The issue of removal is not strictly personal to the Trustee. I cannot conclude this situation is akin to a Trustee seeking to be paid its fees. To the contrary, in these circumstances, it is entirely appropriate for the Trustee to deliver a report, as opposed to an affidavit.

Conclusion:

[42] The report is therefore admissible. It will be up to the judge hearing the removal motion to determine the weight to be given to it, or any part of it.

[43] Mr. Shea takes the position the moving parties' rights to cross-examine pursuant to Newbould J's order are now spent, and they have no further right to cross-examine. I disagree. Even if I had struck the report, I would have granted Farbers leave to file an affidavit instead. The moving parties would then have cross-examined.

[44] It seems to me it will be helpful to the judge hearing the motion to have the benefit of the limited cross-examine Newbould J envisioned. I will permit that cross-examination to proceed. The parties are meeting with Brown J on April 5 to set a new timetable for the removal motion. He can schedule the cross-examination. If the moving parties do not avail themselves this time of that right to cross-examine, they will be barred in the future from doing so, and the court hearing the removal motion will be free to draw whatever inferences it wishes from their failure to do so.

[45] In case the applicant has not been able to comply with paragraph [47] below before their 9:30 with Brown J, the parties will provide Brown J with a copy of this endorsement in the materials filed for the 9:30 on April 5.

[46] I heard brief submissions from the parties on the issue of costs before they knew the outcome of the motion. On the basis of those submissions, reasonable costs are $15,000 all inclusive. Farbers is entitled to those costs. Since the moving parties' positions were identical, my inclination is to have them bear those costs equally. If the parties disagree, they may make brief written submissions to me concerning the apportionment of those costs within 14 days, failing which an order will go requiring each of Dr. Goldfinger and Mr. Lechcier-Kimel to pay $7,500 on account of Farbers' costs.

[47] In an effort to bring some organization to the procedural history of this application, I also direct that the applicant prepare and maintain a continuing record of all endorsements and orders in this case. It is to be in a 3-ring binder, with a yellow cover and backing page titled "Endorsements Record". It is to include, in chronological order, a photocopy of every endorsement and order made in this case, separated by numbered tabs. It is to contain a Table of Contents, which is to be updated each time a new endorsement or order is made. All 9:30 endorsements are to be included as well. It will be the applicant's responsibility to ensure the Endorsements Record is provided with all other material for any further attendances in this case, including the trial.

_____

MESBUR J.

Released: 20110331

CITATION: Luigi Martellacci, Re 2014 ONSC 5188

COURT FILE NO.: 31-457461

DATE: 20140910

SUPERIOR COURT OF JUSTICE – ONTARIO
(BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY OF LUIGI MARTELLACCI aka LOUIE MARTELLACCI, of the CITY of TORONTO in the PROVINCE OF ONTARIO

BEFORE: Newbould J.

COUNSEL: *Mark A. Freake*, for the Trustee Grant Thornton Limited

Brandon Jaffe, for Amy McIntosh

HEARD: September 8, 2014

ENDORSEMENT

[1] This is an appeal by the Trustee of the bankrupt Luigi Martellacci from the decision of Master Jean sitting as a registrar in bankruptcy in which she held that a report filed by the Trustee in an appeal by Amy McIntosh from a disallowance of her claim was inadmissible evidence and that the Trustee was required to file a sworn affidavit if it wished to proffer evidence on the appeal.

[2] Amy McIntosh filed a proof of claim with the Trustee in respect to a 1967 Corvette which is in the possession of the Trustee. The Trustee later notified Ms. McIntosh that her claim was disallowed as she had produced insufficient evidence of her beneficial ownership interest in the Corvette.

[3] Ms. McIntosh served the Trustee with a notice of motion and supporting affidavit in which she set out her intention to appeal the Trustee's disallowance. In response, the Trustee delivered a Trustee's report. Counsel for Ms. McIntosh then inquired as to the authority that permitted the Trustee in a contested disallowance to file a report rather than an affidavit, but stated that if the Trustee agreed to submit to cross-examination the mischief would be addressed. Counsel for the Trustee responded with case authority and then by e-mail stated that the standard protocol was for counsel to ask the Trustee any questions about the Trustee's report and if not satisfied with the answers to seek leave to cross-examine. He further stated that the Trustee would be happy to follow this protocol except that he would consent to the cross-examination provided it was restricted to the questions raised and time limited.

[4] Counsel for Ms. McIntosh did not respond to the Trustee's proposal. One day before the hearing he filed an affidavit alleging that the Trustee had refused to permit cross-examination on the Trustee's report and at the hearing objected to the admissibility of the Trustee's report. The registrar held that the report was inadmissible.

[5] For the reasons that follow, the appeal is allowed. The report of the Trustee is admissible.

Analysis

[6] An appeal of a registrar's order will be allowed where it is demonstrated that the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor which led to a wrong conclusion. See *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 20 C.B.R. (5th) 220 at para 48 (Ont. C.A.) and Houlden, Morawetz and Sarra, *The 2014 Annotated Bankruptcy and Insolvency Act*, at I§54.

[7] In my view the registrar erred in principle and law in coming to her conclusion. She read more into the rules of practice than is provided and she failed to follow established authority binding on her.

[8] The registrar referred to BIA rule 11 which requires every application to the court to be made by motion and to BIA rule 13 which requires the party making the motion to file every affidavit in support of the motion, or the motion, as the case may be. Because the BIA rules do not specify what should be included in a responding motion record, the registrar looked at rule 39.01(1) of the rules of practice which states:

> Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

[9] The registrar then stated that the rules provide only for affidavits on motions. This cannot be correct. The rule does not say that evidence must be by affidavit. The rule is permissive to allow affidavits unless a statute or rule provides otherwise.

[10] Rule 37.10(1) of the rules of practice provides for the need to serve and file a motion record for a motion. Rule 37.10(2) provides what is to be included in a motion record and in what order. Rule 37.10 (2)(c) requires the motion record to contain "a copy of all affidavits and other material served by any party for use on the motion". As to this rule, the registrar said that the reference to "other material" referred to evidence that may be given because a statute or the rules provides for it, and as no statute or rule provided for a trustee's report on an appeal from a disallowance of a claim, the Trustee's report could not be filed.

[11] I do not read rule 37.10(2)(c) as limiting what "other material" may be used. The limitation to that rule by the registrar requiring "other material" to be authorized by statute or another rule is not contained in the rule and is not warranted. The rule is clearly intended to provide technical direction as to what and how materials are to be put together and filed with the court, and no more.

[12] The conclusion that the report was inadmissible because no statute or rule specifically authorized a trustee's report disregarded the common law. The case authority put before the registrar, namely the decision of Justice Mesbur in *Montor Business Corp. (Trustee of) v. Goldfinger* (2004), 75 C.B.R. (5th) 170 and the cases referred to therein were clear authority that

a trustee's report is admissible evidence and there was no appropriate basis to distinguish that authority.

[13] In *Goldfinger*, the trustee responded to a motion to remove the trustee by filing a trustee's report, and a motion was brought to strike the report on the basis that a trustee's report was not admissible evidence. Justice Mesbur held that the trustee's report was admissible evidence. She stated

> **11** Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA*, routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act*.

[14] Some of the arguments made on behalf of Ms. McIntosh in this case were made and rejected by Mesbur J. Regarding the rules of practice, Mesbur J. stated:

> **21** The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the Rules of Civil Procedure, and absent any contrary provision under the Bankruptcy Rules, the general Rules of Civil Procedure must apply. They say Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.
>
> **22** They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.
>
> **23** I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.
>
> **24** As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a

vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.

25 It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the Rules of Civil Procedure, prima facie admissible.

[15] Justice Mesbur also dealt with an argument that a trustee's report was inadmissible as being contrary to the hearsay rule. In dismissing this argument, she referred to a decision of Justice Farley in *Bell Canada International Inc., Re*, [2003] O.J. NO. 4378 as follows:

31 Farley J dealt with this in *Bell Canada International Inc. Re*, the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but ... to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."

32 In support of this proposition, Farley J quoted approvingly from Wigmore which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:

a) they are made by a public official - trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;

b) the Trustee makes the report in the discharge of a public duty or function - the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;

c) the reports are made with the intention they serve as a permanent record - as part of the court record, reports are permanent; and

d) the report is available for public inspection - as part of the court record, the report, like the court file, is open to public viewing.

> **33** In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies* which states that officers of the court (which would include Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in *ex. p James* (1874) 2 Ch. App 609 officers of the Court are obliged not only to act lawfully, but fairly and honourably."

[16] The registrar questioned the public authority aspect of a Trustee as follows:

> Mesbur J. referred to "due authority" or "public official" exception. In my view the trustee is appointed under the legislation to administer the estate, has certain duties and obligations and is an "officer of the court". Where I have difficulties with this line of argument is that the lawyers too are "officers of the court". There is no suggestion that lawyers could "report to the court" as opposed to file affidavit evidence. I see no reason why trustees should be given special standing in this regard.

[17] Apart from the fact that the conclusions of Mesbur J., and that of Farley J. in *Bell Canada International* quoted by Mesbur J., were so far as the registrar was concerned not a line of argument but rather authority binding on her, the comparison of a trustee and counsel was misconceived. While each may be said to be an officer of the court with duties commensurate with their position, they are not officers in the same capacity. A trustee is a party to a proceeding appointed under statutory authority, or by the court if an order is made to replace a trustee, with statutory duties and duties to the court and to all stakeholders. A lawyer retained by a client advocates for the interests of his or her client and as an officer of the court has a duty of candour and respect for the court. But the advocate is not a public officer in the sense that a trustee in bankruptcy is and is not appointed by the court.

[18] The registrar distinguished *Goldfinger* on the basis that it was a factually different case in that *Goldfinger* involved a motion to remove a trustee whereas this case involves an appeal from a disallowance of a claim by the Trustee. I do not see that as being a legitimate way to distinguish *Goldfinger*. The decisions of Mesbur J. in *Goldfinger* and of Farley J. in *Bell Canada International* were dealing with the principle of the admissibility of a report by a trustee in

Goldfinger and of a monitor in *Bell Canada International* in light of their positions as trustee and monitor, not just in light of the particular circumstance of each case.

[19] It was contended in argument that there is a distinction between an interim motion or proceeding and a final proceeding such as an appeal from an order disallowing a claim. I do not agree. There is no principled reason for the distinction. Nor is there a principled reason for distinguishing amongst a report of a monitor, a trustee in bankruptcy and a receiver. If the reasoning of the registrar were correct and a trustee's report could not be introduced as evidence unless a statute or rule specifically allowed it, it would mean that reports of receivers and monitors that are routinely and widely accepted in many proceedings, interim or final, contested or not, could no longer be used. In my view, a report of a trustee in bankruptcy, a monitor or a receiver is admissible in evidence regardless of the nature of the particular motion or application, and whether interim or final or contested or not, unless there is some statutory prohibition of the use of such a report. The rules of practice do not prevent these reports from being admissible evidence.

[20] The registrar accepted the position of Ms. McIntosh that her counsel should have an unfettered right to cross-examine the Trustee and that it was not appropriate to impose restrictions on the cross-examination. This conclusion ignores the practice in Ontario at least regarding cross-examination of court officers such as trustees, receivers and monitors.

[21] The general practice accepted in Ontario is that if a party has questions regarding a report of such a court officer, those questions should be put to the court officer. Generally in my experience, the court officer will answer the questions fully and any follow-up questions that may arise and cross-examination is not necessary. If there is some good reason to cross-examine the court officer, it can be ordered. I do not agree that a person has a *prima facie* right at large to cross-examine a court officer such as a trustee and I would not extend the practice in that way. See Farley J. in *Bell Canada International* at paras. 8 and 9 and his discussion of the limits on cross-examination of a court officer. I agree with his comments.

[22] In this case, counsel for the Trustee suggested that questions could be put to the trustee and that if Ms. McIntosh was not satisfied with the answers, an application to cross-examine the trustee could be made. That is the normal practice. Counsel for the Trustee went further and said he would consent to an order for cross-examination provided it was restricted to the questions raised and time limited. This seemed to be a sensible offer but it was quite open to counsel for Ms. McIntosh to put questions to the Trustee and if not satisfied with the answers move to cross-examine on such terms as required.

[23] I make one last point. The issue here is as to the admissibility of the Trustee's report, and not the weight to be given to it. Whether the Trustee could have filed other evidence, or chosen to file affidavit evidence, is not the issue. The weight to be given to the Trustee's report will be for the registrar dealing with the appeal from the disallowance of Ms. McIntosh's claim.

Conclusion

[24] The appeal is allowed. The Trustee's report is admissible evidence on the appeal from the disallowance of the claim of Ms. McIntosh. The appellant has requested that this court decide the issue rather than returning it to the registrar. I decline to do so, but direct that the appeal from the disallowance be heard by a different registrar.

[25] The Trustee is entitled to its costs of $1,500 inclusive of HST and disbursements to be paid by Ms. McIntosh within 30 days.

Newbould J.

Date: September 10, 2014

COURT FILE NO.: 02-CL-4553
DATE: 20031030

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, as amended (the "CBCA")

BEFORE: FARLEY J.

COUNSEL: *John T. Porter*, *Derrick C. Tay* and *Alan B. Merskey*, for BCI

Christine Snow, for Directors of BCI

James H. Grout, for the Monitor

W. Grant Worden, for BCE

J.L. McDougall, Q.C. and *Michael D. Schafler*, for Peter Legault

Frederick L. Myers, for Horizon

Robert Staley, for Hicks, Muse, Tate & Furst, Inc. and Davivo International Ltd.

HEARD: October 29, 2003

E N D O R S E M E N T

[1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

> (b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

[2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early

June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

[3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

[4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process – which it appears it was not – and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

[5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

[6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" – suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.

> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

[7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

[8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:
>
> > As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs

> of the Commercial List – cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.
>
> The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4^{th}) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines – The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

[9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

[10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion – and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

[11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

[12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

[13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

[14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

J.M. Farley

Released: October 30, 2003