File No. CI 20-01-26627

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. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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

Respondents.

MOTION BRIEF OF THE RECEIVER – QUESTIONS MOTION

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MOTION BRIEF OF THE RECEIVER – QUESTIONS MOTION

I. LIST OF DOCUMENTS

1. The Supplementary First Report of the Receiver dated April 27, 2020;

2. The Second Report of the Receiver dated May 27, 2020;

3. The Supplementary Second Report of the Receiver dated May 31, 2020;

4. The Third Report of the Receiver dated June 22, 2020;

5. The Fourth Report of the Receiver dated June 27, 2020;

6. The Supplementary Third Report of the Receiver dated June 29, 2020;

7. The Fifth Report of the Receiver dated July 6, 2020;

8. The Sixth Report of the Receiver dated August 3, 2020;

9. The Seventh Report of the Receiver dated September 10, 2020;

10. The Supplementary Seventh Report of the Receiver dated September 14, 2020;

11. The Eighth Report of the Receiver dated September 28, 2020;

12. The Supplementary Eighth Report of the Receiver dated October 12, 2020;

13. The Ninth Report of the Receiver dated November 2, 2020;

14. The Supplementary Ninth Report of the Receiver dated November 10, 2020;

15. The Second Supplementary Ninth Report of the Receiver dated December 30, 2020;

16. The Tenth Report of the Receiver dated January 21, 2021;

17. The Eleventh Report of the Receiver dated February 24, 2021;

18. Twelfth Report of the Receiver dated June 4, 2021;

19. The Affidavit of Greg Fenske affirmed September 7, 2021; and

20. Supplementary Twelfth Report of the Receiver, to be filed.

II. LIST OF AUTHORITIES

Tab

1. *Big Sky Living Inc., Re,* 2007 ABQB 249;

2. *Pinnacle Capital Resources Ltd. v Kraus Inc.,* 2012 ONSC 6376;

3. *Battery Plus Inc. Re,* [2002] OJ No 261 (Ont. SCJ [Commercial Division]); and

4. *Ravelston Corp., Re,* [2007] OJ No. 414 (Ont SCJ [Commercial List]).

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties (the "**Property**") of Nygård Holdings (USA) Limited ("**NUSA**"), Nygard Inc. ("**NI**"), Fashion Ventures, Inc. ("**FV**"), Nygard NY Retail, LLC (together with NUSA, NI and FV, the "**US Debtors**"), Nygard Enterprises Ltd. ("**NEL**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd. ("**879**"), 4093887 Canada Ltd. ("**887**"), and Nygard International Partnership ("**NIP**", and together with NEL, NPL, 879 and 887,the "**Canadian Debtors**", and together with the US Debtors, the "**Debtors**") pursuant to an Order (the "**Receivership Order**") of this Honourable Court made on March 18, 2020, as amended by way of the General Order made on April 29, 2020.

2. The Debtors have submitted 103 numbered questions (which, in fact, contain 262 total questions), for answers from the Receiver.

3. The Debtors have filed the Notice of Motion of the Debtors dated September 7, 2021, seeking:

(a) An Order that one or more representatives of the Receiver attend for cross-examination on the Twelfth Report of the Receiver dated June 4, 2021 (the "**Twelfth Report**");

(b) In the alternative, an Order directing the Receiver to answer the questions (the "**262 Questions**") posed by the Debtors allegedly arising out of the

Twelfth Report, which are attached as Schedule "A" to the Notice of Motion of the Debtors dated September 7, 2021, within 15 days, as well as follow-up questions; and

(c) Costs of the motion on a substantial indemnity basis.

4. The Receiver files this brief in order to set out its position with respect to the relief sought and in response to the Affidavit of Greg Fenske affirmed September 7, 2021.

5. The Receiver files the Supplementary Twelfth Report of the Receiver dated September 14, 2021 (the "**Supplementary Twelfth Report**") concurrently with this brief.

Cross-Examination of the Receiver

6. As set out by D. Lee J. in *Big Sky Living Inc., Re,* 2007 ABQB 249 ("*Big Sky*"), cross-examination of a Court-appointed Receiver, being an officer of the Court, is an exceptional circumstance and a party seeking to cross-examine a Receiver must establish a cogent or compelling reason why the Receiver should be subject to cross-examination. Additionally, D. Lee J. notes that:

> … Receivers should not be subject to harassment for doing their job, particularly given that most Receivers in doing their jobs usually offend the parties against who the receivership is ordered. This is particularly so if the parties against whom the receivership is ordered against are using the examination of the Receiver as a fishing expedition, or to allow them to establish the basis of potential lawsuits against the Receiver, at the cost of the petitioning party in this case the HongKong Bank who instituted the receivership. [emphasis added]

Big Sky Living Inc., Re, 2007 ABQB 249 at para 4 ("*Big Sky*") [Tab 1]

7. The Debtors have provided no explanation as to why cross-examination of the Receiver is appropriate in the circumstances, nor have the Debtors indicated the purpose of requested cross-examination.

8. The Debtors' evidence is that:

(a) the Receiver filed the Net Receivership Proceeds Motion (as defined in the Twelfth Report) and the Twelfth Report;

(b) The Debtors oppose the Net Receivership Proceeds Motion;

(c) The Debtors provided the Receiver with the 262 Questions related to the Twelfth Report;

(d) The Receiver advised it would not answer the 262 Questions posed;

(e) The Debtors requested that the Receiver answer the 262 Questions; and

(f) The Receiver reiterated that it would not answer the 262 Questions.

Affidavit of Greg Fenske affirmed September 7, 2021 (the "**Fenske Affidavit**"), at paras 2-8

9. The Receiver notes that:

(a) On July 16, 2021, the Receiver was provided with the 262 Questions and advised by the Debtors that they "need answers by the end of the month". The Debtors provided no explanation as to why answers to the 262 Questions were required by the end of the month, or at all;

Fenske Affidavit, at Ex. "C"

(b) On July 30, 2021, the Receiver responded to the Debtors' request indicating that the 262 Questions are objectionable for various reasons, including that many were already addressed within the materials filed with the Court, earlier e-mail correspondence between the parties and others were argumentative, frivolous, or irrelevant. Moreover many of the 262 Questions could be answered by the Respondents themselves. Most importantly, the Receiver indicated that:

> …responses to these questions are not required to enable NPL to address the key issue in the Net Receivership Proceeds proceedings; that is, that, based on the proper application of the law respecting subrogation as it relates to *The Mercantile Law Amendment Act*, NPL/NEL and their ultimate owner, Mr. Nygard, have no "equity" interest in net receivership proceeds, even on the "best case" which you have asserted for your client. We should add that the same is true in a case where the net proceeds of the Shanghai building sale (of which the Receiver has just learned) are included.
>
> It would be extremely time-consuming and costly for the Receiver to respond to your client's questions, at the very considerable expense of creditors. It is clear that the laundry list of questions were conceived with no consideration for whether answers to them are genuinely needed to enable your client to address the key issues before the Court in the Net Receivership Proceeds proceedings. In the result, as they presently stand, this questioning process is simply harassing, and the Receiver will not be answering the questions.
>
> We are available to discuss this matter with you further, to determine if there are, in fact, questions the answers to which are genuinely and truly needed in order for the proper purpose of clarifying or amplifying the Receiver's materials to address the key issues we have described above.

Fenske Affidavit, at Ex "E"

(c) On August 4, 2021, the Debtors' responded indicating that:

> …All of the questions that have been posed, are needed for the purpose of putting a comprehensive record before the Court to assist the Court in adjudicating upon the outstanding issues.
>
> Fenske Affidavit, at Ex. “F”

(d) On August 11, 2021, the Receiver indicated that its position remained as described in its correspondence dated July 30, 2021;

Fenske Affidavit at Ex. “G”

(e) The Receiver and the Debtors have engaged in significant discussions regarding each party’s position on the key issues in relation to the Net Receivership Proceeds Motion and, in the course of said discussions, the Receiver has clarified and amplified various aspects of the Twelfth Report; and

(f) The Debtors’ made no further attempts to work cooperatively with the Receiver to determine whether any questions are necessary to enable the Debtors to respond to the key issues in relation to the Net Receivership Proceeds Motion.

10. The Receiver respectfully submits that the Debtors’ evidence fails to establish exceptional circumstances that would give rise to any right to cross-examination of a representative of the Receiver in the circumstances. As such, the Debtors’ request for an Order compelling the Receiver to attend for cross the cross-examination ought to be dismissed.

The 262 Questions

11. A summary of the general principles of law as it relates to the duty of a Court-appointed receiver to answer questions of interested parties in a receivership is set out in *Pinnacle Capital Resources Ltd. v Kraus Inc.,* 2012 ONSC 6376 ("*Pinnacle*") as follows:

> A court-appointed receiver is an officer of the court and is in a fiduciary capacity to all stakeholders: *Nash v. CIBC Trust Corp.*, 1996 CarswellOnt 2185 (Ont. Gen. Div.) at para. 6. The fact that the receiver owes fiduciary duties to stakeholders does not, however, entitle a stakeholder to go on a fishing expedition for information: *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009), 81 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) at para. 18.
>
> A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues. In addition, and as noted by Farley J. in *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]) at para. 9, the objectivity and neutrality of the officer of the court is also a factor to consider. [Emphasis added]

Pinnacle Capital Resources Ltd. v Kraus Inc., 2012 ONSC 6376 at paras 27-28 [Tab 2]

12. Courts have held that questions asked to the Receiver must have a demonstrably valid basis and purpose. Questions that are irrelevant, unreasonable, argumentative, and/or may be answered by the party asking the question, have been held to constitute a fishing expedition and/or harassment of a receiver.

Pinnacle, supra at paras 29-33 [Tab 2]

Big Sky, supra at paras 9-11 [Tab 1]

13. Moreover, in L.A. Pattillo J. in *Pinnacle, supra,* the Court held that the receiver was not required to answer some 114 questions posed to it by an interested party. In dismissing a motion to compel the receiver to answer the questions, L.A. Pattillo J. noted as follows:

> 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.
>
> … The Receiver duly and thoroughly investigated and provided all relevant facts it was able to obtain to Equistar... 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.

Pinnacle, supra at paras 30-31 [Tab 2]

14. The Debtors provided the Receiver with a list questions of 103 numbered questions purportedly relating to the Twelfth Report and the Motion Brief of the Receiver dated July 21, 2021. Although the questions are numbered 1 through 92 with respect to the Twelfth Report and 45 through 56 with respect to the Motion Brief, the vast majority of the questions are compound questions. As such, the number of questions asked is substantially higher than 103. As noted in the Supplementary Twelfth Report, a review of

the questions reveals that the Debtors actually asked a total of 262 questions.

15. As outlined at paragraph 8 herein, the Debtors have provided no demonstrably valid basis and purpose for the 262 Questions posed to the Receiver. At no time have the Debtors indicated that answers to the 262 Questions are required to enable the Debtors to respond to the key issues in Net Receivership Proceeds Motion. Rather, the Debtors assert that responses to the questions are necessary to put a comprehensive record before the Court and to assist the Court in adjudicating upon the outstanding issues.

16. The Debtors are entitled to file responsive materials in order to assist the Court in adjudicating upon the outstanding issues.

17. The Receiver has requested that the Debtors' provide a list of questions which they believe may be relevant to the key issues. However, the Debtors have not done so and continue to assert that the Receiver ought to answer all 262 Questions posed without providing a valid basis that would justify the Receiver undertaking the extremely time-consuming and costly exercise required to respond to the 262 Questions, at the very considerable expense of creditors.

18. The Debtors remain unwilling to work cooperatively with the Receiver to determine if there are questions which genuinely and truly require a response in order for the proper purpose of clarifying or amplifying the Receiver's materials to address the key issues in the Net Receivership Proceeds Motion.

19. As such, the Receiver submits that it ought not to be required to answer the

262 Questions posed by the Debtors, or any of them.

20. In the alternative, the Receiver submits that the Debtors ought to be required to provide, in relation to each question, a demonstrably valid basis and purpose for each question in connection with the key issue in the Net Receivership Proceeds proceedings; that is, that, based on the proper application of the law respecting subrogation as it relates to *The Mercantile Law Amendment Act*, NPL/NEL and their ultimate owner, Mr. Nygard, have no “equity” interest in net receivership proceeds, so as to enable the Court to provide proper advice and direction as to which of the 262 Questions, if any, require an answer, and to consider the issue of costs involved in having the Receiver respond to such questions.

21. In the further alternative, the Receiver objects to the 262 Questions posed by the Debtors on the basis that the questions, respectively,:

(a) are answered in the Twelfth Report, or previously filed materials, including certain of the Debtors’ own materials;

(b) are within the Debtors’ own knowledge;

(c) are not questions, but a demand that the Receiver produce documents or create new documents;

(d) are made in reference to the Motion Brief of the Receiver dated June 21, 2021 and therefore improper;

(e) are irrelevant;

(f) are argumentative, misleading, frivolous and/or assume facts not in evidence;

(g) call for speculation;

(h) call for a legal conclusion;

(i) are subject to solicitor-client privilege; and/or

(j) are harassing and/or abusive.

22. Overall, the 262 Questions are prejudicial to creditors as responding to the questions would consume an inordinate amount of time and expense as compared to the probative value of the answers. The costs of such an exercise would be borne by unsecured creditors.

23. Particulars of the Receiver's objections are detailed below.

Answered

24. The Receiver objects to a large number of the 262 Questions on the basis that they are answered in the Twelfth Report, or previously filed materials, including certain of the Debtors' own materials, which are publically available on the Receiver's website.

25. The Receiver submits that it should not be required to expend time and resources providing answers to questions that are answered in materials that are readily available to the Debtors. Similarly, the Receiver should not be required to direct the Debtors to the answers within the materials as the Debtors are capable of doing so without involvement of the Receiver.

26. The Debtors have been actively involved in the Receivership proceedings over the last 18 months and have filed responsive materials to most, if not all, of the Receiver's reports. The Debtors are keenly aware of the contents of the Receiver's reports and their own materials and ought to be able to navigate through the materials without assistance.

27. Examples of such questions include questions 10, 21 and 44.

28. Question 10:

> Provide a sub-schedule that lists separately the fees of the Receiver, TDS and Katten.

29. A schedule which lists separately the fees of the Receiver, TDS and Katten is attached as Appendix "O" to the Twelfth Report. To the extent that the Debtors are seeking a sub-schedule of the fees of the Receiver, TDS and Katten from the appointment date, the question is irrelevant as the Receiver's fees and the fees of counsel, up to the Eleventh Report of the Receiver dated February 24, 2021 have already been approved by the Court and all prior challenges with respect to fees have been discontinued.

30. Question 21:

> Please provide copies of the notices sent by the Receiver pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, including a list of the addressees.

31. The notices sent by the Receiver pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act* are posted on the Receiver's website.

32. Question 44:

> With respect to para. 97, please elaborate on the Receiver's allocation. Explain how the allocation to a particular Debtor "would not yield a different outcome".

33. Paragraphs 92 to 130 of the Twelfth Report provide a detailed analysis on the Receiver's allocation. The answer to the second portion of question 44 is answered by reading the full sentence at the end of paragraph 97 of the Twelfth Report:

> It should be noted that the repayment of the Receiver's Borrowings (totaling $30,082,000) and, therefore, satisfaction of the Receiver's Borrowing Charge (which charged all Property), is captured within "Corporate Overhead" expenses in the Separate Corporation Analysis, as the Receiver's Borrowings were used to fund receivership expenses included as Disbursements. The Receiver did not allocate Receiver's Borrowings to any particular Debtor and notes that this exercise would not yield a different outcome as the Receiver's Borrowings were used only for payment of specific expenses and not to accumulate cash. [Emphasis added]
>
> Twelfth Report of the Receiver dated June 4, 2021 at para 97.

Within the Debtors' Knowledge

34. Similarly, the Receiver objects to a significant portion of the 262 Questions on the basis that they relate to information that is within the Debtors' own knowledge.

35. The Receiver submits that it should not be required to expend time and incur costs to respond to questions that to which the Debtors already know the answer, or that are within the Debtors knowledge. The Debtors operated business until March 18, 2020. As such, they have knowledge as to the state of affairs of the debtors up to the date the Receiver was appointed. The questions are abusive and a waste of Court time and resources.

36. Examples of such questions include the following:

(a) Question 4:

> Of the substantial amount of data and computer hardware that is held by the Receiver, how much is the property or data of NPL?

(b) Question 13:

> With respect to the $1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12th Report and attached as Appendix I:
>
> (i) has the Receiver examined the lease between NPL and NIP to see whether the tenant was responsible to pay for the leasehold improvements? if so, what is the answer?
>
> (ii) is this invoice accounted for in the intercompany accounts between NIP and NPL?
>
> (iii) does the Receiver agree that the contract started in 2016 (per the 1st revision reference) and that as at Jan 27, 2018, $1,097,339; 84% of the total, had already been invoiced by the contractor? …

(c) Question 58:

> Was CRA a creditor at the date of Receivership or did it become a creditor as a result of the post-receivership liquidation?

Not a Question – Demand for Documents

37. The Receiver objects to a number of the 262 Questions on the basis that they are not questions, but, rather, are demands for document production or for the Receiver to create new documents for the Debtors.

38. In *Battery Plus Inc. Re,* [2002] OJ No 261 (Ont. SCJ [Commercial Division]), Greer J. considered a motion of a shareholder of a debtor corporation for leave to examine witnesses regarding documentation and information provided by a receiver and to compel the receiver to produce certain documents. In dismissing shareholder's requests for information from the hard drives of company employees and executives, from the receiver about its own records and time spent, and documentation involving prospective purchasers:

> The Interim Receiver is acting in a fiduciary capacity to all parties in the proceedings. See: *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 286. Therefore, the Interim Receiver must respond to reasonable requests for information from Badr, as well as from prospective purchasers. On the other hand, the position of the party making the request, must be taken into account. No one knows more about how he operated the companies than Badr, himself. If he cannot prepare a reasonable list of specific documents, as opposed to broad sweeping categories, in order to assist him to prepare his affidavits, he is not acting in a reasonable fashion. Mr. Justice Ground speaks to the relevancy of such documents in *Nash v. CIBC Trust Corp.*, [1996] O.J. No. 1833 (Ont. Gen. Div.), DRS 96-13495. He notes at p.2, para. 6, that investors are to receive the same information as the other parties in the litigation. The Motion before Ground J., however, was a Motion to remove the solicitors of record for the Receiver, and was not a Motion on what documentation the Receiver must provide to the parties and to the owner/director.
>
> In *Alberta Treasury Branches v. Hat Development Ltd*. (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.), the Court points out that the directors of the company in receivership, did not have the residual power to interfere with the ability of the receiver to manage the company. Therefore, Badr had no right to cause his counsel to write directly to any of the prospective purchasers of Battery that the Interim Receiver was dealing with. Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in

> such situation between the receiver-manager and with the people involved in the receivership:
>
> > ...does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.
>
> To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents musts relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition. [Emphasis added]

Battery Plus Inc. Re, [2002] OJ No 261 (Ont. SCJ [Commercial Division]) at paras 19-21 [Tab 3]

39. The Debtors have requested documents and information that are irrelevant, within the Debtors' own knowledge, records of the Receiver, and documents that have already been provided and/or are publically available on the Receiver's website.

40. The Debtors have not indicated the purpose of their requests or displayed the relevance of such requests. The Receiver should not be required to spend time and incur cos responding to the Debtors' requests for information and documents for no demonstrated purpose.

41. Examples of such "questions" include as follows:

(a) Question 12:

> Provide a sub-schedule of borrowing interest and fee payments on the Credit Facility that also ties into/reconciles

> to the Receiver's Borrowings and Distribution to Lenders set out in the Receipts and Disbursements statement.

(b) Question 49:

> … Please update such [intercompany] balances from the date of the last audited financials until the date of the receivership.

Questions regarding the Motion Brief of the Receiver

42. The Receiver objects to certain of the 262 Questions on the basis that they relate to the Motion Brief of the Receiver dated June 21, 2021.

43. Parties to litigation are not entitled to cross-examine, or otherwise question, another party on the content of a legal brief filed with the Court. Questioning a receiver, or a party to any litigation, on the content of a motion brief is inappropriate and unreasonable.

44. The Debtors are entitled to file a responsive brief which sets out their challenges to the Receiver's position and contains legal argument in relation to the matters at issue. The Debtors should not be permitted to argue their case and/or attempt to challenge the legal analysis contained in the Receiver's motion brief by way of written questions to the Receiver.

Irrelevant

45. The Receiver objects to a large number of the 262 Questions on the basis that the questions are entirely irrelevant.

46. The majority of irrelevant questions pertain to activities, professional fees

and interim receipts and disbursements that have already been approved by this Honourable Court. Such questions are irrelevant as they pertain to matters that have been reviewed and approved by this Honourable Court and are no longer at issue.

47. The Receiver should not be required to expend time and resources answering questions that are not probative of a fact in issue.

48. Examples of such questions include the following:

(a) Question 24:

> With respect to para. 46 (d), which former employees did the Receiver retain? Produce the independent contractor agreements.

(b) Questions 72 and 74:

> With respect to para. 157, is the “nerve centre” for Royal Bank of Canada’s business, Royal Bank Plaza in Toronto? If not, where is it? …
>
> With respect to Amazon (worldwide), does it commonly present as an integrated corporate enterprise that until recently was managed by Jeff Bezos?

(c) Question 83:

> With respect to paras. 186-187, does the Receiver know whether NPL could have leased out its properties to arm’s length lessees at rates that are higher than NIP’s contractual arrangements?

(d) Question 56 with respect to the Motion Brief of the Receiver:

> Richter Advisory Group Inc. has acted as Receiver for real estate development companies. Would Richter advise

> whether real estate developers commonly use single-purpose companies for each development? If so, please confirm that accounting/bookkeeping is commonly done at the developer's office for all companies in the group. Please confirm that this common feature of real estate developers does not lead to consolidation of the assets and liabilities of all of the companies in the group. Please also confirm that consolidation in those circumstances may lead to statutory breaches of trust by allowing trades of development A to benefit from the assets of development B.

Argumentative, Frivolous Misleading and/or Assume Facts not in Evidence

49. The Receiver objects to a significant portion of the 262 Questions on the basis that the questions are argumentative, frivolous, misleading and/or assume facts not in evidence.

50. The Receiver submits that it should not be required to answer questions which require that the Receiver accept an inference or fact that has not been established, constitute argument put forth in the guise of questioning, and/or misstate the Receiver's prior evidence.

51. Examples of such questions include the following:

(a) Question 28:

> With respect to para. 46(s), which vehicles were "purportedly transferred"? What is meant by "purportedly"?

(b) Question 38:

> What makes the analysis on a separate corporation basis complex as stated in para. 89? Has the Receiver failed to maintain records that causes complications to the analysis?

Has the Receiver made an analysis? Why not? Detail the analysis for subparagraphs (a)-(d)

(c) Question 56:

With respect to para. 122, on what basis is the Receiver's equal allocation to NIP and NPL "fair" in light of NIP having received the benefit of the White Oak advances?

(d) Question 46 with respect to the Motion Brief of the Receiver:

What further corporate formalities does the Receiver believe should have been followed, beyond accounting for such loans and booking them in the intercompany accounts, as was done and reporting such intercorporate loans in the audited financial statements and the notes to the audited financial statements as was done?

Calls for Speculation

52. The Receiver objects to certain of the 262 Questions on the basis that the questions call for speculation.

53. The Receiver submits that it should not be required to answer questions which call for speculation or hypothetical answers, rather than facts or opinion properly within the scope of the Receiver's duties. Certain questions posed by the Debtors would require the Receiver to speculate as to the outcome of hypothetical situations based on what the Debtors could have, but did not, do, the thoughts and analysis of other experts, and/or the corporate structure of unrelated companies. As such, the Receiver should not be required to answer the questions.

54. Examples of questions that call for speculation include the following:

(a) Question 29:

> With respect to para. 48, how did the attacker enter the password-protected servers? …

(b) Question 60:

> With respect to para. 129, what other obligations “may” NPL have? Details of quantums…

(c) Question 89:

> With respect to para. 197 (a), are there any “other direct liabilities of NPL which the Receiver knows about”? If not, isn’t that a possibility regarding any corporation in receivership?

Calls for a Legal Conclusion

55. The Receiver objects to a number of the 262 Questions on the basis that the questions call for a legal conclusion.

56. The Receiver submits that the questions which require that the Receiver come to a legal conclusion are inappropriate and improper. The Receiver is not in a position to provide a legal opinion to the Debtors. The Debtors are entitled to undertake legal research and file a brief of law with the Court which outlines their position and argument with respect to the application of the law to the facts in issue.

57. Examples of questions that call for a legal conclusion include the following:

(a) Question 18:

> Has the Receiver considered or established if any consultant may be liable for damages in relation to the ransomware attack?

(b) Question 39(iii):

> With respect to para. 91 (a) – (d), …
>
> (iii) …Why is reasonableness relevant to the issue of consolidation?

(c) Question 43:

> With respect to para. 96, please explain why the posting of security by NPL to secure the Landlord's Charge would render NPL liable for the Landlord's Charge.

Privileged Information

58. The Receiver objects to certain of the 262 Questions on the basis that the Debtors are expressly seeking information that is subject to solicitor-client privilege.

59. The Debtors assert that the Receiver has waived privilege by mentioning that it received legal advice in the Twelfth Report.

60. In *Ravelston Corp., Re,* [2007] OJ No. 414 (Ont SCJ [Commercial List]), it was held that the receiver had not waived privilege by making reference in a report to the fact that it worked with counsel to formulate its position and took into account certain factors. In finding that solicitor-client privilege had not been waived by the receiver, Cumming J. made the following comments:

> CBCC cites the reference by the Receiver in s. 4.1 of the Eighteenth Report that the Receiver worked closely with its counsel during May and June, 2006 "to formulate a position"

> relating to a proposed *nolo contendere* plea, taking into account certain factors. …
>
> The Receiver has refused to provide access to CBCC to legal opinions underlying the Receiver's determining that the Plea Agreement should be executed. The Receiver claims that such information is subject to solicitor-client privilege.
>
> … The principle that communications between a solicitor and his/her client are privileged is recognized as fundamental to the administration of justice. *Solosky v. Canada*, [1980] 1 S.C.R. 821 (S.C.C.).
>
> There can be a waiver of privilege where it is shown the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive such privilege. There is no evidence in the situation at hand that the Receiver voluntarily intended to waive privilege.
>
> There can also be a waiver of privilege even in the absence of an intention to waive, "where fairness and consistency so require". *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C. S.C.)) at paras. 6-10.
>
> … The evidentiary record does not establish any arguable unfairness such that it can be asserted that privilege should fall away. In my view, there is not any aspect of "fairness" in the situation at hand that comes into play such that the normative sanctity to solicitor-client privilege is to be overridden.

Ravelston Corp., Re, [2007] OJ No. 414 (Ont SCJ [Commercial List]) at paras 41-47 [Tab 4]

61. The Receiver did not intend to waive privilege by mentioning that it received advice from counsel. The Debtors have not established any arguable unfairness that can be asserted in the circumstances. The normal sanctity to solicitor-client privilege ought to be upheld. As such, the Receiver should not be required to answer such questions.

62. In addition, Receivers are required to file publicly-available copies of detailed accounts for services in connection with the receivership, and those of the

Receiver's counsel, which inevitably disclose that the Receiver has obtained legal advice, and cannot be said to have waived privilege simply by reason of having made such disclosures.

63. Examples of such questions include the following:

(a) Question 40:

> With respect to para. 94 (a), please share the advice which the Receiver received from TDS, including support for such advice.

(b) Question 65:

> What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133?

Harassing / Abusive

64. The Receiver objects to a significant number of the 262 Questions on the basis that the questions are harassing and/or abusive.

65. The manner in which the questions are posed is generally misleading, harassing, sarcastic and abusive. A number of the misleading, harassing and/or abusive questions contain baseless allegations or insinuations of impropriety and/or lack of diligence on the part of the Receiver.

66. The manner in which the questions are posed distract from the issues and the fact-finding and truth-finding Court process, and constitute inappropriate criticism, sarcasm and harassment, which seek to undermine the Receiver, a Court-appointed officer, and the integrity of the Receivership process. The following are examples of such

questions:

(a) Question 32:

With respect to para. 69, how does the Receiver have an interest in the proceeds of the disposition of the Falcon Lake and Fieldstone properties “to maximize unsecured creditor recoveries”? Does the Receiver owe a fiduciary duty to NPL? To NEL? To Peter Nygard?

(b) Question 38:

What makes the analysis on a separate corporation basis complex as stated in para 89? Has the Receiver failed to maintain records that causes complications to this analysis? Has the Receiver made an analysis? Why not?

(c) Question 42:

Did the Receiver neglect to keep track of payroll liability of each Debtor? Ditto re professional fees?

(d) Question 50:

With respect to paras. 109-110, the Receiver’s accounting treatment differed from the Debtors because the Court held that the borrowers under the loan agreement were NI, not NIP. The Court relied on the express wording in the loan agreement, notwithstanding that the advances from White Oak went directly to NIP. Correct?

(e) Question 53:

Are paras. 113-123 argument that the Receiver intended to advance in its brief rather than in its report.

(f) Question 87:

What duty has the Receiver extended to NPL and its creditors in applying for a consolidation order?

(g) Question 92:

> With respect to para. 201, is the basis which a Court may permit a bankruptcy assignment by a Receiver to reverse statutory tax priorities and/or to exercise rights of examination under s.163(1) of the BIA? If not, what facts would lead a court to authorize a Receiver to assign?

(h) Question 45 with respect to the Motion Brief of the Receiver:

> Has the Receiver not been approving and paying the wages for all employees throughout the receivership? If that is the case, can the Receiver explain why it would not already know the breakdown of liability for employees of NIP and NPL/NEL? On the basis that it must already know this, explain how this point is relevant to NPL and NEL?

67. These types of questions constitute a fishing expedition to see if the Debtors can uncover or insinuate some sort of impropriety. In that regard, it is instructive that the Debtors have provided no evidence of impropriety during the course of the receivership.

68. Based on the foregoing, the Receiver respectfully submits that the Debtors motion ought to be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2021.

THOMPSON DORFMAN SWEATMAN LLP

Per: "G. Bruce Taylor"
G. Bruce Taylor / Ross A. McFadyen /
Mel M. LaBossiere
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

2007 ABQB 249
Alberta Court of Queen's Bench

Big Sky Living Inc., Re

2007 CarswellAlta 489, 2007 ABQB 249, [2007]
A.W.L.D. 2012, 156 A.C.W.S. (3d) 1071, 32 C.B.R. (5th) 74

In the Matter of The Insolvency of Big Sky Living Inc.

D. Lee J.

Heard: April 10, 2007
Judgment: April 16, 2007
Docket: Edmonton BK03-97916

Counsel: Roger C. Stephen for Applicants, Peter Leduc, Norman Seguin
J.H. Hockin for KPMG Receiver of Big Sky Living Inc., HSBC Bank Canada

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Headnote

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles

Cross-examination — PL and NS applied for order requiring receiver to attend for cross-examination on its filed report — Application adjourned pending further submissions — Applicants failed to provide affidavit in support, and in oral submissions failed to give particulars as to questionable conduct receiver was allegedly involved in — Cross-examination of receiver, who is officer of court, is exceptional circumstance, and receivers should not be subject to harassment for doing their job, particularly if parties against whom receivership is ordered against are using examination as fishing expedition, or are allowed to establish basis of potential lawsuits against receiver at cost of petitioning party who instituted receivership — Applicants were given time-limited opportunity to put in writing particulars of wrongdoing alleged in receivership, or alternatively, applicants could provide court with specific questions for receiver which could be answered by way of written interrogatories or through cross-examination.

Table of Authorities

Cases considered by *D. Lee J.*:

Big Sky Living Inc., Re (2007), 2007 ABQB 20, 2007 CarswellAlta 25, 28 C.B.R. (5th) 1 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135 (Ont. C.A.) — considered

APPLICATION for order requiring receiver to attend for cross-examination on its report.

***D. Lee J.*:**

1 The Applicants Peter Leduc and Norman Seguin seek an order requiring Tim Reid of KMPG Inc. to attend at the law offices of their solicitor Roger C. Stephens to be cross-examined on the the report of the Receiver dated and filed January 12, 2007. I originally dealt with this matter on January 9, 2007 when Mr. Leduc and Mr. Seguin applied for the following relief:

> 1. An Order suspending the sale of the unsold lands which remain the subject matter of this Receivership, namely, twenty-three lots (the "Lands") to Ashton Homes Ltd. ("Ashton") pending further Order of this Court;
>
> 2. An Order requiring the Receiver to provide an accounting and report to this Court respecting all sales of the lands governed by this receivership and the parties' performance under the purchase and sale agreement between the Receiver and Ashton;
>
> 3. An Order requiring the Receiver of Big Sky Living Inc., KPMG Inc., to obtain an appraisal of the Lands;
>
> 4. An Order requiring the Lands to be listed and sold on the open market to the highest bidder.

2 I declined to granted any of the relief sought in the January 9, 2007 motion, and any attempt to cross-examine the Receiver would have to await his Report. This is discussed in my written Reasons dated January 11, 2007, now reported at 2007 ABQB 20 (Alta. Q.B.).

3 Following the issuance of the Receiver's latest report, the Applicants Mr. Leduc and Mr. Seguin through their counsel Mr. Stephens submitted that the report "raises many questions with respecting the conduct of the receivership, and in particular the continued sale of lands at prices established in 2001, despite the protests of the Applicants". No Affidavit in support of this motion to cross-examine the Receiver is made either by Mr. Leduc or Mr. Seguin. The Receiver's latest report dated January 12, 2007 is quite extensive. In oral submissions Mr. Stephens is not able to give the Court many, if any, particulars as to the questionable conduct that he says the receiver is involved in.

4 Cross-examination of a Receiver, who is an officer of the Court, is an exceptional circumstance, and Receivers should not be subject to harassment for doing their job, particularly given that most Receivers in doing their jobs usually offend the parties against who the receivership is ordered. This is particularly so if the parties against whom the receivership is ordered against are using the examination of the Receiver as a fishing expedition, or to allow them to establish the basis of potential lawsuits against the Receiver, at the cost of the petitioning party in this case the HongKong Bank who instituted the receivership.

5 The law in this area was described in my written Reasons for Judgment in *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) and 2004 ABQB 423 (Alta. Q.B.). More recent cases from the Ontario Courts have confirmed the circumstances in which an examination of a Receiver is appropriate.

6 In *Ravelston Corp., Re*, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]) Cumming, J. of the Ontario Superior Court of Justice (Commerical List) stated the following criteria at paragraphs 37 and 38: —

> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours, Inc., Re* (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons*

with Developmental Disabilities v. Aboriginal Partners & Youth Society, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)

38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:

> [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 [Re Confectionately Yours*] 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.

7 The Ontario Court of Appeal in 2007 ONCA 135 (Ont. C.A.) concluded that there was not reason to interfere with the motion Judge's decision in *Ravelston Corp., Re*.

Conclusion

8 As matters presently stand, Mr. Stephens has not been able to show the Court any cogent or compelling reason why the Receiver should be subject to a cross-examination. However, I am prepared to give Mr. Stephens a further opportunity to put in writing the particulars of the wrongdoing that he is alleging in this Receivership. I am also prepared to give Mr. Stephens the opportunity, in the alternative, to provide the Court with specific questions for the Receiver, which the Receiver could answer by way of written interrogatories or through cross-examination.

9 This list of questions however must have a demonstrably valid basis and purpose, in accordance with the principles described above.

10 Any cross-examination of the Receiver, or any questions that I direct the Receiver to answer, will also have to be dealt with in a procedurally fair manner, and the costs involved in having the Receiver answer these questions or be cross-examined, has to be dealt with.

11 Mr. Stephens will have until April 24, 2007 to produce particulars as to the improprieties he believes exists in this Receivership, as well as to provide a list of questions, and the reasons the questions need to be asked and answered. Mr. Hockin will have until May 8, 2007 to respond to the arguments put forward by Mr. Stephens, to advise which questions, if any, are acceptable, and the objection that he has to the Receiver answering the remainder of the questions proposed.

Order accordingly.

End of Document

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

Pinnacle Capital Resources Ltd. v. Kraus Inc.

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

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

L.A. Pattillo J.

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

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

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

Subject: Insolvency; Corporate and Commercial; Estates and Trusts

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Questions posed by creditor — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to provide answers to questions posed by creditor — Motion dismissed — Majority of questions posed were not related to creditor's s. 81.1 claim and were mere fishing expedition looking for impropriety by receiver — Receiver acted reasonably and in accordance with duties in responding to questions and had no further information relating to creditor's claim — Further questions were irrelevant and unreasonable.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Questions posed by creditor — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to provide answers to questions posed by creditor — Motion dismissed — Majority of questions posed were not related to creditor's s. 81.1 claim and were mere fishing expedition looking

for impropriety by receiver — Receiver acted reasonably and in accordance with duties in responding to questions and had no further information relating to creditor's claim — Further questions were irrelevant and unreasonable.
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
Confidential information — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order varying sale and approval and vesting order by unsealing confidential appendices — Motion adjourned — Given circumstances in which appendices were sealed, it was important to give secured creditor involved in sale of companies opportunity to establish documents should remain confidential — Motion relating to unsealing of confidential appendices to be brought back on proper notice to secured creditor.
Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous
Payment of claim — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to pay creditor $35,425.25 — Motion dismissed — Pursuant to sale agreement and vesting order, where purchaser paid receiver in trust for goods used or consumed, cash to be disposed in accordance with agreement — Under agreement money held in trust by receiver could not be paid out until agreement was reached by receiver, creditor and purchaser, or until court order was made for disposition.
Debtors and creditors --- Receivers — Discharge of receiver — General principles
Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Receiver and companies brought motion for order discharging receiver and releasing receiver from further obligations as receiver on filing of discharge certificate — Motion granted — Purposes of receiver's appointment were complete — In absence of evidence of improper or negligent conduct receiver to be released.

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — referred to

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — considered

Look Communications Inc. v. Look Mobile Corp. (2009), 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) — considered

Nash v. CIBC Trust Corp. (1996), 1996 CarswellOnt 2185, (sub nom. *Nash v. C.I.B.C. Trust Corp.)* 6 O.T.C. 368 (Ont. Gen. Div.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40

Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered
Turbo Logistics Canada Inc. v. HSBC Bank Canada (2009), 81 C.B.R. (5th) 169, 2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

MOTION by creditor for order directing receiver to provide answers to questions posed by creditor, for order varying sale and approval and vesting order by unsealing confidential appendices, and for payment for goods used or consumed by purchaser; MOTION by receiver for discharge.

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

Introduction

1 This matter involves two motions.

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

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

Background

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

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

6 On June 11, 2012, again on Red Ash's application, PwC was appointed trustee in bankruptcy of each of the Operating Companies. On the same day, and pursuant to Red Ash's receivership application, PwC was appointed as Receiver of the Companies.

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

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

9 The Sale Transaction closed on June 11, 2012.

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

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

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

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

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

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

Equistar's s. 81.1 Claim

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

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

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

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

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

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

Equistar's Motion

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

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

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

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

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

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

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

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

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

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

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

i. forecasts of consumption of supplier goods available to or relied upon by the Receiver; investigations conducted by the Receiver, as described in the Third Report, which relate to the extent of goods supplied by Equistar;

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

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

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

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

Law and Analysis

(a) The Questions

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

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

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

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

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

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

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

(b) Unsealing the Confidential Appendices

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

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

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

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

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

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

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

(c) The $35,425.25

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

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

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

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

The Receiver's Motion

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

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

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

Conclusion

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

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

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

Order accordingly.

End of Document

2002 CarswellOnt 230
Ontario Superior Court of Justice [Commercial List]

Battery Plus Inc., Re

2002 CarswellOnt 230, [2002] O.J. No. 261, [2002] O.T.C. 55, 111 A.C.W.S. (3d) 213, 31 C.B.R. (4th) 196

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as Amended

In the Matter of Battery Plus Inc. and 1271273 Ontario Inc.

Application under the Bankruptcy and Insolvency Act, R.S.C. c.B-3. Section 47.1

Greer J.

Heard: January 14, 2001
Judgment: January 23, 2002
Docket: 01-CL-4319

Counsel: *Melvyn L. Solmon*, for Battery Plus Inc., 1271273 Ontario Inc.
Harvey Chaiton, for Interim Receiver, Deloitte & Touche Inc.
Katherine McEachern, for Laurentian Bank
Bryan Skolnik, for Domenick Bellisario, secured creditor

Subject: Insolvency; Corporate and Commercial

Headnote

Receivers --- Conduct and liability of receiver — Duties

B owned all shares of numbered company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for copies of personal e-mails, voice mails and companies' computer records to be produced by receiver — Receiver ordered to produce B's personal documents, e-mail and voice mail and copies of offers for purchase of companies — B was required to provide receiver with list, description and relevance of specific documents which he required — At no time did B specify exactly which documents he required — Receiver did not owe duty to owner of shares of business in receivership to copy everything in receiver's possession — Interested party had right to documents relating to specific purpose — As B was in best position to know how companies were operated, he was not acting in good faith by not preparing reasonable list of specific documents as opposed to broad sweeping categories.

Corporations --- Directors and officers — Fiduciary duties — Effect of receivership or winding-up

B owned all shares of number company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies — Motion dismissed — Directors of company in receivership had continuous obligation to shareholders and unsecured creditors to act honestly and in best interests of debtors to attain best possible price for assets — Difficult to say that as director B was acting in best interest of companies and debtors by subpoenaing representatives of prospective purchasers as witnesses — Abuse of process in receivership to subject non-parties with no knowledge about receivership, other than terms of offer being made by company they worked for, to have to attend on discovery — Order for witnesses to appear was refused.

Table of Authorities

Cases considered by *Greer J.*:

Alberta Treasury Branches v. Hat Development Ltd., (sub nom. *Hat Development Ltd., Re)* 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264, 1988 CarswellAlta 313 (Alta. Q.B.) — considered
Nash v. CIBC Trust Corp., (sub nom. *Nash v. C.I.B.C. Trust Corp.)* 6 O.T.C. 368, 1996 CarswellOnt 2185 (Ont. Gen. Div.) — considered
Royal Bank v. Vista Homes Ltd., 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590 (B.C. S.C.) — considered
SLP Resources Inc. v. Sorrel Resources Ltd., 65 C.B.R. (N.S.) 288, 1987 CarswellAlta 317 (Alta. Q.B.) — considered

MOTION by shareholder for production of documents by interim receiver and for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies.

***Greer J.*:**

1 Battery Plus Inc. ("Battery") and 1271273 Ontario Inc. ("127") move, together with Antoine Chahine Badr ("Badr"), the owner of all the shares of 127, which in turn owns all the shares of Battery, requiring Deloitte & Touche Inc. as Interim Receiver ("Deloitte" or the "Interim Receiver") of Battery and 127 to provide access to any and all of the documents and books and records of the two companies to November 15, 2001, the date on which Deloitte was appointed the Interim Receiver. Deloitte's was, in August 2001, appointed a Monitor of the companies, and this later became an Interim Receivership at the behest of the major secured creditor, the Laurentian Bank. ("Laurentian"). Laurentian is owed approximately $6,660,000 by Battery. Battery and 127 also ask for copies of its own E-mails and voice mails for Badr that continued to come to the companies after the appointment. They also want all computer records and data on the companies' hard drives. They further asks the Court to order Deloitte to produce time dockets for all its employees who have worked on behalf of Deloitte as Monitor and Interim Receiver and all accounts rendered by it during the period to today's date. Badr asks the Court to personally let him be in attendance with his counsel or another representative of the law firm acting for him, when the examination of all such records takes place. He further wants to be able to take copies of any and all such documents.

2 Aside from the question of how documentary evidence is to be treated and what rights these companies and their owner have in this interim receivership, the companies want Deloitte held in breach of the Order of Mr. Justice Spence made January 3, 2002. Lastly, they ask the Court for leave to examine five persons as witnesses with respect to the documentation and information which the Interim Receiver has made available to Laurentian and to prospective purchasers of Battery and 127, but not to the two companies in the interim receivership.

Some background facts

3 It is clear from the tenor of the documents before me, on behalf of Battery and 127, and from the scope of the relief they are asking the Court to make, that they and Badr are unhappy about the interim receivership. They do not want Deloitte's to sell the companies, although I am told by Deloitte's that it shortly hopes to move before the Court for approval of the sale of the companies.

4 On December 19, 2001, the parties appeared before Mr. Justice Spence on a 9:30 a.m. appointment. He allowed them to schedule a Motion for directions for the first available date in January, 2002. In that Endorsement, Mr. Justice Spence said the following:

> Mr. Chaiton will seek to sort out the computer copies and information access matters with the Interim Receiver so that Mr. Solmon receives what he should have.

6 Later, on January 3, 2002, Mr. Justice Spence made a further Endorsement, which reads in part:

1. As to documents, BPI should advise the IR promptly which of the documents copied pre Dec. 19 are required for the affidavit for the motion to remove the power of sale, and IR is to release such of those documents as it approves for that purpose promptly. BPI may move for further release of documents.

7 There were documents, referenced in this part of the Endorsement, which were copied by Badr's assistant, Williams, in the presence of a representative of Deloitte's when the interim receivership took place. Such an examination of the documents, followed by the copying of them, I am told, took the better part of a day. For the reasons set out in the various affidavits filed, Badr never received these copies and claims only to have received his personal papers. He claims that he cannot produce proper affidavits in the various Motions he and his companies intend to bring on against the Interim Receiver, including a Motion to ask the Court to remove the power of sale given to the Interim Receiver in its appointment, without this documentation. At no time, however, has Badr ever specified in writing exactly what documents he requires for the period prior to November 15, 2001.

8 It is the position of Battery and 127 that they have not been provided with copies of any such documents, nor is there a list of which had been so copied. They say that Deloitte's has not co-operated in the least, in providing them with what they need. On the other hand, these companies insist that they are entitled to examine everything and basically have copies of whatever they want. It appears, on the surface of their Motion, that they are simply on a "fishing expedition" to see everything and create problems for the Interim Receiver.

The Interim Receiver's position

9 Despite the companies' position that they are not indebted to Laurentian and that they want an order discharging Laurentian's security, and despite all the Motions that they intend to bring before the Court, it must be remembered that the Interim Receiver is appointed by the Court on evidence provided by the secured creditor. Such appointments are not made lightly. Further, the Interim Receiver is an officer of the Court and, as such, must regularly report to the Court. Those Interim Reports set out all expenses of the Interim Receiver, steps taken by it to protect assets and to market these assets for sale. The first Report of Deloitte has been presented to the Court. That Report indicates that an "Inventory Theft" may have occurred the night before the interim receivership was ordered. There is also an issue as to whether cheques totalling approximately $290,000 were diverted and not deposited to credit of Battery when received. All of this is set out in detail in the Interim Report.

10 Michael Baigel ("Baigel") is a Senior Manager of Deloitte and has been involved almost on an exclusive basis since its appointment on November 15, 2001, pursuant to the Order of Mr. Justice O'Driscoll, in the management and supervision of Battery's interim receivership. Deloitte's takes the position that Badr's request for each and every of his own documents, E-mails and all pre — and post receivership documents is oppressive and abusive, and is made "in furtherance of Badr's continuous attempts to prevent the sale of the business which was expressly authorized by Order of this Honourable Court." It cannot be forgotten, that when Mr. Justice O'Driscoll made the appointment, he noted in his Reasons that the cheques of Battery were being turned back by the bank, that the rent was due and unpaid, that there was a payroll to meet and that Battery had no funds from which to pay it. The appointment was not one lightly entered into by the Court.

11 Very lengthy affidavits have already been filed for purposes of the aforementioned Motions being brought on. The Interim Receiver says that Badr is refusing to put any limitation on his request for documentation. Badr has never provided the Interim Receiver with a limited list of documents he needs in order to complete his affidavits. Surely his accountant would have copies of the companies' financial statements for at least 6 years, if all other copies were on the business premises. Since Badr is the person who operated these companies, he must have some more specific idea of which documents it is necessary for him to have, in order to be able to complete the affidavits. The list attached to his counsel's letter of December 21, 2001, is so open-ended as to not have to be taken seriously. For example, counsel asks for the hard drives from the computers of 10 employees plus a copy of the main server for Battery's computer system plus nine other broad requests for information.

12 Baigel says, in his affidavit, that Deloitte has been receiving complaints from prospective purchasers that they have been receiving letters from counsel to Badr. Further, representatives of these prospective purchasers have received subpoenas to appear as witnesses on discovery, although there are no court orders authorizing this. Such tactics, in my view, are meant to discourage these prospective purchasers from bringing forward bona fide offers to the Interim Receiver. Further, Battery and 127 have steadfastly refused to inform the Interim Receiver as to how they obtained the information regarding who were prospective purchasers. That places the source of their knowledge under suspicion.

13 Baigel says in paragraph 35 of his affidavit, that the Interim Receiver changed the password to Badr's voicemail to restrict remote access to information, but that it has not intercepted or listened to Badr's voicemail or E-mail. Baigel says, contrary to Badr's position that a promise was made to him by the Interim Receiver to give him these electronic communications, the Interim Receiver made no such promise. Further, there is a dispute between the parties as to whether or not there was an agreement that the documents copied by Joanne Williams were to all be given to Badr or not. Finally, Deloitte says that there really is no need to give so many documents to Badr to help him prepare his affidavits, when any such Motions to be brought are premature, in the first place. The Interim Receiver did, however, agree in the letter of November 19, 2001 from Baigel to Badr that the Interim Receiver retained the hard drive of his computer because it contained proprietary information of Battery. The letter states that Badr told the Interim Receiver that this hard drive also contained personal information. The Interim Receiver undertook to provide him with a file listing of the contents, and to make copies "of the personal files" for him thereafter, presumably when the listing has been examined by the Interim Receiver. It appears that this did not take place, given the impossible demands for documentation, which Badr made thereafter.

14 On December 21, 2001, counsel for the Interim Receiver wrote to one of Badr's counsel to point out that Badr had no inherent right to everything he was asking for, given that the Interim Receiver, by Order of the Court, was given:

> ...the exclusive power of management, possession and control over the assets and operations of Battery Plus. Accordingly, your client's title provides him with no right to possession or access to any of the books, records or documents of Battery Plus.
>
> Having said that, if you legitimately require access to certain documentation in order to respond to the allegations made in the various court materials, I indicated to Mr. Justice Spence and counsel that copies of the documentation you reasonably require for that purpose would be provided. At no time, however, did I indicate that all of the documentation copied by Chahine's assistant would be released; it must be necessary for the purpose of responding to the allegations made in the court materials.

15 The problem facing the Court is that Badr has made no attempt to be "reasonable" in his requests and demands. That tactic has placed the Interim Receiver in a very difficult position, having been provided with no reasonable list of documents needed to help with the affidavits Badr plans to file in support of his various Motions to be brought on.

Legal Analysis

16 Frank Bennett in *Bennett on Receiverships*, 2nd ed., Carswell Publishing, 1998, notes at p.167, that a court-appointed receiver, in its managerial capacity takes charge of the management of the debtor's assets. The directors of the company in receivership, do, however, have a continuous obligation to the shareholders and to the unsecured creditors to act honestly and in the best interests of the debtor to attain the best possible price for its assets. In the receivership before me, there is really only one shareholder. I am unsure how many unsecured creditors there are. Laurentian, however, is the key debtor. How can Badr be said, as director, to be acting in the best interests of the companies and the debtors by sending out letters to prospective purchasers to discourage them,

and by subpoenaing their representatives as witnesses? This tactic is questionable. On the face of it, this appears to be both abusive and oppressive, given the circumstances of the interim receivership in question. See also, p.180 for duties of the court appointed receiver.

Bennett does say, at p.181, supra, that:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.

17 Who then, are these "interested persons", at law? Certainly, any prospective purchaser of the assets of the company in receivership, falls within that category. The information to be provided is financial information relating to the operations of the company, valuations such as prospective purchasers of assets and the company itself, tax information that may be relevant, information respecting leases, franchises and other matters affecting business operations. On the other hand, it is not reasonable to think that the receiver owes a duty to the owner of the shares or business in receivership, who was operating the business until the day before the interim receiver stepped in, to copy every single piece of paper that is now in the interim receiver's possession. That is an expensive folly not worth considering.

18 In *Royal Bank v. Vista Homes Ltd.*, [1984] B.C.J. No. 2713 (B.C. S.C.), Vancouver Registry No. C832220, lien claimants in the receivership, wanted further input into the proposed sale or liquidation of the assets. The Court, there, noted that it would help these claimants better understand what was taking place, if they were to be given copies of all offers for the condominium project, if they received copies of the monthly reports of the receiver-manager, and if the receiver-manager had the services of independent counsel. In the case at bar, the only step not complied with, is that Badr be provided with copies of any offers received. The Court further points out at p.2, para.9 that the receiver-manager is obliged to respond to requests for information "...which are consistent with the position of the party making the request and the amount involved in the particular asset in question."

19 The Interim Receiver is acting in a fiduciary capacity to all parties in the proceedings. See: *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 286. Therefore, the Interim Receiver must respond to reasonable requests for information from Badr, as well as from prospective purchasers. On the other hand, the position of the party making the request, must be taken into account. No one knows more about how he operated the companies than Badr, himself. If he cannot prepare a reasonable list of specific documents, as opposed to broad sweeping categories, in order to assist him to prepare his affidavits, he is not acting in a reasonable fashion. Mr. Justice Ground speaks to the relevancy of such documents in *Nash v. CIBC Trust Corp.*, [1996] O.J. No. 1833 (Ont. Gen. Div.), DRS 96-13495. He notes at p.2, para. 6, that investors are to receive the same information as the other parties in the litigation. The Motion before Ground J., however, was a Motion to remove the solicitors of record for the Receiver, and was not a Motion on what documentation the Receiver must provide to the parties and to the owner/director.

20 In *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.), the Court points out that the directors of the company in receivership, did not have the residual power to interfere with the ability of the receiver to manage the company. Therefore, Badr had no right to cause his counsel to write directly to any of the prospective purchasers of Battery that the Interim Receiver was dealing with. Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the people involved in the receivership:

> ...does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

21 To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents musts relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

Conclusion

22 The following Orders shall issue:

1. The Interim Receiver shall produce a list to Badr of the documents on the hard drive of his personal computer, and provide him with a copy of all his personal documents found therein.

2. Badr shall provide the Interim Receiver with a list of specific documents from the ones that were copied by Joanne Williams, or elsewhere, which are required by him to assist in him completing his affidavits. Badr shall provide a clear description of the document and state why it is relevant, and for which Motion the affidavit is being prepared in support of. ___

3. The Interim Receiver shall check the messages left on Badr's voicemail after November 14, 2001 and any E-mail messages that may still be on Badr's computer to determine if any are personal to him, and not business-related messages. A copy of such personal voicemail and personal E-mail messages shall be given to Badr, if any. If there is an issue as to which may be personal, and which may be business-related, I may be spoken to.

4. The Interim Receiver shall provide Badr with copies of all Offers received by it for the purchase of the business.

5. I refuse to order any of the so-called witnesses to appear on the subpoenas served on each of them by Badr. In my view, it is an abuse of the process, in the receivership, to subject non-parties, and persons with no knowledge about the receivership, other than what the terms of an arm's length offer is being made by the company he or she works for, to have to attend on discovery.

6. All other requests for Badr for any further information from the hard drives of company employees/ executives, from the Interim Receiver about its own records, time spent and documentation involving prospective purchasers, is hereby dismissed. The companies are entitled to receive copies of all Interim Reports prepared by the Receiver.

7. The Interim Receiver is not in breach of the Order of Spence J. made January 3, 2002. Spence J. made it clear that documents to be released must relate to the affidavit in support of the Motion to remove the power of sale from the Interim Receivership's Order. The letter of Bradr's counsel dated December 21, 2001, with its all-encompassing broad list of requests, did not meet the criteria set by Spence J.

8. The balance of relief requested by Badr in hereby dismissed.

23 Given the nature of the Orders made by me respecting documentation, in my view the ordering of Costs is not appropriate.

Order accordingly.

End of Document

2007 CarswellOnt 661
Ontario Superior Court of Justice [Commercial List]

Ravelston Corp., Re

2007 CarswellOnt 661, [2007] O.J. No. 414, 155 A.C.W.S. (3d) 258, 29 C.B.R. (5th) 1

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc.

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and the Courts of Justice Act, R.S.O. 1990 c. C.-43, as amended

Cumming J.

Heard: January 15, 18, 25, 26, 30, 2007
Judgment: February 7, 2007 *
Docket: 05-CL-5863

Proceedings: affirmed *Ravelston Corp., Re* (2007), 2007 CarswellOnt 1115 (Ont. C.A.) [Ontario]

Counsel: Alex MacFarlane, Max Mendelson for Moving Party Receiver
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Robyn Ryan Bell, Derek J. Bell for Sun-Times Media Group (formerly Hollinger International Inc.)
M.P. Gottlieb, W. Brock for Hollinger Inc.
David R. Wingfield, Paul D. Guy for Peter G. White, Peter G. White Management Limited
David Moore for Catalyst Fund General Partner I Inc.
Clifton Prophet for Argus Corporation Limited

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Receiver was appointed for company and company was granted protection under Companies' Creditors Arrangement Act — Company was charged in United States with five counts of mail fraud, two counts of wire fraud, and two counts relating to non-compete payments — President and other officers and directors of company were also charged — President of company entered into plea agreement in which he agreed to plead guilty to one count — Receiver negotiated plea agreement for company in which company would plead guilty to one count — Receiver brought motion for approval of its activities and for order directing receiver to enter into plea agreement and enter guilty plea — Shareholder in company brought motion for directions challenging process followed by receiver in preparing its report — Motion for directions dismissed — Cross-examination of receiver was not appropriate as there was no evidence that receiver had not been acting in objective and neutral manner — Legal advice received by receiver was subject to solicitor-client privilege — Receiver was not required to disclose full contents of its communications with United States Attorney's Office — Receiver needed to be able to conduct meaningful and candid negotiations in confidence in order to discharge its duties in administration of estate — Negotiation of plea agreement was properly dealt with in confidence between receiver and United States Attorney's Office.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

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Table of Authorities

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Ostrander v. Niagara Helicopters Ltd. (1973), 1973 CarswellOnt 89, 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (Ont. H.C.) — considered

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s. 47(1) — referred to

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Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 101 — referred to

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Chapter 227, s. 3572(b) — referred to

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Chapter 232, s. 3664(h) — referred to

Evidence Act, R.S.O. 1990, c. E.23
s. 22.1 [en. 1995, c. 6, s. 6(3)] — referred to

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s. 9(1) — considered

s. 17(2) — referred to

Rules considered:

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R. 16(a)(1)(C) — referred to

MOTION by receiver for approval of plea agreement; CROSS-MOTION by shareholder for directions regarding procedure followed by receiver.

***Cumming J.*:**

The Plea Agreement Motion

1 The Receiver of The Ravelston Corporation Limited ("RCL"), RSM Richter Inc. ("Richter"), brings a motion for an order approving its Eighteenth Report dated January 5, 2007, approving the activities of the Receiver, and in particular, for an order directing the Receiver to:

> (1) enter into a Plea Agreement (as attached to the Eighteenth Report) with the United States Attorney's Office (Northern District of Illinois) ("USAO"), and
>
> (2) subject to the acceptance by the U.S. District Court of the guilty plea by RCL, as represented by the Receiver, voluntarily enter a plea of guilty to Count Two of the Third Superceding Indictment dated August 17, 2006 on behalf of RCL.

2 The Receiver asserts that the Plea Agreement is fair and reasonable and entry into the Plea Agreement accomplishes the primary objective of the Receiver, being "to extricate RCL on a timely basis from the morass of litigation to which it is a defendant." The motion raises several novel issues. (This motion is referred to as the "Plea Agreement Motion" or simply as the "Motion".)

3 Conrad Black Capital Corporation ("CBCC"), the majority shareholder of RCL, Conrad M. Black, Peter G. White, and Peter G. White Management Corporation ("PWMC") (a shareholder of RCL), oppose the Motion. (The opposing parties are collectively referred to as the "Black group".)

4 CBCC brought what in effect was a cross-motion for directions on January 15, 2007, challenging the process followed by the Receiver in making its Eighteenth Report and the adequacy of such Report. (This cross-motion is referred to as the "CBCC Cross-Motion for Directions".)

Background to the Receivership

5 RCL is a privately held corporation, with 98.5% of its equity owned by officers and directors of Hollinger Inc. ("Hollinger") and Hollinger International Inc. ("International") at the relevant times and 1.5% owned by the estate of a former Hollinger director. Approximately 65.1% of RCL is owned by CBCC, which in turn is controlled by Conrad M. Black, who became a member of the House of Lords of the United Kingdom in 2000, becoming Lord Black of Crossharbour. Lord Black was the Chief Executive Officer and Chairman of the Board of Directors of RCL, Hollinger and International at the material times. Lord Black resigned as an officer of RCL on April 19, 2005.

6 Mr. F. David Radler was the President of RCL until the Receiver was appointed April 20, 2005. Between 1998 and 2003 Mr. Radler was the President and Chief Operating Officer of Hollinger and International. Mr. Radler holds a 14.2% ownership interest in RCL through his holding company, F.C. Radler Ltd.

7 Mr. Peter G. White, then a director and Executive Vice-President of RCL, swore an affidavit dated April 19, 2005 in support of the application of RCL and its subsidiary, Ravelston Management Inc. ("RMI") for an order staying all proceedings in respect of RCL pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and appointing Richter as Receiver pursuant to s. 101 of the *Courts of Justice Act* R.S.O. 1990, c C.43 ("*CJA*") and s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), for the purpose of maintaining and maximizing value for all stakeholders. (These ongoing proceedings can be referred to as the "Canadian Insolvency Proceedings.")

8 Pursuant to an Order of Farley J. of this Court, dated April 20, 2005, Richter was appointed as receiver and manager and interim manager with respect to the property, assets and undertaking of RCL, and RMI. RCL and RMI were granted protection under the *CCAA*. See *Ravelston Corp., Re*, [2005] O.J. No. 1643 (Ont. S.C.J. [Commercial List]).

9 The primary business purpose of RCL is an investment holding company, with its principal asset being its direct or indirect interest in Hollinger, a Canadian corporation and reporting issuer with retractable common shares and exchangeable non-voting preference shares Series II listed on the Toronto Stock Exchange. As of March 5, 2005 RCL and RMI owned directly or indirectly some 78.3% of the common shares of Hollinger.

10 The most significant asset of Hollinger is its interest in International, a Delaware and public corporation traded on the New York Stock Exchange, which through its operating subsidiaries has owned and published newspapers around the world, including the Chicago Sun-Times in the United States, The Daily Telegraph in the United Kingdom and the National Post in Canada. (International has since been re-named "Sun-Times Media Group, Inc." in 2006 and is referred to herein as either "International" or "Sun-Times.")

11 As of April 1, 2005 Hollinger owned directly or indirectly some 17.4% of the equity and 66.8% of the voting interest in International. As of May 18, 2004, there were cease trade orders made in respect of both Hollinger and International. As such, RCL, deemed an insider, cannot trade its shares in Hollinger.

12 RCL and its subsidiary RMI provided management and advisory services for compensation to each of Hollinger and International and other related entities pursuant to agreements until about late 2003. The termination of these agreements is the subject of litigation.

13 There is extensive litigation involving all the entities referred to and the principal individuals behind the entities, as set forth in Mr. White's affidavit of April 19, 2005.

14 Mr. White states in his April 19, 2005 affidavit that given the underlying value of Hollinger and International he believed the value of RCL exceeded the liabilities of the corporation. However, given the lawsuits faced by RCL, the absence of distributions from Hollinger, the non-payment of management fees and the inability of RCL to dispose of any shares of Hollinger, RCL and RMI were unable to pay amounts then owing to creditors as they became due. Hence, RCL and RMI were "facing severe financial difficulty" with its financial condition "eroding quickly." There was a need for the Receiver to be appointed to provide stability and to preserve the assets.

15 The receivership ultimately embraced RCL, RMI, and other subsidiary entities, those being Argus Corporation Limited ("Argus") and 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., and 509647 N.B. Inc. (collectively, the "N.B.Subs"). (All collectively being the "Companies").

16 As stated above, RCL, directly or indirectly through the Companies, owns about 78.3% of Hollinger, or some 27.4 million common shares. Hollinger has about 17.4% of the equity of International.

17 The United States Securities and Exchange Commission ("S.E.C.") commenced proceedings against Lord Black, Mr. Radler and Hollinger on November 15, 2004. Lord Black commenced a proceeding in Ontario (Court file 06-CL-6259) for contribution and indemnity in respect of certain ongoing proceedings (not including the S.E.C. action).

18 An Agreement was later made on November 13, 2006 to toll the limitation period in respect of Lord Black's claim for contribution and indemnity from RCL, RMI and Argus in respect of the S.E.C. action until the completion of the S.E.C. action.

Background to the Criminal Proceedings in the United States

19 On August 18, 2005 an indictment was returned in Chicago against RCL, Mr. Radler and Mark S. Kipnis (an officer of International) with each defendant charged with five counts of mail fraud and two counts of wire fraud.

20 Mr. Radler entered into a Plea Agreement on September 20, 2005 whereby he would plead guilty to Count One.

21 Mr. Radler has stated in his plea agreement that:

> (i) He personally and on behalf of RCL participated in a scheme to divert non-compete payments from International to Hollinger, RCL and other individual defendants;
>
> (ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors; and
>
> (iii) It was not in International's interest to have monies diverted to Hollinger or RCL from International in respect of non-compete payments.

22 The defendants allegedly benefited from having non-compete payments diverted to Hollinger from International because RCL had a greater direct interest in Hollinger than in International.

23 The Receiver engaged U.S. counsel to represent and defend RCL. The Ninth Report of the Receiver dated September 15, 2005, reviews and reports upon these events.

24 The Receiver in its Tenth Report dated September 15, 2005, stated that the Receiver would make a thorough analysis after its U.S. criminal counsel obtained discovery of the evidence accumulated by the USAO. The Receiver expressed the view RCL should voluntarily accept service of the indictment and "that it is appropriate for RCL to enter a plea of not guilty...." An Order by Farley J. of this Court dated October 4, 2005, directed the Receiver to accept service of the Indictment and enter a plea of "not guilty". See *Ravelston Corp., Re*, [2005] O.J. No. 4266 (Ont. S.C.J. [Commercial List]). On November 10, 2005, the Order of Justice Farley directing the Receiver to attorn was upheld by the Court of Appeal: *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.). The plea of not guilty was entered on November 22, 2005.

25 On November 17, 2005, a First Superceding Indictment added Lord Black, John A. Boultbee and Peter Y. Atkinson as defendants. A Second Superceding Indictment was returned December 15, 2005. Messrs. Black, Boultbee, Atkinson and Kipnis have entered pleas of not guilty to the charges.

26 An 80 page Third Superceding Indictment was returned by the Grand Jury on August 17, 2006, pursuant to which RCL was added as a named defendant to Counts 8 and 9 in respect of the alleged diversion from International of non-compete payments paid by CanWest Global Communications Corp. ("CanWest") as part of the purchase of a 50% interest in the *National Post* and certain other newspaper related assets. (There are now seventeen Counts in the Third Superceding Indictment.)

27 The Receiver and its counsel entered into discussions with the USAO in April, 2006, in an attempt to negotiate a settlement of the criminal charges against RCL. On January 4, 2007, the USAO delivered a final version of a Plea Agreement relating to certain criminal charges to the Receiver's counsel.

28 The Plea Agreement is based upon a guilty plea by RCL to Count Two of the Third Superceding Indictment, dealing with a non-compete payment in the Forum Communications Inc. ("Forum") transaction.

29 On January 5, 2007, the Receiver served its notice of this Motion for an order approving RCL entering into the Plea Agreement and to change its plea from not guilty to guilty. The Receiver's Eighteenth Report sets forth the Receiver's position in support of the Motion.

30 On January 3, 2007, CBCC and Peter White Management Limited ("PWML") had served a notice of motion seeking directions with respect to the Receiver's obligation to prepare for the trial, given its not guilty plea. The Receiver had advance notice of this motion as of December 22, 2006. CBCC and PWML assert that the Receiver was obliged to not finalize the content of the Plea Agreement in the face of their outstanding motion.

31 On August 7, 2006, RCL had given notice to its co-defendants it would be withdrawing from the joint defence agreement (which the defendants had orally agreed to) for 60 days. RCL did not participate in the joint defence agreement thereafter.

32 Given this course of events, it would be apparent to the co-defendants that there was a real possibility that RCL might enter into a Plea Agreement. In my view, this is why CBCC and PWML gave notice to the U.S. District Court and to RCL on December 22, 2006 of the intent to bring a motion for directions in this Court. This motion became moot given the Receiver's Plea Agreement Motion, served January 5, 2007.

33 The trial of the defendants is scheduled to commence March 14, 2007, before Judge Amy J. St. Eve in the United States District Court, Northern District of Illinois, Eastern Division.

The CBCC Cross-Motion for Directions, Heard January 15, 2007

34 On January 9, 2007, in response to the Plea Agreement Motion at hand, CBCC provided the Receiver with an initial set of questions with respect to the Eighteenth Report. The Receiver provided written responses ("Receiver's Answers") on January 10, 2007. On January 11, 2007, CBCC provided the Receiver with an additional set of questions. The Receiver provided answers ("Additional Answers") the same day. CBCC asserted that the Receiver had not properly considered the interests of all stakeholders in the Ravelston estate.

35 As mentioned above, on January 15, 2007 CBCC brought what was in effect a cross-motion for directions in respect of the Receiver's pending Motion. This Cross-Motion for Directions was dismissed orally at the conclusion of the hearing. I undertook to give written reasons for my decision in respect of the Cross-Motion for Directions. My reasons follow.

Issues Arising from the CBCC Cross-Motion for Directions

36 There were three issues arising from the CBCC Cross-Motion for Directions.

(1) Was CBCC entitled to examine the Receiver on the information contained in the Eighteenth Report relating to the proposed Plea Agreement?

(2) Had the Receiver waived its right to claim solicitor-client privilege over communications regarding the Plea Agreement and issues related thereto by allegedly disclosing portions of such communications in the Eighteenth Report? and

(3) Should the Receiver be required to disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documentation?

Issue #1 Is an examination of the Receiver appropriate in the circumstances?

37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), at para. 2, var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, (2003), [2002] S.C.C.A. No. 460 (S.C.C.); *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List])) at para. 5 ; *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194

(Ont. S.C.J. [Commercial List]) at para. 4; *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 (Alta. Q.B.)at para. 18; and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 (Alta. Q.B.)at paras. 17-22

38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List])) at para 8, Farley J. of this Court stated:

> [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* [*Re Confectionately Yours*] 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.
>
> [emphasis added.]

39 CBCC submits that the Receiver is not acting in an objective and neutral manner in dealing with CBCC's questions or the interests of its stakeholders.

40 In my view, the evidentiary record did not support the allegation that the Receiver was not acting in an objective and neutral manner. There was no good reason to depart from the norm that a court-appointed receiver is not subject to cross-examination on its reports.

Issue #2: Has there been a waiver of solicitor-client privilege on the part of the Receiver?

41 CBCC cites the reference by the Receiver in s. 4.1 of the Eighteenth Report that the Receiver worked closely with its counsel during May and June, 2006 "to formulate a position" relating to a proposed *nolo contendere* plea, taking into account certain factors. The USAO rejected RCL's offer to plead *nolo contendere*. Negotiations in respect of the Plea Agreement under present consideration were ultimately concluded January 5, 2007.

42 The Receiver has refused to provide access to CBCC to legal opinions underlying the Receiver's determining that the Plea Agreement should be executed. The Receiver claims that such information is subject to solicitor-client privilege.

43 Anyone considering a plea agreement in respect of a criminal charge is entitled to the confidential advice of the person's counsel, and solicitor-client privilege attaches to the communications between counsel and client. The principle that communications between a solicitor and his/her client are privileged is recognized as fundamental to the administration of justice. *Solosky v. Canada*, [1980] 1 S.C.R. 821 (S.C.C.).

44 There can be a waiver of privilege where it is shown the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive such privilege. There is no evidence in the situation at hand that the Receiver voluntarily intended to waive privilege.

45 There can also be a waiver of privilege even in the absence of an intention to waive, "where fairness and consistency so require". *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C. S.C.)) at paras. 6-10.

46 CBCC asserts in its factum that the legal advice received by the Receiver "is critical" to this Court's assessment of the Plea Agreement

> and understanding of whether the Receiver independently and fairly assessed the risks associated with attempting to defend the U.S. Criminal Proceeding, the likelihood of conviction, the enforceability of a monetary penalty and its ranking in the estate, the impact of any restitution orders on distribution, the costs of maintaining a defence and the impact of the Plea Agreement on all of Ravelston's stakeholders.

47 Legal advice received in respect of a proposed plea agreement is by reason of its subject matter "critical" advice. The evidentiary record does not establish any arguable unfairness such that it can be asserted that privilege should fall away. In my view, there is not any aspect of "fairness" in the situation at hand that comes into play such that the normative sanctity to solicitor-client privilege is to be overridden.

Issue #3 Must the Receiver Disclose the Full Contents of Its Communications with the USAO Regarding the Plea Agreement Including All Relevant Documents?

48 CBCC requested an order that the Receiver provide copies of all documents, analyses and reports, including legal opinions and advice, with respect to the negotiation with the USAO in respect of the Plea Agreement.

49 To discharge its duties in the administration of an estate, a receiver necessarily enters into confidential discussions to resolve issues or disputes with specific stakeholders. A receiver must have the ability to conduct meaningful and candid negotiations in confidence with a view to achieving a resolution in the best interests of the estate. RCL itself could conduct such negotiations in confidence prior to the appointment of the Receiver. The Receiver steps into the shoes of RCL for administrative purposes of the RCL estate.

50 To require a receiver to disclose all the details of its discussions with a stakeholder, regardless of whether those details are relevant to the outcome of the discussions, would severely impede a receiver's ability to embark upon any negotiations. The USAO provided the Receiver and its counsel with witness statements. The confidentiality in respect of these statements is protected pursuant to a Protective Order granted by Judge St. Eve in the U.S. District Court. The record establishes the USAO entered into discussions April 10, 2006 with the Receiver on a confidential basis.

51 The USAO and Receiver understood the Receiver would be obliged, if the negotiations were successful, to provide to this Court the information necessary to enable the Court to reach an informed conclusion as to whether to approve the Plea Agreement. The implicit agreement as to confidentiality of the negotiations limits the disclosure needed to meet that standard.

52 In my view, the negotiation of the Plea Agreement was properly a matter dealt with in confidence between the Receiver and the USAO. Notice to the Receiver on December 22, 2006, of the intended CBCC/PWMC motion (served January 3, 2007), referred to above, was irrelevant to these negotiations.

The Motion for a "Payments Report"

53 The Receiver brought a motion (which can be referred to as the "Payments Report Motion") on January 12, 2007 seeking approval of its Nineteenth Report dated January 9, 2007 and, in particular, an order authorizing the Receiver to complete a report and analysis to be filed with this Court setting out the payments made by RCL and its subsidiaries between January, 1998 and January, 2004 to Messrs. Black, Radler, Boultbee and Atkinson.

54 At the return of the motion, the Receiver advised it has been engaged in this analysis as a necessary requirement in the ordinary administration of the estate. The Receiver advised it expected the analysis to be completed in some three or four weeks.

55 The Black group appeared at the return of the motion and gave notice that they were opposed to public dissemination of the analysis and report.

56 The so-called "Payments Report Motion" has been adjourned to February 12, 2007.

The Plea Agreement Motion

57 In formulating its position relating to a proposed *nolo contendere* plea, the Receiver states in its Eighteenth Report it took into account the following factors:

(a) The Receiver had no first-hand knowledge of RCL's activities which predated its appointment in April 2005;

(b) The Receiver's knowledge about the events underlying the criminal and civil claims was limited to what it was able to learn by reviewing the documents it had received to date;

(c) RCL's liabilities likely greatly exceeded the realizable value of its assets. The Receiver sought to extricate RCL from the U.S. Criminal Proceedings on a cost-effective basis provided that in doing so, the interests of RCL's estate were well served;

(d) As an indicted corporation, the Receiver understood that RCL's guilt at trial would be based, in large part, on the actions of its officers and other agents;

(e) The directors and officers of Hollinger, Sun-Times and RCL were overlapping, and the relationship amongst these entities was complicated (i.e. the same individuals alleged in the Second Superseding Indictment as "RCL's Agents" were also agents of Sun-Times and of Hollinger);

(f) The Receiver determined that notwithstanding that RCL had not yet been charged in respect of the CanWest non-compete payments, it would likely be charged with those counts if it did not pursue a plea arrangement. Furthermore, the Receiver was concerned that proceeding to trial would increase the quantum of the fine sought by the USAO if RCL was ultimately unsuccessful at trial;

(g) The Receiver was mindful that the manner in which it resolved the U.S. Criminal Proceedings should not adversely impact on its ability to defend the civil proceedings to which RCL was named as a defendant; and

(h) The uncertain status of any U.S. fine or restitution order in the Canadian Insolvency Proceedings (as defined below). It was important the Receiver establish that any fine or restitution order have no greater status (if any) in the Canadian Insolvency Proceedings than that of ordinary unsecured claims.

58 The Receiver in its Eighteenth Report then lists factors taken into account in deciding to propose entering a guilty plea to Count Two of the Third Superceding Indictment, being:

(a) In accordance with general corporate law, a corporation acts only through its officers, directors, employees or agents;

(b) A corporation is generally responsible for the acts or omissions of its officers, directors, employees or agents;

(c) Radler, the former president of and significant shareholder of RCL, president of Sun-Times and a director of Hollinger, has stated in his plea agreement and is likely to testify at trial that:

(i) He personally and on behalf of RCL, participated in a scheme to divert non-compete payments from Sun-Times to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors;

(iii) It was not in Sun-Times' interest to have monies diverted to Hollinger or RCL from Sun-Times in respect of non-compete payments; and

(iv) The defendants benefited from having non-compete payments diverted to Hollinger from Sun-Times because RCL had a greater direct interest in Hollinger than in Sun-Times, and Radler's company, F.D. Radler Ltd., held a 14.2% ownership interest in RCL;

(d) Radler's testimony, as the former president of RCL, is likely to bind RCL at trial;

(e) Hollinger, in its Cooperation Agreement (the "Hollinger Cooperation Agreement") with the USAO has acknowledged (i) the U.S. Government has developed evidence during its investigation that Hollinger is criminally liable because one or more of Hollinger's former officers, directors or employees violated U.S. Federal criminal law with the intent, in part, to benefit Hollinger with the fraudulent diversion from Sun-Times to Hollinger of approximately US$16.55 million; (ii) that one or more of Hollinger's former officers, directors or employees acted illegally with respect to Hollinger's receipt of the said US$16.55 million in non-compete payments; and (iii) that it was inappropriate for Hollinger to receive those monies. The individuals whose acts are impugned were also officers or directors of RCL; and

(f) The USAO has a very high success rate in securing convictions.

59 The Receiver then states in its Eighteenth Report that it concludes there is "a strong rationale" to enter into the Plea Agreement, for the following reasons:

(a) The guilty plea of RCL's president, Radler, in conjunction with the factors set forth above;

(b) Prior to it's appointment in April, 2005, the Receiver had no first-hand knowledge of RCL's prior activities. Many of the events underlying the criminal and civil claims against RCL occurred as much as ten years ago. The Receiver is only able to discern what it knows about the events underlying the criminal and civil claims by reviewing documentation and witness statements made available to it.

(c) The RCL estate lacks liquidity — it is likely that the value of the valid claims against the RCL estate will significantly exceed the net realizable value of its assets. The Receiver is of the view that it should attempt to extricate RCL from any litigation on an economic basis provided that by doing so, RCL's interests are well served;

(d) The criminal litigation is complex; it will be costly to litigate. The Receiver estimates that the cost of preparing for and attending at trial could exceed US$3 million. As noted above, RCL's estate has limited financial resources;

(e) The implications to RCL of a guilty plea are strictly monetary. A guilty plea will only result in a fine and restitution order in favour of the U.S. government being levied against RCL. Pursuant to the Plea Agreement, the status of any such fine or restitution order in the Canadian Insolvency Proceedings will be determined in those proceedings and will have no higher priority (if any) than a general unsecured claim. The Plea

Agreement eliminates the risk that the U.S. government may attempt to assert a property or similar claim ranking in priority to all other claims asserted against RCL;

(f) In practice, a receiver does not attest to matters that pre-date its appointment. The Receiver therefore considered the factors/evidence available to it that may put RCL at risk at trial. In this regard, the Receiver understood that RCL's guilt at trial would be based, in part, on the actions of its officers and other agents with the ability to bind RCL. Radler, RCL's president, pled guilty to one count of the Indictment. Hollinger also acknowledged the wrongdoings of certain of its former officers and directors (some of whom were also officers and directors of RCL) in the Hollinger Cooperation Agreement;

(g) Should RCL be found guilty of one or more counts as charged under the Third Superseding Indictment, there is a significant likelihood that a higher fine would be levied. The Fine is significantly less than stipulated by the *Guidelines* if RCL were to be found guilty. (Furthermore, the Receiver is of the view that the amount that is likely to be distributed by RCL in respect of the Fine (if a provable claim) will be considerably less than the agreed amount of the Fine);

(h) The Plea Agreement preserves the Receiver's right to challenge the validity of the Fine and/or any restitution order in the Canadian Insolvency Proceedings;

(i) Even if the restitution order results in a valid claim against the RCL estate, any monies paid to Sun-Times from the RCL estate in respect of the litigation detailed in Section 5.1(e)(v) of the Plea Agreement will be offset dollar-for-dollar against the amounts payable under the restitution order;

(j) The Plea Agreement preserves the Receiver's right to advance arguments at sentencing as to RCL's responsibility for any damages, including the argument that in determining the amount attributable to RCL, the damage caused by other parties and individuals must be considered, as well as the amount paid by those parties and individuals (i.e. at the present time it appears that the total amount paid in respect of criminal restitution cannot exceed US$83,950,000, of which US$32.8 million has already been paid);

(k) The Receiver is of the view that the civil proceedings in both the U.S. and Canada are the preferred forum in which to resolve the competing claims made against RCL, its affiliates and subsidiary companies, rather than the U.S. Criminal Proceedings. The Receiver determined that participating in the U.S. Criminal Proceedings would not be helpful, but might be detrimental, to the position of RCL in its civil proceedings. An unfavourable outcome in the U.S. Criminal Proceedings would adversely affect RCL's ability to defend itself in the civil proceedings; a favourable outcome would still require RCL to litigate the civil proceedings;

(l) By pleading guilty to the Forum transaction, which involved the least of the non-compete payments received by Hollinger, the Receiver structured the Plea Agreement in such a manner as to minimize any adverse ramifications that a guilty plea may have to the interests of RCL, including its interests as a defendant to the civil proceedings; and

(m) In the Receiver's view, the Plea Agreement incorporates many of the provisions and concepts of the *nolo* [*contendere*] plea (including the requirement to have the status of any fine and restitution order determined in the Canadian Insolvency Proceedings).

The role of the court-appointed Receiver

60 A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Sovereign Bank v. Parsons*, [1913] A.C. 160 (Ontario P.C.) at 167.

61 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." *Toronto*

Dominion Bank v. Fortin (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) at 113. The essence of a receiver's power is to settle liabilities and liquidate assets.

62 It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (Ont. H.C.) [*Ostrander*].

63 A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander v. Niagara Helicopters Ltd.*, *supra* at 286.

64 It is appropriate for a receiver to consider negative economic factors such as cost, time and risk. See generally *National Trust Co. v. Massey Combines Corp.* (1988), 69 C.B.R. (N.S.) 171 (Ont. H.C.) at 179 dealing with the test to be employed in considering whether to approve a sale of assets.

65 There apparently has only been one previous analogous situation in Canada to the one at hand, where a receiver sought court approval to plead guilty to a criminal charge in the U.S.

66 In *YBM Magnex International Inc., Re* (April 14, 1999), Doc. Calgary 9801-16691 (Alta. Q.B.) [*YBM*], Paperny J. of the Alberta Court of Queen's bench (as she then was) dealt with an unopposed motion by a receiver seeking court approval of a guilty plea agreement with the U.S. Attorney in respect of a one-count information for criminal conduct related to money-laundering and falsification of public financial statements. She stated at p.17:

> This court must determine whether the plea agreement being entered into is fair and reasonable, considering the interests of all the stakeholders to the estate.
>
> I am satisfied that the receiver independently and fairly assessed the risks associated with attempting to defend these charges, the likelihood of conviction, the likelihood of pre-trial forfeiture, the size of the fine, the ranking in the estate, the impact of competing restitution orders on distribution and the costs of maintaining a defence, successful or not. I accept his risk assessment.
>
> In my view, this agreement is prudent and commercial reasonable in the circumstances, as well as being abundantly fair to all stakeholders. [emphasis added]

67 A court-appointed receiver under the *BIA* or *CJA*, as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. *YBM Magnex International Inc., Re*, [2000] A.J. No. 1118 (Alta. Q.B.) at paras. 34, 87; and *Confederation Treasury Services Ltd., Re*, [1995] O.J. No. 3993 (Ont. Bktcy.), at para. 8, (citing Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3rd ed. 1995) at 1-61/2).

68 In *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40 Doherty, J.A. stated:

> Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The

> receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision in within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

69 In *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 5-6 Galligan J.A. made general observations as to how a receiver is to make business decisions in the administration and management of an estate. He emphasized that the court should be reluctant to second-guess the considered business decisions made by a receiver. As well, the conduct of the receiver is to be reviewed in the light of the specific mandate given to the receiver by the court. The duties of a receiver are to consider the interests of all parties or stakeholders. The court is to consider whether there was unfairness in the process leading to the receiver's recommendation to the court and whether the receiver acted reasonably and prudently in all the circumstances.

The risks in a guilty plea vs. the risks in pleading not guilty and proceeding to trial

70 There are two options for the Receiver in respect of the criminal charges facing RCL: plead guilty or continue a plea of not guilty and defend at trial.

71 The Receiver is faced with an imminent criminal trial. The Receiver must decide what is in the best interests of the estate of RCL in these unfortunate circumstances. This decision must be made, and be seen to be made, within the bounds of reasonableness. The Receiver must balance the interests of all the stakeholders in exercising its business judgment and in making its recommendation.

72 In his Endorsement dated October 4, 2005 (reported as *Ravelston Corp., Re*, [2005] O.J. No. 4266 (Ont. S.C.J. [Commercial List])) dealing with the Receiver's request for approval to voluntarily appear and enter a plea of not guilty on behalf of RCL to the Indictment returned August 18, 2005, Farley J. stated at para. 5:

> However, the Receiver also has to be mindful that a fundamental reason for its appointment was to extricate Ravelston from the morass of litigation in which it was involved (including litigation with International and [Hollinger] on the other side). The US Criminal Proceedings are not something as to which the Receiver was instrumental; as I understand it, the complaints involved there predate the Receiver's involvement. Acting responsibly, the Receiver must zealously safeguard the interests of legitimate stakeholders (including the DOJ and those for whom the DOJ is responsible for protecting); the Receiver thus has an umbrella responsibility and it would be helpful for the DOJ to recognize that responsibility of the Receiver. If the Receiver concludes that it would be wasteful for Ravelston's estate to engage in protracted, costly litigation, then it would be undesirable to adopt a "scorched earth" policy or anything approaching same. That approach would as well be unlikely to be fruitful in seeing if a resolution of the US Criminal Proceedings (including any further potential exposure) vis-à-vis Ravelston could be advantageously discussed with the DOJ.

73 Counsel for CBCC submits that the question that must be answered by the Receiver is — What are the comparative prejudices to the competing stakeholders in RCL by a changed plea and what is the appropriate balance in weighing such comparative prejudices? The Black group asserts that the Receiver has made erroneous assumptions in calculating possible prejudice, has followed an imperfect process lacking in due diligence, and that the Receiver ultimately brings its Motion to change the plea upon a false rationale.

74 The Receiver emphasizes that it seeks as much avoidance of risk and uncertainty as possible. The Receiver says that there is an issue of significant cost in RCL defending at trial. The Receiver argues that the liabilities of RCL exceed the realizable value of its assets. There are also three possible adverse consequences to RCL being convicted in the criminal proceedings: a fine, a restitution order, and collateral estoppel in respect of the civil

proceedings. (I leave aside the possibility of forfeiture of assets as forfeiture does not seem to be sought by the USAO against RCL. RCL apparently has only some jewelry worth about US $100,000 situated in the United States and the USAO has reportedly advised the Receiver it is not interested in asserting any claim against the jewelry. There are Forfeiture Allegations against the individual defendants included within the Indictment.)

75 The three possible adverse consequences must be weighed in the plea consideration. These consequences are relevant to the determination by the Receiver of the balancing of interests as between the stakeholders in RCL and in the Receiver adopting a position in respect of the plea of RCL.

76 The Receiver's position is that after consultation with its counsel and after careful review of all the available evidence against RCL that there is sufficient evidence to justify a plea of guilty on behalf of RCL. The Receiver says that given such evidence, in conjunction with the economics and terms of the Plea Agreement, coupled with the precarious financial position of RCL, the Plea Agreement is in the best interests of RCL's stakeholders.

77 All defendants other than Mr. Radler have entered pleas of not guilty. None of the allegations have yet been proven in court.

78 With respect to a former director or officer innocent of any criminal wrongdoing, the stigma or association with the criminal proceedings exists at present and in all events. The stigma may be worsened by a corporate plea of guilty by RCL but, if so, it is only incremental and not such as to displace the greater interest of the estate. In any event, the failure of this Court to approve the plea would, of course, not mean the U. S. criminal proceedings would disappear.

79 Assuming the U.S. District Court is prepared to accept a guilty plea from RCL, based upon evidence that establishes the constituent elements of the offence, and certain former directors and officers are also criminal defendants, the plea of the co-accused has no juridical impact upon the position of another defendant. Any one defendant has no say (*qua* a defendant) on whether a co-defendant can plead guilty. There is no prejudice of legal interest in the criminal proceedings potentially affected.

80 Lord Black and Mr. White as shareholders of RCL, and as unsecured creditor claimants of RCL, have an economic interest in the estate of RCL. It is their economic interests as stakeholders in RCL that must be considered by the Receiver in determining whether to enter into the Plea Agreement.

81 As stated above, Mr. Radler entered into a Plea Agreement with the USAO on September 20, 2005, wherein he agreed to enter a voluntary plea of guilty to Count One of the Indictment. Mr. Radler indirectly has an equity interest in both Hollinger and International through a 14.2% ownership in RCL through a holding company, FDR Ltd. Mr. Radler was President of RCL and President and Chief Operating Officer of Hollinger and International at the material times.

82 It is alleged in the Indictment that RCL and its agents fraudulently inserted themselves and Hollinger as recipients of non-compete fees from the sale of newspaper businesses by International that should have been paid exclusively to International.

83 The issue of guilt of RCL at trial is dependent in large part upon the actions of its officers and other agents. There is an overlapping of the directors and officers of RCL, Hollinger and International. The individuals alleged to be wrongdoers in the Indictment were agents of all three entities (other than Mr. Kipnis who was an officer of International and not of RCL).

84 A corporation can have criminal liability even though it is an artificial, juristic person. RCL is responsible for an act committed by an agent of RCL within the scope of his employment. Even if a jury finds that an act of an agent was not committed within the scope of his employment, RCL may be responsible because RCL later approved of the act. An act is approved if, after it is performed, another agent of the corporation, with the authority

to authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

85 Ravelston is a named defendant in Counts One through Nine. The Plea Agreement provides that RCL would plead guilty to Count Two, dealing with a single transaction, being the Forum transaction.

86 RCL acknowledges in the Plea Agreement that to its knowledge Forum had not requested that Hollinger be included as a non-compete covenanter in the sale to Forum of community newspaper assets by International for some U.S.$14 million. Hollinger received US $100,000 as the result of the insertion of it as a non-compete covenanter entitled to 25% of the total amount payable (US $400,000) for the non-compete covenants. The Plea Agreement states that RCL breached its fiduciary duty to International to refrain from acting to benefit itself or anyone else at International's expense and that it participated in a scheme to defraud International of money to which International was entitled under the Forum transaction. The Receiver is of the opinion, having examined the witness statements and documentation that Mr. Radler's testimony at trial, as the former President of RCL, is likely to bind RCL at trial.

87 The Black group claims the Receiver has not done due diligence before entering into the Plea Agreement. The Receiver says in fact that it has had significant pre-criminal trial disclosure, being that to which all defendants are entitled. The Receiver says it and its counsel have reviewed the sworn witness statement of Mr. Radler dated August 18, 2005 as provided to the Grand Jury. The Receiver says it has reviewed statements Mr. Radler has made to the Federal Bureau of Investigation and other US law enforcement agencies, and has reviewed the witness statements of each of the co-defendants, or agents of RCL, provided to the Special Committee of International and to the USAO.

88 Indeed, as a corporate defendant the Receiver says it has been entitled to even greater disclosure than that afforded to the individual defendants, by reason of s. 16 (a) (i) (C) of the U.S. Federal Rules of Criminal Procedure which has resulted in disclosure of the witness statements of the directors, officers, employees or agents of RCL. This disclosure was made under a Protective Order made by Judge St. Eve on January 6, 2006.

89 The Receiver says that it did not approach the other defendants because the Receiver was of the view that it had a duty to make certain public disclosures such that the individual defendants would have declined any attempt to be interviewed. However, as the Black group points out, a Receiver may be able to exert a protective "common interest privilege" in certain situations in respect of disclosures. *CC & Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 637 (Ont. S.C.J.).

90 In my view, although common interest privilege may perhaps have been available to meet the Receiver's concerns in talking to the defendants in the context of the Receiver's intent to possibly change RCL's plea, this is not fatal to the Receiver's Motion. The Receiver says it had ample disclosure as to the USAO's case against RCL such that the Receiver formed the view that there was a significant risk of conviction of RCL.

91 The Receiver has determined, with the advice of its U.S. criminal counsel, based upon the facts known to them, that there is a "substantial risk" that RCL would be found guilty at trial of one or more of the counts charged under the Third Superceding Indictment, based in part upon the guilty plea of Mr. Radler, the President of RCL over the relevant time period.

92 It is noted that in *Hollinger International Inc. v. Black*, 844 A.2d 1022 (U.S. Del. Ch. 2004) at 11-12, 15-16, and 46-47, Vice Chancellor Strine of the Court of Chancery of Delaware considered a November, 2003 written agreement, signed by Lord Black, which constituted a "Restructuring Proposal" for International. The agreement included a statement that the non-compete payments "were not properly authorized on behalf" of International. Vice Chancellor Strine examined the findings of International's Special Committee in respect of the non-compete

payments received by Messrs. Black, Radler, Atkinson and Boultbee. He concluded that the evidence did not support Lord Black's claim in the case before him that the non-compete payments were properly approved by International's independent directors. The Vice Chancellor found that the best evidence in the record suggested that the Restructuring Proposal was accurate in saying that there was not proper authorization for the non-compete payments.

The factor of a fine

93 RCL agrees to a fine of US $7 million through paragraph 12 of the Plea Agreement. The contemplated fine takes into account the United States *Sentencing Guidelines ("Guidelines")* which considers the relevant conduct of a defendant in respect of all related offences or possible charges beyond the count to which the defendant has been convicted. As such, the amount of pecuniary gain which RCL is alleged to have derived looks to all the non-compete payments (admitted to be US$83,950.000) in which RCL allegedly participated and not simply the relatively small non-compete payment received in respect of the Forum transaction.

94 The USAO gives the Receiver a two level reduction in the offence level because of the cooperation of the Receiver (Paragraph 6(d) of the Plea Agreement). Applying the sentencing minimum and maximum multipliers, the fine range would be US $67,160,000 to US $134,320,000 if RCL was convicted at trial, given that US $83,950,000 is the total pecuniary amount involved in all transactions underlying the offences.

95 The Receiver says that the US $7 million fine is some 90% less than the low end of the range for fines seen under the *Guidelines* for a total pecuniary loss of US $83,950,000. While advisory rather than directory, the *Guidelines* are to be consulted and considered together with the relevant statutory sentencing factors set forth in 18 U.S.C. s. 3553(a), when sentencing in Illinois. *U.S. v. Stitman*[472 F.3d 983 (U.S. C.A. 7th Cir. 2007)] 2007 WL 60421; *United States v. Alburay*, 415 F.2d 782 (U.S. C.A. 7th Cir. 2005). The *Guidelines* fine range is expressly referred to in paragraph 6(f) of the Plea Agreement.

96 In my view, the Receiver is reasonable in contemplating the possibility of a fine, in the event of conviction, that is significantly higher than the US $7 million agreed upon in the Plea Agreement.

97 The *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c. 37 ("*MLACMA*") provides in s. 9(1) that when the Minister of Justice approves the enforcement of the payment of a fine imposed in respect of an offence by a court of criminal jurisdiction in the United States, the fine can be enforced in Canada.

98 The fine and any restitution order must ultimately be dealt with in the Canadian insolvency proceedings. The USAO may amend the claim already filed with the Receiver to reflect the fine and any restitution order. This Court would ultimately have to determine whether a claim for either or both the fine and restitution order constitute valid claims in the Canadian insolvency proceedings. The Receiver retains the right to argue that they do not give rise to a valid claim.

The Assets and Liabilities of RCL

99 The Receiver in its Eighteenth Report makes the somewhat cryptic statement that in 2006 "RCL's liabilities likely greatly exceeded the realizable value of its assets." The Receiver seeks to extricate RCL from the U.S. criminal proceeding on a cost-effective basis. At the conclusion of the hearing on the Cross-Motion for Directions on January 15, 2007, this Court suggested that a more detailed financial analysis of RCL would be appropriate for the return of the Plea Agreement Motion.

100 This resulted in a Supplement to the Eighteenth Report. In the Supplement's Appendix "A", the "Analysis of Estimated Funds Available for Distribution", the estimated range is from a negative of $27 million to a positive of $10 million after priority payments for ongoing restructuring proceedings costs (some $6-10 million), payments to the Argus preference shareholders (some $23-$24 million), payment of priority claims of the tax authorities (some

$4.256 million) and payment of secured claims of Hollinger/Domgroup and payment of the Pension Administrator Claim (some $29 million-$66 million), before addressing the estimated unsecured and filed contingent claims of some $1.037 billion.

101 This Analysis suggests it is extremely unlikely that there will be any surplus available for shareholders in any and all events. However, the Black group submits that the Receiver's estimate of the present value of RCL lacks meaningful analysis.

102 The major asset of RCL is the value of its shares in Hollinger (and indirectly the value of Hollinger's shares in International). Taking the January 16, 2006 market value of Hollinger's thinly traded shares, the Receiver gives an estimated value to Hollinger's holding in International as being only $31 million. CBCC submits that with an acquittal of the defendants in the criminal proceedings the value of the shares would rise significantly. CBCC refers to the 2005 purchase by Catalyst Fund General Partner I ("Catalyst") of a sizeable bloc of some 883,000 common shares for over $7.00 per share (well above the listed value of $1.15 per share on January 16, 2007).

103 In Appendix "A" to its Third Supplemental Record the Receiver calculates the required realization per Hollinger share to fund claims *prior* to a consideration of contingent claims to be $7.12 per share. After a discounted estimate for the contingent claims, the Receiver estimates a realization of $8.95 to $12.60 per share in Hollinger would be required to settle all claims before any surplus would be available for shareholders.

104 Thus, the Receiver's view is that there cannot realistically be a recovery of share value such as to result in equity for RCL's shareholders. However, the Black group says that if the Receiver changes its plea to a guilty plea to Count Two, that the shareholders of RCL will lose any chance at all for a recovery of their equity notwithstanding an acquittal in the criminal proceedings.

105 If there is a conviction of all defendants in the criminal proceedings then it seems certain that with fines and restitution orders, coupled with possible civil action awards, that the individual defendants would lose their equity in RCL and RCL would lose its equity in Hollinger.

106 However, if there is an acquittal then the Black group says there is a realistic chance of regaining equity on their part through a rise in value of the shares and restructuring under their leadership. They say that a change in plea by the Receiver dooms this possibility while in reality gaining nothing or relatively little for the Receiver. Hence, they argue, in balancing the economic interests of the various stakeholders, the balance should favour the Black group in not approving the change in plea.

The factor of costs in going to trial

107 The Receiver submits that there would be an estimated outlay of $3 million in legal fees to defend the criminal proceeding. As well, the Receiver points out that the legal fees would be a priority charge against the assets of the estate. The liquid and near-liquid assets of the estate are less than $7 million.

108 The estimate of legal fees for RCL to retain counsel and mount a proper defence in the criminal proceedings seems modest at $3 million, given the anticipated length (reportedly at least three months) and complexity of the trial.

109 The Black group says that RCL could have a relatively cost-free defence through an inactive, "coat-tail" defence following that of the other defendants. The Black group says that there are not truly diverging interests as between the defendants. The Black group says that there is an identical interest to the defence of all defendants in their central position that Mr. Radler is being untruthful in his expected evidence and that, accordingly, all defendants are to be acquitted.

110 The Receiver says that there is some divergency in the defendants' defences evidenced by Atkinson, Boultbee and Kipnis having filed severance motions. However, these motions were dismissed by Judge St. Eve on January 22, 2007 on the basis that the defendants had failed to demonstrate that their claimed mutually antagonistic defences would prejudice them in a joint trial.

111 In my view, the Receiver is reasonable in being of the opinion that a so-called coat-tail defence would be inappropriate and inadequate and hence, inadvisable. RCL's interests and fate are not necessarily tied to that of any one or more of the other defendants and their positions. RCL should properly have separate counsel prepared and present in all events to independently advise the Receiver and to ensure that RCL's interests are protected at all times at trial. This is particularly necessary as a divergency of interests as between defendants is seen to be a distinct possibility by the Receiver and RCL's counsel.

The factor of restitution

112 RCL agrees by paragraph 6(f) of the Plea Agreement that the total pecuniary loss involved in the transactions underlying all the offences set forth in the Third Superceding Indictment pertaining to the alleged diverted non-compete payments is US$83,950,000. Paragraph 9 states that RCL understands that the offence to which it pleads guilty carries "any restitution order ordered by the Court." U.S. Code s. 3663A requires that restitution for the loss is required in respect of an offence against property. Paragraph 20 of the Plea Agreement sets forth the agreement as to the determination of restitution.

113 Paragraph 20 (a) of the Plea Agreement provides that the restitution order is to provide for restitution for the pecuniary loss attributable to the offense of conviction *and* the transactions underlying the offences charged in the Third Superceding Indictment. Thus, RCL is potentially liable for restitution of pecuniary loss up to about US $51,150,000 (ie. US$83,950,000 less US $32.8 million already repaid relating to non-compete payments). However, an apportionment of liability would be done to fairly determine RCL's actual contribution to the loss. If more than one convicted defendant contributed to the pecuniary loss, apportionment of liability is required pursuant to U.S. Code s. 3664(h). RCL reserves the right to make representations as to allocation. RCL's "economic circumstances" can also be taken into account in determining restitution.

114 Article XVII.2 of the *MLACMA* states that the two Governments shall assist each other, *inter alia*, in proceedings related to restitution to the victims of crime and the collection of fines.

115 United States Code s. 3572(b) provides that the imposition of a fine in sentencing is not to impair the ability to make restitution to a victim such as International. Section 8C.3 (a) of the *Guidelines* is to the same effect, saying that the court shall reduce the fine to the extent the imposition of the fine would impair the ability to make restitution. Sections 5E1.1 and 5E1.2 say that if a defendant is ordered to make restitution and to pay a fine, any money paid is first to be applied to satisfy the order of restitution. Thus, the Black group argues, if there is a conviction of the defendants, the quantum of the restitution order, even with an allocation, would overwhelm the possibility of a large fine being payable by RCL.

116 As stated above, in the event of the conviction of the individual defendants, the apportionment of liability and allocation of restitution would be made by the court as between the defendants. Indeed, with a conviction of all defendants, assuming enforceability in Canada of the restitution order, the defendants' indirectly held shares in RCL would be subject to seizure to satisfy the restitution requirement.

117 However, in the event of an acquittal of all defendants other than Mr. Radler, there is uncertainty as to how much of the US$ 83,950,000 RCL might be required to pay in restitution.

118 The Black group argues that the present Plea Agreement leaves the possibility that a large amount would be ordered payable by RCL as restitution upon the guilty plea, and potentially most of the restitution would be payable by RCL if the other defendants are acquitted.

119 The impact of paragraph 20(a) of the Plea Agreement upon RCL's liability to pay restitution is uncertain in the event of an acquittal of the individual defendants (other than Mr. Radler). The Receiver was apparently unable to obtain greater clarity, and hence greater certainty, in further discussions with the USAO during the course of the hearing of the Motion at hand. However, paragraph 20(a) states that restitution is for the pecuniary loss attributable to "the transactions underlying the offences charged in the Third Superceding Indictment *which* are *attributable to the defendant* [ie. RCL]" [emphasis added]. Thus, it would be arguable that in respect of non-compete payments made directly to an acquitted defendant, such loss could not be attributed to RCL.

120 There has already been restitution made by Hollinger and individual defendants (a total of US$32.8 million) in respect of non-compete payments relating to the sale of the U.S. community newspapers. Thus, RCL's potential exposure to a restitution requirement appears to be limited to the US$26.4 million allegedly paid directly to RCL by Can West as a non-compete payment (some US$26.4 million was also allegedly paid directly to the individual defendants) in connection with the purchase of a 50% interest in the *National Post* and several hundred Canadian newspapers for about US $2.1 billion.

121 However, any such restitution order following upon a guilty plea would probably have only limited impact upon RCL from a practical standpoint.

122 First, the Receiver reserves the right (by paragraph 20(c)(vi) of the Plea Agreement) to argue that any restitution order does not give rise to a valid claim by the U.S. Government in the Canadian insolvency proceedings.

123 Second, whether or not there are acquittals of the individual defendants in the criminal proceedings, there remains a significant risk of civil liability on the part of RCL in respect of the Illinois civil claims advanced by International for recovery of this $26.4 million received by RCL.

124 Paragraphs 20(e)(iii) and (iv) of the Plea Agreement provides that any amount to which International may become entitled to through its Illinois civil action is subject to an agreement of May 13, 2005 between the Receiver and International whereby such amount is to be accepted as a claim for distribution purposes in the Canadian Claims Procedure in the *CCAA* proceeding. If the US Government's claim based upon any restitution order is recognized by the Ontario Court as a valid claim in the Canadian insolvency proceedings, such restitution to International will then be off-set and reduced dollar-for-dollar by the amount of the claims finally proven through a resolution of the civil actions by International. This removes the possibility of double recovery by International.

125 Third, it is agreed (by paragraph 20(e)(vi) of the Plea Agreement) that any U.S. Government claim based upon a restitution order, if accepted as a valid claim in the Canadian insolvency proceedings, is simply an unsecured claim without any priority. The unfortunate reality is that there is a probable significant excess of liabilities to assets in the winding-up of RCL. If so, the *pro rata* claim of the U.S. Government would impact adversely upon other unsecured creditors in respect of any monies available for the unsecured creditors, but have no practical impact upon RCL itself.

The risks of collateral or issue estoppel in the civil proceedings

126 In the United States, the doctrine of collateral estoppel or issue preclusion may be applied in civil proceedings in respect of issues which have been previously determined on a criminal conviction through a guilty plea. *Appley v. West*, 832 F.2d 1021 (U.S. C.A. 7th Cir. 1987), at 1025 -6 (7th Cir.) [*Appley*]. A criminal conviction

based upon a guilty plea within Illinois and the ambit of the 7th Circuit seems to conclusively establish for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he or she was convicted. *Nathan v. Tenna Corp.*, 560 F.2d 761 (U.S. C.A. 7th Cir. 1977).

127 In Canada, criminal convictions are admissible in subsequent civil proceedings. A criminal conviction ordinarily constitutes *prima facie* proof, "but in some cases, the person convicted may be precluded by the doctrine of abuse of process from contesting the underlying facts." *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.)) at para. 19 per Sharpe J.A.

128 The Plea Agreement proposes that RCL plead guilty to Count Two, which involved an alleged non-compete payment of $400,000 in the Forum transaction. It is alleged that $100,000 was wrongly diverted to Hollinger. The Receiver submits that collateral estoppel at most would apply only to the $100,000 in the Forum transaction.

129 The Receiver is faced with RCL being a defendant in the criminal proceedings. The Receiver is also faced with RCL being one defendant in a number of civil actions both in the U.S. and Canada, including: a class action, *Betthel v. Black* [2006 CarswellSask 255 (Sask. Q.B.)] in the Court of Queen's Bench Judicial Centre of Saskatoon, No. 1492 of 2004; a class action in Ontario, being *Steve Drover et al. v. Argus Corporation et al.* file no. 04-CV-028649; an Ontario action, *Hollinger Inc. v. Ravelston Corp.*[2006 CarswellOnt 7269 (Ont. S.C.J.)], file no. 06-CL-6261; an action in the U.S. District Court for the Northern District of Illinois, Eastern Division, *Hollinger International Inc. Hollinger Inc. et al*, No. 04C-0834; and a class action in the U.S. District Court for the Northern District of Illinois, *Teacher's Retirement System of Louisiana v. Black* (June 3, 2004), Doc. No. 04 C 834 (U.S. Dist. Ct. S.D. Ill. 2004), No. 0C-0834 (collectively, referred to as the "civil proceedings"). These civil proceedings raise several alleged causes of action beyond allegations simply related to the non-compete payments. However, they include in part alleged wrongdoing because of the non-compete payments, including those referred to in Counts One and Two.

130 The Black group says that the Receiver failed to properly evaluate the risk that a guilty plea to Count Two of the Third Superceding Indictment will prejudice RCL's position in subsequent civil proceedings. The Black group submits that there is a real risk that plaintiffs in the civil proceedings would seek to use a guilty plea to prevent RCL from relitigating the facts and issues underlying Count Two, pursuant to the U.S. doctrine of collateral estoppel and the Canadian doctrine of abuse of process.

131 The Black group also asserts that Hollinger and International support the Receiver's Plea Agreement Motion at hand because collateral estoppel would likely result in their civil actions being successful.

132 The Black group submits that a plea of guilty to Count Two, given its wording, is an admission as to facts beyond simply those relating to the Forum transaction. In Count Two the Grand Jury charges RCL as follows:

> The Grand Jury realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

133 Count Two then charges RCL with mail fraud "for the purpose of executing and attempting to execute the above — described scheme". The proof of the "scheme" is a precondition to a finding of guilt in respect of mail fraud. The "scheme" is that described in paras. 1 to 33 of Count One, set forth in the first 22 pages of the Third Superceding Indictment.

134 I turn then to a consideration of paras. 1-33 in Count One of the Third Superceding Indictment. Paragraph 1 sets forth as background the interests and inter-relationships of the defendants in respect of RCL, Hollinger and International. The accusation is made in paragraph 2 that from about January, 1999 to about May, 2001 at Chicago the defendants "intended to devise, and participated in a scheme to defraud International and International's public shareholders..." The alleged general "scheme" as to the diversion of non-compete payments is then described

at length and in detail in paras. 3 to 33, dealing with a number of sales of community newspapers and other publications by International, totaling about US $678 million in sale proceeds to International.

135 The Black group argues that by pleading guilty to Count Two, RCL would admit to the facts constituting alleged fraud in respect of all the transactions set forth in Count One. The particular non-compete payments referred to in Count One allegedly diverted to the defendants include US$2 million (American Trucker), US$12 million (CNHI 1), US$1.2 million (Horizon), and US $100,000 (Forum).

136 The U.S. doctrine of collateral estoppel is similar to issue estoppel in Canada. It may preclude the relitigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical. Unlike issue estoppel in Canada, collateral estoppel does not require mutuality (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) at 99 (*C.U.P.E., Local 79*)). Collateral estoppel may be applied in civil trials to issues decided in a prior criminal conviction: *Appley*, *supra* at 1025-6.

137 The Canadian doctrine of abuse of process provides courts with the discretion to prevent relitigation of issues decided in a previous proceeding. A previous criminal conviction is *prima facie* admissible in a civil proceeding under s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23. When determining whether or not the criminal conviction has preclusive effect in the civil proceeding, the Supreme Court in *C.U.P.E., Local 79* advises the courts to, "turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process". In that same case, the Supreme Court identified a non-exhaustive list of situations where relitigation enhances, rather than impeaches, the integrity of the judicial system: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; and (3) when fairness dictates that the original result should not be binding in the new context (e.g. where there was an inadequate incentive to defend a criminal prosecution): *C.U.P.E., Local 79*, *supra* at 106, 110.

138 As I have already outlined above, the Black group points out that Count Two incorporates by reference paras. 1-33 of Count One, which describe in detail the alleged scheme to defraud International of non-compete payments received from the sale of its U.S. community newspapers to various entities, including Forum. The Black group referred the Court to the decision in *U.S. v. Belk*, 435 F.3d 817 (U.S. C.A. 7th Cir. 2006), at 819 [*Belk*]. They submit that the *Belk* decision indicates that the crime to which the Receiver proposes to plead guilty is not limited to mail fraud in relation to the Forum transaction, but also includes the entire "scheme" to defraud International as set out in paras. 1-33 of Count One. In other words, by pleading guilty to Count Two, RCL would be admitting that it participated in a scheme to defraud International of non-compete payments for every transaction involving the sale of International's U.S. community newspapers. As mentioned above, according to the Black group, there is a real risk that plaintiffs would rely on the doctrines of collateral estoppel and abuse of process to prevent RCL from attempting to rebut these admissions in the pending civil proceedings in both the U.S. and Canada.

139 The Receiver asserts that the Plea Agreement reduces RCL's exposure to civil liability because the guilty plea to Count Two is restricted to mail fraud only in relation to the Forum Transaction.

140 By paragraph 5 of the Plea Agreement, RCL agrees to plead guilty "to the charge contained in Count Two". As stated above, Count Two necessarily incorporates by reference an admission to the facts of the alleged "scheme" set forth in Count One. However, paragraph 5 of the Plea Agreement goes on to say that "[I]n pleading guilty [RCL], by its Receiver, admits the following facts...." Paragraph 5 then goes on to provide some background but refers only to a "scheme" to defraud International of money to which its was entitled under the Forum transaction. Paragraph 5 goes on to describe how RCL used interstate mail to execute that scheme. The Plea Agreement does not mention any other sale of U.S. community newspapers to any other entity. Paragraph 5 concludes with the statement that "[t]he factual summary contained in this paragraph is provided for the sole purpose of establishing a factual basis for [RCL's] plea of guilty."

141 In addition, both the Receiver and Hollinger submit that even if the Black Group is correct in its analysis of the consequences of a guilty plea to Count Two, the risk of actual prejudice to RCL in the civil proceedings is minimal, for two reasons. First, RCL faces a number of civil suits regarding the U.S. $2.1 billion CanWest transaction (the alleged scheme to defraud International of non-compete payments from this transaction is described in Counts Eight and Nine of the Third Superceding Indictment). According to paragraph 25 of the Plea Agreement, all other Counts against RCL (ie. other than Count Two) will be dismissed, which preserves RCL's ability to defend the CanWest aspect of the civil proceedings without raising concerns of collateral estoppel and abuse of process.

142 Second, restitution has already been paid for the approximate U.S. $32.8 million in non-compete payments allegedly improperly taken from International in relation to the sale of the U.S. community newspapers (*Hollinger International Inc. v. Black*, 844 A.2d 1022 (U.S. Del. Ch. 2004). C.A. No. 183-N (May 19, 2004) (Transcript), aff'd 872 A.2d 559 (U.S. Del. S.C. 2005). (Reportedly, Hollinger has made restitution of US$16.5 million, Lord Black US$7.1 million. Mr. Radler, U.S.$7.1 million and Mr. Atkinson, US$2.2 million.) Thus, the only outstanding issues in this aspect of the civil proceedings relating to these non-compete payments are compensatory and punitive damages.

143 I note that neither party put forward evidence from a U.S. attorney regarding the likely impact of the proposed Plea Agreement on RCL's position in the U.S. civil proceedings. There is no way for this Court, as a Canadian court of law, to objectively evaluate the risk that the U.S. doctrine of collateral estoppel will prejudice RCL in the U.S. civil proceedings if it pleads guilty to Count Two. In addition, it is not obvious whether it would be an abuse of process for RCL to rebut the facts set out in Count Two in a Canadian civil proceeding, given the significant discretion afforded the trial judge to assess whether relitigation would be detrimental to the adjudicative process. Suffice it to say that collateral estoppel and abuse of process are live issues.

144 Nevertheless, I am satisfied that the Receiver acted reasonably. The Receiver has retained experienced civil counsel in both Canada and the U.S. In consultation with its counsel over a number of months, the Receiver has concluded that the risk of prejudicing its position in the civil proceedings by pleading guilty to Count Two is lower than the risk of prejudice RCL faces in the civil proceedings if it is convicted on all Counts it faces.

145 In my view, it was reasonable for the Receiver to evaluate and compare the risks associated with the "worst case scenarios" — i.e. the risk of prejudice to RCL's position in the civil proceedings by (i) entering the Plea Agreement or (ii) being convicted on all of Counts One to Nine.

146 If there were to be an acquittal then, of course, there is no risk of prejudice through a continuing plea of not guilty. However, the prospect of acquittal is not relevant to evaluating the risk to RCL's position in the civil proceedings. This is because the Receiver has reasonably concluded that there is a significant risk of RCL being convicted of all Counts against RCL in the Third Superceding Indictment.

147 Given the conclusion RCL faces a significant risk of conviction, the Receiver is left with an evaluation of the risks resulting from a guilty plea to Count Two under the Plea Agreement as compared with the risks arising from a continuing not guilty plea with an eventual conviction on all nine Counts it faces.

148 Were RCL convicted on all Counts, it would face the risk that collateral estoppel and abuse of process would preclude relitigation of the issues surrounding the sale of all the U.S. community newspapers *and the CanWest Transaction*. But if RCL enters into the Plea Agreement, there would be greater certainty for the estate because it would only face the much lesser risk that collateral estoppel and abuse of process would preclude, at most, relitigation of the issues surrounding the sale of the U.S. community newspapers.

Disposition

149 The major underlying premise to the Receiver's Motion to change its plea from not guilty and plead guilty to Count Two of the Third Superceding Indictment, is that the Receiver considers there is a significant risk of the conviction of RCL on all nine Counts it faces if it proceeds to a trial.

150 Having made that assessment, the Receiver entered into negotiations with the USAO with a view to determining whether the alternative of a change of plea was feasible and desirable. In doing so, the Receiver has acted with the realization that the RCL estate has limited assets and that the significant cost of defending at trial will have a very adverse impact upon the limited resources remaining available in the estate.

151 The Receiver submits that the Plea Agreement brings some greater certainty, inasmuch as the fine is fixed at US$7 million, the concern as to collateral estoppel arguably relates only to Count Two and a possible civil claim of US$100,000, and that an order of restitution would likely be less than that seen upon a conviction on all nine Counts.

152 The Plea Agreement achieved has reduced significantly the probable fine that would be otherwise imposed upon a conviction at trial. While there is certainly a risk of a significant restitution order upon sentencing through the Plea Agreement, the impact is lessened by other protective provisions. There is a risk as to a greater quantum of restitution being ordered if there is a conviction following upon a trial.

153 There is a concern of collateral or issue estoppel that may arise upon a plea of guilty to Count Two. However, this risk is modest in all the circumstances, and in any event, this risk would be significantly greater in the event of a conviction at trial upon all nine Counts faced by RCL.

154 In my view, the Receiver has made a reasonable and sufficient effort to determine the best course of action in all the circumstances, has considered the interests of all parties and has followed a fair and proper process in arriving at the Plea Agreement. The Receiver has assessed the risks of (1) the likelihood of conviction; (2) the size of the potential fine and ranking in the estate; (3) the impact of a competing restitution order on a receivership distribution and (4) the cost to the estate of maintaining a defence. I accept the Receiver's risk assessment. The Receiver has concluded that there is a greater probability of each of the risks coming to pass in the event the Receiver did not enter a guilty plea pursuant to the Plea Agreement. The Receiver's decision to enter into the Plea Agreement is well within the bounds of reasonableness. In my view, the Plea Agreement is prudent and commercially reasonable taking into account all the circumstances, as well as being fair to all stakeholders.

155 The Receiver has taken such reasonable steps as are possible in the circumstances to minimize any impact of a guilty plea by RCL upon former directors and officers. It has not named any former director or officer other than Mr. Radler and the fact of his Plea Agreement. Each of the individual defendants maintains all the defences and rights that he may have at present.

156 The Receiver has followed a fair and proper process in arriving at the Plea Agreement, determining upon a change of plea and in bringing forward the Motion at hand for approval. The interests of all stakeholders have been given due consideration. The Receiver has weighed carefully and fairly the pros and cons of entering into the Plea Agreement and in trying to balance responsibly the divergent interests of the various stakeholders. The Receiver, facing an extremely serious criminal trial, has fairly, objectively and responsibly negotiated the Plea Agreement and brought forward same for approval by this Court, all with a view to acting in the best interests of the estate.

157 For the reasons given, the Motion is granted. An Order will issue in accordance with these Reasons for Decision.

Motion granted; cross-motion dismissed.

Footnotes

* Affirmed *Ravelston Corp., Re* (2007), 2007 CarswellOnt 1115, 29 C.B.R. (5th) 45 (Ont. C.A.). A corrigendum issued by the court on February 12, 2007 has been incorporated herein.

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