File No. AI 20-30-09537

IN THE COURT OF APPEAL

IN BANKRUPTCY AND INSOLVENCY

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) Respondent,

- 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) Appellants.

MOTION BRIEF OF THE RECEIVER (CANCELLING OF STAY)

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I. LIST OF DOCUMENTS

1. Affidavit of Adam Sherman sworn December 10, 2020;

II. LIST OF AUTHORITIES

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1. Section 195 of the *Bankruptcy and Insolvency Act,* RSC 1985, c. B-3, as amended

2. *Business Development Bank of Canada v Paletta & Co. Hotels Ltd.,* 2012 MBCA 115

3. *Royal Bank of Canada v Bodanis,* 2020 ONCA 185

4. *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MBCA 46

5. *7451190 Manitoba Ltd. v. CWB Maximum Financial Inc. et al,* 2019 MBCA 95

6. *8527504 Canada Inc. v. Sun Pac Foods Ltd.*, 2015 ONCA 916

7. *Plaza Mining Corp., Re,* [1983] B.C.J. No. 1179 (BC CA)

III. INTRODUCTION AND BACKGROUND

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd. ("**NEL**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Respondents**") pursuant to an Order (the "**Receivership Order**") of the Honourable Mr. Justice Edmond of the Court of Queen's Bench (the "**Judge**"). The Receivership Order was subsequently amended by a General Order made on April 29, 2020, which limited the scope of the Receivership Order in relation to the property, assets and undertakings of the Respondents NEL and NPL.

2. On November 9, 2020 and November 13, 2020, the Judge heard certain contested motions brought in the receivership proceedings (the "**Receivership Proceedings**").

3. On November 19, 2020 the Judge made an Order (the "**Inkster Approval and Vesting Order**"), pursuant to which he:

(a) approved the sale transaction (the "**Transaction**") contemplated by the accepted Offer to Purchase (as amended) (the "**Sale Agreement**") between the Receiver as vendor and Eighth Avenue Acquisitions Ltd. (or such nominee as designated by Eighth Avenue Acquisitions Ltd.) as purchaser (the "**Purchaser**") relating to assets described in the Sale Agreement, namely the

land and premises (including, without limitation, buildings and fixtures) located at 1771 Inkster Boulevard in Winnipeg, Manitoba, and certain chattels used in connection with that property (collectively, the "**Inkster Property**");

(b) provided for the vesting in the Purchaser all of the right, title and interest of the Respondent NPL in and to the Inkster Property free and clear of any and all encumbrances upon the closing of the Transaction;

(c) provided that, for the purposes of determining the nature and priority of claims and encumbrances respecting the Inkster Property, the net proceeds from the sale of the Inkster Property shall stand in the place and stead of the Inkster Property, and all such claims and encumbrances shall attach to the net proceeds of the sale of the Inkster Property with the same priority they had with respect to the Inkster Property immediately prior to the sale;

(d) dismissed the Respondents' request for an order discharging the Receiver;

(e) refused the Respondents' request for a lifting of the stay under the Receivership Order for the purpose of allowing one or more of the Respondents to file a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"); and

(f) granted certain other relief.

4. On November 27, 2020, the Respondents filed a Notice of Appeal with this Honourable Court pursuant to section 193 of BIA in connection with their proposed appeal from the Inkster Approval and Vesting Order.

5. The Receiver has now filed a Notice of Motion to be heard by a Judge of this Honourable Court in Chambers, along with the Affidavit of Adam Sherman sworn December 10, 2020 (the "**Sherman Affidavit**"). Given that an Appeal Book has yet to be prepared and filed by the Respondents, the Receiver has, by way of the Sherman Affidavit, attempted to provide this Honourable Court with relevant portions of the record in the Receivership Proceedings for the purposes of considering the Receiver's motion.

6. As set out in its Notice of Motion, the Receiver is seeking:

(a) if necessary, an Order abridging the time for service of the motion and supporting materials;

(b) an Order cancelling any automatic stay imposed as a result of section 195 of the BIA with respect to the Inkster Approval and Vesting Order;

(c) a declaration that, pursuant to section 193 of the BIA, the Respondents require leave of a Judge of this Honourable Court to proceed with the proposed appeal as set out in the Notice of Appeal filed on November 27, 2020, and if necessary, that the stay imposed pursuant to section 195 of the BIA is inapplicable in respect of the Inkster Approval and Vesting Order until such time as leave may be granted to the Respondents;

(d) if necessary, an Order providing for the hearing of the appeal of the Respondents on an expedited basis, and the abridgment of applicable time periods and filing deadlines;

(e) an adjournment of the motion with respect to the relief described at subparagraphs (c) and (d) above.

7. The Transaction is scheduled to close (in accordance with the terms of the Sale Agreement) by no later than January 18, 2021. A continuation of any stay of the Inkster Approval and Vesting Order beyond that date will put the entire Transaction at risk as a result of the Receiver's inability to close.

8. Given the urgency to protect the Transaction and the relatively tight timelines with which the parties are faced, the Receiver submits that initially obtaining a ruling from this Honourable Court as to whether the stay under section 195 of the BIA ought to be lifted represents the most efficient use of resources. Simply put, if this Honourable Court agrees to lift any stay that may apply, this will allow the Receiver to close the Transaction without the necessity of immediately determining the issue of whether the Respondents actually require leave to proceed with their appeal pursuant to section 193 of the BIA.

9. In the circumstances, the Receiver does not presently propose to argue the issues related to the relief described at subparagraphs 6(c) and (d) above on the initial return date for the hearing of this motion. Rather, the Receiver requests that those aspects of the motion be adjourned until a later date.

10. Accordingly, this Brief is being filed to outline the legal basis for the requested Order cancelling of a stay of proceedings pursuant to section 195 of the BIA. In due course, the Receiver intends to file a Supplementary Brief to outline the legal basis for the other requested relief, in advance of the future hearing for such relief.

V. ISSUE

11. Should any applicable stay of proceedings pursuant to section 195 of the BIA be cancelled so as to allow the Transaction to close as scheduled?

V. ARGUMENT

12. Section 195 of the BIA provides for an automatic stay of proceedings upon appeal from an order or judgment:

> **195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended at s 195 (the "**BIA**") [Tab 1]

13. This Honourable Court has broad discretion to cancel the stay imposed by section 195 "… if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper."

The BIA, *supra* s 195 [Tab 1]

14. The factors to be considered by this Honourable Court in determining whether the stay under section 195 of the BIA should be cancelled are:

(a) The merits of the appeal; and

(b) The relative prejudice to the parties, including whether irreparable harm would be suffered if the stay was not cancelled.

Business Development Bank of Canada v Paletta & Co. Hotels Ltd., 2012 MBCA 115 at paras 9 - 15 [*Paletta*] [Tab 2]

Royal Bank of Canada v Bodanis, 2020 ONCA 185 at para 11 [*Bodanis*] [Tab 3]

Merits of the Appeal

15. Based on the Notice of Appeal filed by the Respondents, it appears the following issues are raised on appeal:

(a) Whether the Judge erred in law by deciding that the Receiver should not be discharged;

(b) Whether the Judge erred in law by deciding that NPL may, rather than does, have a right of subrogation to the security of White Oak Commercial Finance, LLC and Second Avenue Capital Partners, LLC (collectively, the "**Lenders**") pursuant to section 2 of *The Mercantile Law Amendment Act*, C.C.S.M. c. M130;

(c) Whether the Judge erred in law by refusing the Respondents' request to lift the stay of proceedings under the Receivership Order to enable the Respondents, or any one of them, to file a Notice of Intention to Make a Proposal under the BIA; and

(d) Whether the Judge erred in law by deciding that the Receivership Order authorized the Receiver to sell the Inkster Property, and in approving the Transaction proposed by the Receiver.

16. The Receiver disagrees with the Respondents' characterization of their grounds of appeal as errors in law committed by the Judge. Rather, the Receiver submits the decision of the Judge on all the issues raised in the appeal represented an exercise of judicial discretion, which properly took into account the relevant law and the facts that were before him.

17. It is also important to bear in mind that the Judge was specifically appointed to deal with the Receivership Proceedings as a whole and has in fact been actively involved in that exercise since early March 2020. A review of the Receiver's Ninth Report (as found at Exhibit 9 to the Sherman Affidavit) provides a thorough summary of the Receivership Proceedings through to early November 2020, and mentions the various issues that have previously come to the Judge for determination.

18. Obviously, the fact the Judge has been intimately involved in the Receivership Proceedings to date does not shield his decision from appellate review where an obvious error has been committed. However, given the nature of insolvency matters such as the Receivership Proceedings, and the level of engagement of the Judge to date, it is respectfully submitted that as a starting point, significant deference is owed to the decision of the Judge.

19. The standard of review to be applied on an appeal from a discretionary decision of a judge in a receivership proceeding was set out by Steel J.A. in *Royal Bank*

of Canada v. Keller & Sons Farming Ltd., 2016 MBCA 46 (which also dealt with an appeal from an order approving a proposed sale of assets by a receiver):

> The decision of the motion judge was an exercise in judicial discretion and is entitled to deference in this Court. We will intervene only if the motion judge exercising his discretion, erred in law, misapprehended the evidence in a material way or was clearly wrong. See *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.,* 2012 MBCA 115 (Man. C.A.) at para 8, (2012), 288 Man. R. (2d) 129 (Man. C.A.); and *Towers Ltd. v. Quinton's Cleaners Ltd.,* 2009 MBCA 81 (Man. C.A.) at para 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.).

Royal Bank of Canada v. Keller & Sons Farming Ltd., 2016 MBCA 46 at para 12 [*Keller*] [Tab 4]

See also, *7451190 Manitoba Ltd. v. CWB Maximum Financial Inc. et al,* 2019 MBCA 95 at para 28 [*CWB Maximum Financial*] [Tab 5]

20. In deciding that the Receiver should not be discharged, the Judge found as follows:

> After reviewing all of the evidence and the briefs filed, the following are my findings and directions:
>
> > a) The Receiver is Court-appointed, and the duties and role of a Court-appointed Receiver must be distinguished from a privately appointed Receiver. A Court-appointed Receiver is charged with the duty to account for all receipts and disbursements and must continue to act in that capacity until discharged by the Court. A Court-appointed Receiver acts as a Court officer for the benefit of all stakeholders. The Receiver is a fiduciary for any surplus funds received which may be payable to other creditors and the debtors. (See *Ostrander v. 38 Niagara Helicopters Ltd. et al.* (1974), 1 O.R. (2d) 281, 40 D.L.R. 39 (3d) 161 (Ont. H.C.); Frank Bennett *On Receiverships*, 3rd Ed 2011, 40 at p 608; *Canadian Commercial Bank v. Simmons Drilling Ltd.,* [1989] 78 Sask.R. 87, 62 D.L.R. (4th) 243 (Sask. C.A.); and BIA at 1 s. 247);
> >
> > d) Pursuant to the receivership order, the Receiver is authorized to market and sell the Inkster Property to satisfy the Lenders' debt, the Receiver's borrowing charge, the landlord's charge and other creditors

> claims including the claims that may be advanced by the debtors such as NPL and NIP. The Receiver is fulfilling its duties as a Court-appointed officer. The Receiver is neither a trespasser nor is its conduct wrongful or illegal in the circumstances;
>
> …
>
> e) There are still a number of matters that must be completed by the Receiver as the Court's officer in the administration of the receivership proceedings. Paragraph 64 of the Receiver's ninth report lists the various steps that must be completed. I do not intend to read those numerous steps that are required onto the record. They are contained in paragraph 64 of the ninth report;
>
> …
>
> … I remain of the view that the Receiver is in the best position to liquidate assets, assess the priority of the various claims, and make a recommendation to the Court to address claims of other stakeholders. Now is not the time to discharge the Receiver and appoint a proposal trustee… [emphasis added]

Affidavit of Adam Sherman affirmed December 10, 2020, Exhibit 15 [Sherman Affidavit]

21. Section 243 of the BIA and section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, provide for the appointment a receiver at the Court's discretion. It is submitted that the timing of the discharge of a Court-appointed receiver appointed is also a matter generally within the discretion of the Court appointing it. As such, the Receiver submits the Judge's decision is owed significant deference.

22. It is apparent from the Reasons for Decision that the Judge considered the evidence and relevant law before him. Respectfully, there was no error in law and/or misapprehension of the evidence, and the decision of the Judge to refuse the request to discharge the Receiver was not clearly wrong. Thus, the Receiver submits there is no arguable merit on this ground of appeal.

23. In finding that NPL *may* have subrogation rights pursuant to section 2 of *The Mercantile Law Amendment Act*, C.C.S.M. c. M130, the Judge held:

> After reviewing all of the evidence and the briefs filed, the following are my findings and directions:
>
> …
>
> c) NPL is a limited recourse guarantor pursuant to the Credit Agreement. NIP, the entity that carried on the fashion clothing business is also a guarantor pursuant to the Credit Agreement. Both entities may have rights to subrogation to the extent of their payments to the Lenders were made on behalf of the borrowers, as defined in the Credit Agreement;
>
> d) Pursuant to the receivership order, the Receiver is authorized to market and sell the Inkster Property to satisfy the Lenders' debt, the Receiver's borrowing charge, the landlord's charge and other creditors claims including the claims that may be advanced by the debtors such as NPL and NIP…
>
> …
>
> f) The Receiver and AGI disagree on the proper accounting treatment of certain assets and liabilities and treatment of intercompany loans within the Nygard Group of Companies. I agree with the analysis provided by the Receiver that it is incorrect to characterize the proceeds generated from the NPL property sales as repayment of NIP's debt to the Lenders and result in NIP owing approximately $17 million to NPL;
>
> g) The Receiver and AGI agree that a review of the accounting records of the Nygard Group of Companies show that as at March 18th, 2020, NPL was indebted to NIP in the amount of approximately $2.5 million, and NEL was indebted to NIP in the amount of approximately $18.1 million. I agree with the Receiver that the correct accounting treatment respecting the proceeds generated from the NPL property sales, namely the Niagara property and the Notre Dame property, is an intercompany payable as between one or more of the US debtors and NPL, and not an intercompany payable between NIP and NPL. This interpretation is consistent with the terms of the Credit

> Agreement which makes it clear that NIP and NPL are guarantors, not borrowers;
>
> h) The Receiver is a fiduciary respecting the assets and proceeds of sale of the Property, including the sale proceeds of the Inkster Property and must continue to report to the Court. There are competing claims which will have to be determined if the parties are unable to agree on the priority disputes; [emphasis added]

Sherman Affidavit, Exhibit 15

24. In *8527504 Canada Inc. v. Sun Pac Foods Ltd.*, 2015 ONCA 916, K. van Rensburg J.A. dismissed an appeal of a debtor on the basis, among other things, that the receiver's right to sell an action was *res judicata*. In doing so, the Court referred to the decision of the Ontario Court of Appeal on a previous appeal by the debtor, noting as follows:

> In its motion for leave, Liquibrands asserted, among other things, that the motions judge erred "in finding that the Action was collateral [under 852's security]" and "in ordering BDO to conduct a marketing process for the sale of the Action".
>
> Feldman J.A., sitting in chambers, noted in her endorsement that the issue of importance asserted for appeal was "whether the lender should be entitled to profit from its breach of the forbearance agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it". She noted that Liquibrands wanted to see the Action continued and concluded before the rights of the parties to the proceeds of the receivership were finally determined.
>
> Feldman J.A. concluded that to proceed as proposed by Liquibrands would turn the process inside out, allowing the debtors, through a funded receiver, to use the funds realized in the receivership to fund their action rather than to pay 852. She found that the December 2014 Orders were grounded in law and reason, and were based on the facts and the documents presented. She concluded that the orders were owed deference. [Emphasis added]

8527504 Canada Inc. v. Sun Pac Foods Ltd., 2015 ONCA 916 at paras 16-19 [Tab 6]

25. It is submitted that the decision of a receivership judge with respect to whether an asset is collateral under a receivership order, and whether that asset can and should be marketed in light of a debtor's potential claim to the proceeds of the proposed sale where the amount of the debtor's potential claim has not yet been established, is a discretionary decision.

26. As such, the Judge's decision that NPL may, rather than does, have a right of subrogation to the Lenders' security is owed deference. In any event, the Judge clearly considered the evidence and law before him on the issue of NPL's potential right of subrogation. There is no error in law and/or misapprehension of the evidence, and the decision was not clearly wrong. As a result, the Receiver also submits there is no arguable merit on this ground of appeal.

27. The Judge found as follows in refusing the Respondents' request to lift the stay of proceedings under the Receivership Order to enable the Respondents, or any one of them, to file a Notice of Intention to Make a Proposal under the BIA:

> … I reviewed and considered the reports filed by AGI and the NOI alternative respecting some of the Nygard Group of Companies. Because I found that the treatment of the previous NPL property sales by Nygard Group accounting staff and AGI was not appropriate, I conclude that the underlying premise for the NOI alterative is flawed and inappropriate. The accounting analysis is inconsistent with the terms of the Credit Agreement and inconsistent with the original NOI filling in which all Canadian debtors, including NPL, reported they were insolvent and included one consolidated creditor list with the Canadian debtors, totalling approximately $60.5 9 million.
>
> The proposed proposal trustee at the time was A. Farber and Partners Inc. I originally stayed the NOI proceedings because I found that the Nygard Group of Companies were not acting in good faith and with due diligence, as required for debtors to

> remain in possession and to seek the protection of the BIA under the proposal process. The NOI alternative and the scenarios suggested by AGI are based on inappropriate accounting treatment, and the NOI alternative is therefore not viable.
>
> There is insufficient evidence to establish that NEL and NPL are solvent entities, and I do not accept the opinion of AGI that they are solvent. I remain of the view that the Receiver is in the best position to liquidate assets, assess the priority of the various claims, and make a recommendation to the Court to address claims of other stakeholders. Now is not the time to discharge the Receiver and appoint a proposal trustee. The respondent's request a lift of the stay and permit some of the Canadian debtors to make a proposal in bankruptcy is denied.

Sherman Affidavit, Exhibit 15

28. In *Plaza Mining Corp., Re,* [1983] B.C.J. No. 1179 (BC CA), Macdonald J.A. dismissed an application for a stay of proceedings by two shareholder-directors of a bankrupt company pending an appeal from an order approving the sale of certain assets.

> The offers were taken before Lander J. at a hearing on 17th August… The trustee had also received a refinancing proposal from the shareholder-directors, Mr. John and Mr. Jones, who are the appellants in this court. The day before the hearing before Lander J. the inspectors met to consider the offers and the refinancing proposal and resolved to accept the Erickson offer. The Erickson offer was as I have already indicated approved by Lander J. The judge had before him a document entitled "Refinancing Proposal", executed 15th August 1983 by Mr. John for and on behalf of the former directors of Plaza, and counsel for the directors told the judge that a trust account had been set up with First Guaranty Limited of Newport Beach, California to which a total of $3,500,000 had been committed which would be available to the creditors of Plaza within 60 days. …
>
> …
>
> The application for a stay which is made to me is opposed by the receiver-manager, the trustee in bankruptcy, Erickson, and Troutline. … After describing the nature of the application and what had happened before van der Hoop L.J.S.C., Lander J. said that he had reviewed two things in his decision, the affidavits of Mr. McMullen, the trustee — two affidavits — and all of the steps taken by the directors as early as March

1983, and other actions before that. The judge noted that counsel for the directors told him there were sufficient funds in a trust account in Newport Beach, California to refinance Plaza, but he said there was no affidavit material to support the contention, and Mr. McMullen's affidavits (Mr. McMullen is a member of the trustee's firm responsible for the matter) said that his affidavits said that similar assurances had been given by the directors at other times; further, that he noted that the escrow agreement with respect to the funds provided for a lot of conditions and collateral before any funds would be released from the account. He therefore said that he would give no weight to Mr. McMullen's affidavits, and he was of the opinion that the refinancing by the directors was not even possible at that time. … The judge found that the trustee had a duty to act prudently and follow a cautious course; and he said, on the materials before him, it would seem that the trustee had done this and that he should follow the trustee and inspectors' decision. He said the trustee is an officer of the court and his decision should be weighed heavily as long as he is acting properly and there was no indication that he was not.

…

It is my opinion that Lander J. had a significant foundation for dealing with this proceeding as one in bankruptcy, that is to say, an application by the trustee in bankruptcy for approval of a sale. … And, of course, it was a matter that greatly concerned the creditors. The trustee had the right to redeem the Bank of Montreal security…The offers indicated a substantial surplus after redemption. The Erickson offer would produce for the unsecured creditors approximately 40 cents on the dollar. Then, before Lander J. there was a notice of motion by the trustee for approval of the Erickson bid; and the receiver-manager through its counsel asked for an adjournment of its motion. Counsel for the receiver-manager informed me without challenge from other counsel here that Lander J. repeatedly indicated during the hearing that he regarded the matter as one in bankruptcy. Now if it was a proceeding of that nature, on that basis, the judge had, I think, much support from the evidence and law for his approval of the Erickson offer.

…

…I am entitled to look at the merits of the appeal; and when I do that, I do not assess a very high chance of succeeding…

Plaza Mining Corp., Re, [1983] B.C.J. No. 1179 (BC CA) at paras 5, 9, 13 and 21 [*Plaza Mining Corp*.] [Tab 7]

29. Based on the preceding authority, it is submitted that the decision of an insolvency court judge with respect to whether it is appropriate to approve a proposed sale, rather than accept an alternative proposal put forward by a debtor company (or its principals) is an exercise of discretion. The Receiver submits this principle applies equally to the present case, where the Judge was considering the issue of rejecting a sale of an asset so as to allow a debtor to proceed with a formal proposal pursuant to the BIA.

30. Based on the Reasons for Decision, it is apparent the Judge considered the evidence and law before him. The Judge referenced the relevant facts, and made findings as to those which he accepted, and those he did not. The Receiver submits the Judge made no error in law and/or misapprehension of the evidence, and his decision was not clearly wrong. Again, there is no arguable merit on this ground of appeal.

31. The Judge provided thorough reasons for approving the Transaction with respect to the Inkster Property. Importantly, the Judge reviewed the law, citing the factors considered in assessing whether to approve the sale of assets by a Court-appointed Receiver and found as follows:

> After reviewing all of the evidence and the briefs filed, the following are my findings and directions:
>
> > a) The Receiver is Court-appointed, and the duties and role of a Court-appointed Receiver must be distinguished from a privately appointed Receiver. A Court-appointed Receiver is charged with the duty to account for all receipts and disbursements and must continue to act in that capacity until discharged by the Court. A Court-appointed Receiver acts as a Court officer for the benefit of all stakeholders. The Receiver is a fiduciary for any surplus funds received which may be payable to other creditors and the debtors….

> b) I am satisfied the Receiver has successfully managed the liquidation process to substantially pay the debt owing to the Lenders. I disagree with the submission advanced by the respondents that the Receiver has become a trespasser and continuing to liquidate real property is wrongful and inappropriate;
>
> …
>
> Having considered the evidence filed, including the ninth report, supplementary ninth report, and the confidential appendices, as well as the affidavit evidence file on behalf of the respondents, including the reports filed by AGI, I find as follows:
>
> 1. The Receiver has made sufficient effort to get the best price for the Inkster Property and has not acted improvidently.
>
> 2. The best interests of the parties are satisfied by completing the transaction as soon as is reasonably possible.
>
> 3. The marketing process utilized by the Receiver and the real estate broker was commercially fair and reasonable and carried out with efficacy and integrity.
>
> 4. The Lenders, the primary secured creditor, the debtors, landlords who hold valid landlords charge, and other creditors support the Transaction.
>
> 5. There has been no unfairness in the marketing process, concluding with the Sale Agreement.
>
> After considering all of the applicable criteria, I conclude that the Transaction should be approved as requested by the Receiver. In accordance with the principles set out above, I place a great deal of confidence in the actions taken and the opinions formed by the Receiver. The approval and vesting order attached as schedule 8 of the notice of motion is granted. [citations omitted]

Sherman Affidavit, Exhibit 15

32. A receivership judge's decision to approve a sale of assets by a Court-appointed receiver is clearly a matter of discretion.

Paletta, supra at para 8 [Tab 2]

Keller, supra at para 12 [Tab 4]

CWB Maximum Financial, supra at para 28 [Tab 5]

33. The Judge considered the evidence and law before him. The Judge gave thorough reasons for his approval of the Transaction. The Judge made no error in law and/or misapprehension of the evidence, and his decision was not clearly wrong. As with the other grounds, there is no arguable merit on this ground of appeal.

Relative Prejudice to the Parties

34. Courts have consistently held that a stay pursuant to section 195 of the BIA ought to be cancelled where the stay may result in irreparable harm to the Receiver and interested stakeholders. Where the stay of a sale approval and vesting order jeopardizes the closing of the sale and may result in the deal being lost, the stay may be cancelled to prevent irreparable harm to the Receiver and interested stakeholders.

Paletta, supra at para 9 [Tab 2]

Plaza Mining Co., supra at paras 11, 18 and 20-21 [Tab 7]

Bodanis, supra at paras 11-14 [Tab 3]

35. As noted by Macdonald J.A. in *Plaza Mining Cor., Re,* [1983] B.C.J. No. 1179 (BC CA), the stay may be cancelled to prevent irreparable harm even where lifting the stay would effectively frustrate the appeal:

> Now I have to attempt to do justice between the parties, that is, not prevent an appellant from prosecuting his appeal while at the same time not causing prejudice to the respondents. Here, the refusal of a stay will effectively frustrate the appeal, but in deciding the matter I am entitled to look at the merits of the appeal; and when I do that, I do not assess as very high its chances of succeeding. Granting a stay will likely prejudice the creditors in the various ways described by the trustees' Mr. McMullen in his affidavit, and I do not know of appropriate

> terms that could be imposed that would eliminate or significantly reduce the prejudice if I should grant a stay.

Plaza Mining Co., supra at para 21 [Tab 7]

36. There is a serious risk that the Purchaser will refuse to proceed with the Transaction if the Receiver is unable to close by the scheduled closing date of January 18, 2021, or by some date reasonably proximate to that.

Sherman Affidavit, at para 5

37. In the Ninth Report of the Receiver dated November 2, 2020, the Receiver recommended that the Motion Judge approve the Transaction and expressed the opinion that the Transaction represents the best recovery in the circumstances for the following reasons:

(a) the marketing process undertaken by the Receiver, with the assistance of Colliers, and the activities undertaken by the Receiver leading to the Transaction was designed to solicit interest from a number of *bona fide* parties that would be interested in and familiar with industrial real property assets;

(b) there is a limited market for the Inkster Property. The Inkster Property has been on the market since late April 2020 and the market has been extensively canvassed in the process leading up to the Transaction and all likely bidders, including Mr. Nygard, have already been provided with an opportunity to bid on the Inkster Property;

(c) the further marketing of the Inkster Property would, in the Receiver's view, not likely result in greater realizations and may put the Transaction at risk, impairing recoveries;

(d) the Purchaser assumes the cost and risk of the certain fire rating resistance issues and removal of a Fast Track System, which costs could be significant;

(e) the Transaction represents the only binding offer received for the Inkster Property; and

(f) the Purchaser is able to close in 60 days of issuance of the Inkster Approval and Vesting Order, the proceeds of which could potentially result in meaningful recoveries for the unsecured creditors of the Respondents' estates.

Sherman Affidavit, Exhibit 9

38. If the Transaction does not close the risks that existed at the time the Transaction was approved remain and may significantly impair recoveries to the detriment of interested parties.

39. While there is a clear risk of irreparable harm to the Receiver should the stay remain in place, there is no irreparable harm to NPL, or any of the other Respondents, in permitting the Transaction to proceed and close as scheduled.

40. Paragraph 5 of the Inkster Approval and Vesting Order provides that the net proceeds from the sale of the Inkster Property shall stand in the place and stead of the Inkster Property. The net proceeds from the sale of the Inkster Property will continue to be held until a distribution of the proceeds is approved by the Court of Queen's Bench.

41. As was acknowledged by the Judge, NPL, NIP, or any of the other Respondents, may assert claims to the net proceeds from the sale of the Inkster Property

and competing claims and priority disputes will need to be decided by the Court before a distribution is approved by the Court.

Sherman Affidavit, Exhibit 15

42. Moreover, it cannot be overlooked that the Respondents previously gave the following evidence with respect to the sale of the Inkster Property in March of 2020, in connection with their objection to the appointment of the Receiver:

> 18. Sales of the Toronto buildings at 1 Niagara, the Inkster buildings, the Notre Dame building, and the Broadway building will generate $25.4 million net dollars. See confidential Affidavit of Greg Fenske for the breakdown on the offers on the buildings and the inventory offer. The general plan is to use the monies from the sale of the buildings to pay $20 million dollars to White Oak pursuant to their security and to allow the purchasers of the buildings in Manitoba to continue using the buildings in the fashion industry and to potentially retain the employees. Peter Nygard will no longer have any ownership interest in the buildings or the business.
>
> …
>
> 21. The completion of these transactions would represent the culmination of the objectives of the Nygard Group of Companies which would be to pay off the indebtedness to the employees, suppliers and other stakeholders including White Oak Capital and allow these fashion jobs to be retained in Winnipeg.
>
> 22. This would also divest to the ownership of Peter Nygard and all of the Nygard Group of Companies under different ownership and would allow the different Purchasers the ability to move forward with the current employees of Nygard International.
>
> …
>
> 31. The proceeds from the sale of the building at 1 Niagara will go to White Oak.
>
> 32. The proceeds from the sale of the Manitoba properties when added to the monies received from the sale of 1 Niagara will go to White Oak up to a maximum of $20,000,000.00.

> 33. The proceeds from the sale of the Inventory assets will go to White Oak up to the maximum of the amount owing in excess of $20,000,000.
>
> 34. The remainder of the monies will go to the Proposal Trustee to make a proposal to pay the remaining creditors.
>
> Sherman Affidavit, Exhibit 3

43. To be clear, as of March 2020, the evidence provided on behalf of the Respondents was that they were intending to sell the Inkster Property as part of a plan to pay the Lenders and other creditors of the "Nygard Group of Companies". In the circumstances, the Receiver submits that there is clearly no prejudice and/or irreparable harm to the Respondents (or, in particular, NPL) if the Transaction closes as scheduled and the Inkster Property is sold, as was previously contemplated by the Respondents.

44. Accordingly, the Receiver submits balance of convenience strongly favors the removal of the stay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2020.

THOMPSON DORFMAN SWEATMAN LLP

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

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Appeals

R.S.C. 1985, c. B-3, s. 195

s 195. Stay of proceedings on filing of appeal

Currency

195.Stay of proceedings on filing of appeal

Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

Amendment History

1992, c. 27, s. 69

Currency

Federal English Statutes reflect amendments current to November 25, 2020
Federal English Regulations are current to Gazette Vol. 154:23 (November 11, 2020)

End of Document

2012 MBCA 115
Manitoba Court of Appeal

Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.

2012 CarswellMan 727, 2012 MBCA 115, 224 A.C.W.S. (3d) 255, 288 Man. R. (2d) 129, 564 W.A.C. 129, 5 C.B.R. (6th) 334

Business Development Bank of Canada (Applicant) Respondent and Paletta & Company Hotels Ltd. (Respondent) Appellant

Scott C.J.M.

Heard: December 13, 2012
Judgment: December 14, 2012
Docket: AI 12-30-07892

Counsel: R.W. Schwartz, J.S. Harvey for Appellant
G.B. Taylor, J.J. Burnell for Respondent
D.G. Douglas, R.A. McFadyen for Receiver, Lazer Grant Inc.
D.G. Guénette, D.A. Johnston for Government of Manitoba (Manitoba Development Corporation)

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Procedure on opposition to sale

Sale of assets of hotel of debtor, by receiver, was approved — Debtor sought to appeal and automatic stay was put in place — Receiver brought application to set aside stay — Application granted — Motion judge's decision was entitled to deference — Facts and convenience favoured lifting stay — Maintaining hotel over coming season would be great expense — Deal had been approved and it was not obvious another ready buyer would purchase property — No procedural fairness occurred and debtor had been given receiver's reports and was aware of problems in selling property — Debtor did not have compelling case for appeal.

Table of Authorities

Cases considered by *Scott C.J.M.*:

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 38 D.L.R. (4th) 321, 73 N.R. 341, 46 Man. R. (2d) 241, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 1987 CarswellMan 176, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, [1987] D.L.Q. 235 (S.C.C.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — referred to

Soldier v. Canada (Attorney General) (2009), 236 Man. R. (2d) 107, 448 W.A.C. 107, [2009] 2 C.N.L.R. 362, [2009] 4 W.W.R. 455, 2009 MBCA 12, 2009 CarswellMan 36 (Man. C.A.) — referred to

Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 466 W.A.C. 70, 2009 CarswellMan 375, 2009 MBCA 81, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70 (Man. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 195 — considered

APPLICATION by receiver for statutory stay of sale order of debtor's property.

***Scott C.J.M.*:**

1 On November 18, 2010, a Court of Queen's Bench motions court judge appointed Lazer Grant Inc. as receiver of essentially all the assets of the respondent (Paletta) in relation to a business known as the Hecla Oasis Resort. On November 16, 2012, after numerous and lengthy efforts made by the receiver and an experienced hotel consultant to dispose of the assets of the resort, the receiver applied to the same Queen's Bench motions court judge (who had remained seized of the matter throughout) for a vesting order to approve an asset purchase agreement dated November 15, 2012, with Lakeview Management Inc. In the absence of an agreement by both the receiver and Lakeview Management Inc., the transaction must close by no later than December 14, 2012. It is common ground that the actual price for the assets being purchased, consisting of chattels and equipment, is approximately $350,000.

2 There can be no doubt that the receiver and the secured creditors were disappointed by the amount of the sale price; notwithstanding, the applicant (Business Development Bank of Canada) and Manitoba Development Corporation, the two largest secured creditors, approved the sale.

3 On November 20, the motions court judge approved the transaction.

4 Section 195 of the *Bankruptcy and Insolvency Act* reads as follows:

> **Stay of proceedings on filing of appeal**
>
> **195.** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

5 On November 29, 2012, Paletta filed a notice of appeal against the decision of the motions court judge. In the result, an "automatic stay" came into effect. This caused the receiver to move before a Court of Appeal judge in chambers, returnable Thursday, December 13, being the next available chambers day, to remove the stay so that the sale approved by the motions court judge could be completed.

6 Argument proceeded before me on December 13 by counsel for the parties, for the receiver and for Manitoba Development Corporation.

7 At the conclusion of argument, I indicated to counsel that in light of the urgency, I would endeavour to have my decision completed by today and that my reasons would be brief and to the point.

Standard of Review

8 The motions court judge's decision was an exercise in judicial discretion and is hence entitled to deference. See *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at para. 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.), and *Soldier v. Canada (Attorney General)*, 2009 MBCA 12, 236 Man. R. (2d) 107 (Man. C.A.).

Decision

9 The facts overwhelmingly support the conclusion that the balance of convenience favours the removal of the stay and that irreparable harm will result if this is not done. The receiver estimates that it will cost in excess of

$300,000 to heat and maintain the resort premises over the winter. The Business Development Bank of Canada has already advanced approximately $1.2 million to the receiver with respect to the costs of the bankruptcy, including maintenance of the property, and is not willing to continue this level of support. Despite serious efforts, the receiver has been unable to obtain a better offer. The deal is approved and is ready to close now. There will be enormous uncertainty if the sale is not completed, with no guarantee that Lakeview Management Inc. will still be "at the table" at a future date.

10 On December 12, the parties and the court were provided with a form of "letter of intent" proferred on behalf of a corporation related to Paletta. The letter of intent is conditional on a 60-day inspection period and specifically states that it is not a "legally binding and enforceable Agreement of Purchase and Sale." The proposed purchase price, I was told, is $500,000. Paletta's counsel advised that his client was not willing to fund the upkeep and heating of the resort while "due diligence" was taking place pursuant to the letter of intent.

11 Counsel for Paletta focussed his argument on the assertion that there had been a lack of procedural and substantive fairness on the part of the receiver. This concern arises, counsel argues, because the receiver failed to advise Paletta until a day and a half prior to the proceedings before the motions court judge on November 19, that the chattels and physical assets had become "unhinged" from the resort enterprise itself, and that efforts were no longer being made to sell the entire complex as one entity. Counsel asserted that the final negotiations between Lakeview Management Inc. and the receiver were done "behind closed doors," which prevented Paletta or someone on its behalf from bettering the Lakeview Management Inc. offer.

12 But the facts are that, throughout, Paletta was provided with the receiver's reports (eight in all) and was fully aware of the difficulties being encountered by the receiver in even obtaining signs of interest in the assets under receivership. It is obvious that the Queen's Bench motions court judge was fully aware that there were difficulties with some Paletta family members and addressed it in his reasons for decision of November 20 as follows:

> What is particularly important to me in my assessment of this matter is that the Paletta group have been served with materials for every application which the Receiver has made during the course of this receivership and have been present at many, if not most of them. Although Mr. Schwartz argues that the relationship between the Receiver has been strained, that does not depart from the fact that there is a court appointed receiver. If the receiver is doing something that is inappropriate or not commercially reasonable, there was ready access to the court to complain and to convince the court to put the Receiver back on track.
>
> . . . . .
>
> I do not accept that a party who claims to be a stakeholder can sit quietly back and then come in at the last minute and say that the publicized process is all wrong. At best, the Paletta group has simply stuck their heads in the sand. At worst, they wanted to see what someone else would offer and then try and arrange for someone else or themselves to do better. Neither extreme nor anything in between is reason for me to interfere with the process which has been undertaken by the Receiver with the knowledge of all concerned.
>
> . . . . .
>
> The practical thing to do, at this time, is to approve the offer of Lakeview Management. It is not the court's function to make its Receiver, nor the major creditors, take unnecessary risks and there being no one prepared to fund, it is time to move on or at least give Lakeview and the government the opportunity to work out their plans.

13 It is noteworthy that the existing lease agreement between Paletta and the Province of Manitoba deals essentially with the very same classification of assets as are now the subject of the agreement with Lakeview Management Inc.

14 Based on all of these facts, I am not satisfied that Paletta has an arguable case, or a reasonable prospect of success, in challenging the procedure followed by the receiver in arriving at the asset purchase agreement with Lakeview Management Inc., as approved by the motions court judge.

15 I am completely satisfied the receiver has made out a compelling case for the stay to be removed. See *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). My decision would be the same regardless of the deference required of me by the applicable standard of review.

16 For the foregoing reasons, I grant the receiver's application to cancel the stay under s. 195 of the *Bankruptcy and Insolvency Act*.

17 Costs may be spoken to.

Application granted.

2020 ONCA 185
Ontario Court of Appeal

Royal Bank of Canada v. Bodanis

2020 CarswellOnt 3314, 2020 ONCA 185, 316 A.C.W.S. (3d) 414, 78 C.B.R. (6th) 165

Royal Bank of Canada (Moving Party / Respondent) and David Bodanis (Responding Party / Appellant)

Royal Bank of Canada (Moving Party / Respondent)
and Irenka Bodanis (Responding Party / Appellant)

I.V.B. Nordheimer J.A.

Heard: March 2, 2020
Judgment: March 6, 2020
Docket: CA M51328 (C67467), M51356 (C67464)

Counsel: Rachel Moses, for Moving Party
Scott Rosen, for Responding Parties

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Miscellaneous

Creditor obtained bankruptcy orders against debtors — Debtors began appeal proceedings — Creditor brought motions for directions — Automatic right of appeal existed, automatic stays cancelled — There was appeal as of right under s. 193(c) of Bankruptcy and Insolvency Act — Value of property involved in appeals exceeded $10,000 — Debtors' entire property had been taken out of their control and placed into hands of trustee who had right to dispose of that property and distribute it among creditors, without further court intervention — Automatic stay under s. 195 of Act should be cancelled — Chance of success of appeal was not high — No prejudice if stay was cancelled.

Table of Authorities

Cases considered by *I.V.B. Nordheimer J.A.*:

Buduchnist Credit Union Limited v. 2321197 Ontario Inc. (2019), 2019 ONCA 588, 2019 CarswellOnt 11103, 72 C.B.R. (6th) 245 (Ont. C.A.) — distinguished

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — distinguished

Comfort Capital Inc. v. Yeretsian (2019), 2019 ONCA 1017, 2019 CarswellOnt 21285, 75 C.B.R. (6th) 217 (Ont. C.A.) — considered

Crate Marine Sales Ltd., Re (2016), 2016 ONCA 140, 2016 CarswellOnt 2491, 33 C.B.R. (6th) 169 (Ont. C.A.) — considered

First National Financial GP Corporation v. Golden Dragon HO 10 Inc. (2019), 2019 ONCA 873, 2019 CarswellOnt 18509, 74 C.B.R. (6th) 1 (Ont. C.A.) — followed

Ravelston Corp., Re (2005), 2005 CarswellOnt 9058, 24 C.B.R. (5th) 256 (Ont. C.A.) — followed

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — followed

Wong v. Luu (2013), 2013 BCCA 547, 2013 CarswellBC 3824, [2014] 4 W.W.R. 504, 10 C.B.R. (6th) 318, 55 B.C.L.R. (5th) 129, (sub nom. *Luu (Bankrupt), Re)* 348 B.C.A.C. 155, (sub nom. *Luu (Bankrupt), Re)* 595 W.A.C. 155 (B.C. C.A.) — distinguished

Yewdale v. Campbell, Saunders Ltd. (1994), 53 B.C.A.C. 235, 9 B.C.L.R. (3d) 253, [1995] 9 W.W.R. 477, 34 C.B.R. (3d) 74, (sub nom. *Yewdale (Bankrupt) v. Campbell, Saunders Ltd.)* 87 W.A.C. 235, 1994 CarswellBC 1187 (B.C. C.A.) — followed

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONCA 225, 2016 CarswellOnt 4553, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635, 347 O.A.C. 226 (Ont. C.A.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 193 — considered

s. 193(a) — considered

s. 193(b) — considered

s. 193(c) — considered

s. 195 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTIONS by creditor for directions in bankruptcy proceedings.

***I.V.B. Nordheimer J.A.*:**

1 There are companion motions in these two bankruptcy proceedings that seek directions. The moving party asserts that the appellants in these matters do not have an appeal as of right but rather must seek leave to appeal. In the alternative, the moving party says that the automatic stay that would result from an appeal as of right ought to be cancelled.

2 Both appellants owe monies to the moving party and others pursuant to various judgments and costs awards totalling in the hundreds of thousands of dollars. They have owed these monies, in some cases, for many years. In November 2018, the moving party commenced bankruptcy applications against the appellants. A trial was held on these applications and, at its conclusion, on August 12, 2019, the trial judge granted bankruptcy orders. The appellants then filed appeals from those orders.

3 The first issue is whether there is an appeal as of right. The conclusion on that issue turns on the wording of s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, which reads:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

4 Each of ss. 193(a), (b) and (c) are invoked in this case. I agree that neither ss. 193(a) nor (b) apply. Based on the analysis contained in *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), I conclude that a bankruptcy order does not involve future rights. Similarly, there is no evidence in this case that the bankruptcy orders will likely affect another case raising the same or similar issues in the same bankruptcy proceedings, unlike the situation in *Wong v. Luu*, 2013 BCCA 547, 55 B.C.L.R. (5th) 129 (B.C. C.A.), at para. 21. Consequently, s. 193(b) does not apply.

5 However, in my view, s. 193(c) does apply to this case. Clearly, the value of the property involved in this appeal exceeds $10,000. Indeed, there is no dispute that that is the case. However, the moving party submits that the bankruptcy orders, which appoint a Trustee in Bankruptcy, simply preserve the assets of the bankrupt and therefore do not "involve" property of more than $10,000. The moving party relies on observations made in certain other cases including *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.), *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635 (Ont. C.A.), and *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588, 72 C.B.R. (6th) 245 (Ont. C.A.).

6 Each of those decisions is distinguishable from the case at hand. In all three of those cases, the order being appealed was an order appointing a Receiver over certain properties. It was not a bankruptcy order as is the case here. There are distinctions between orders appointing a Receiver and bankruptcy orders appointing a Trustee in Bankruptcy. Among those distinctions is the fact that, unlike a Receiver, the Trustee in Bankruptcy does not require court approval in order to monetize the bankrupt's assets (except in limited circumstances). Instead, the Trustee has a duty to dispose of the bankrupt's assets and distribute the proceeds amongst the creditors, subject to the inspectors' approval.

7 In relying on these decisions, the moving party points out the commentary that has been made in them that s. 193(c) ought to be narrowly construed in order to avoid conflict with other statutes, particularly the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. As laudable a goal as that may be, it cannot be used to, in effect, read the subsection out of the statute. On that point, counsel for the moving party fairly concedes that, if the interpretation of s. 193(c) that she urges in this case were to be adopted, the subsection would not apply to any bankruptcy proceeding, since all of them will realistically involve assets totalling more than $10,000.

8 While I appreciate the concerns that are used to justify the narrow approach, I do not see how a court can invoke those concerns in order to avoid the plain wording of the statute. The basic principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21. If there is a pressing concern on this issue, it is one that Parliament must address.

9 While the facts of each case may determine whether s. 193(c) properly applies, in my view, it clearly applies here where the appellant's entire property have been taken out of their control and placed into the hands of a Trustee in Bankruptcy, who has the right to dispose of that property and distribute it among the creditors, without further court intervention. The orders here are more akin to the type of orders that were considered in *Crate Marine Sales Ltd., Re*, 2016 ONCA 140, 33 C.B.R. (6th) 169 (Ont. C.A.), and *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017 (Ont. C.A.), where an appeal as of right was found to exist. Consequently, I conclude that the appellants have an appeal as of right.

10 That conclusion then raises the second issue: should this court cancel the automatic stay that results from an appeal? Section 195 of the *Bankruptcy and Insolvency Act* reads:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

11 In considering whether the automatic stay should be cancelled, the court will principally consider two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties: *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1 (Ont. C.A.), at para. 40; *Yewdale v. Campbell, Saunders Ltd.* (1994), 9 B.C.L.R. (3d) 253 (B.C. C.A.), at para. 15.

12 In this case, while the appeals may not be entirely meritless, they are ones that appear to only challenge either the trial judge's exercise of discretion in refusing an adjournment, or his factual findings that an act of bankruptcy had been committed. Their chances of success cannot be seen as being very high.

13 In addition, I fail to see any prejudice to the responding parties if the automatic stay is cancelled. Their sole significant asset appears to be their residence and it is already the subject of mortgage proceedings by the Toronto-Dominion Bank. Another factor is, as the trial judge noted, that the responding parties have a history of delay. Further, there is some evidence of the responding parties' improper dealings with their property, as evidenced by a fraudulent conveyance action that was commenced in 2014.

14 All of these considerations favour the moving party. Consequently, I conclude that the automatic stay under s. 195 should be cancelled.

15 The moving party is entitled to its costs of these motions fixed at $5,000, inclusive of disbursements and HST.

Order accordingly.

End of Document

2016 MBCA 46
Manitoba Court of Appeal

Royal Bank of Canada v. Keller & Sons Farming Ltd.

2016 CarswellMan 147, 2016 MBCA 46, 265 A.C.W.S. (3d) 664, 330 Man. R. (2d) 12, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 675 W.A.C. 12

Royal Bank of Canada, (Plaintiff) Respondent and Keller & Sons Farming Ltd. and Keller Holdings Ltd., (Defendants)

Shilo Farms Ltd. and Marcus Keller, Appellants and Ernst & Young Inc., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity, (Applicant) Respondent

Freda M. Steel, Diana M. Cameron, Janice L. leMaistre JJ.A.

Heard: May 2, 2016
Judgment: May 2, 2016
Docket: AI 16-30-08585

Counsel: R.W. Schwartz, for Appellant, Shilo Farms
F.J. Trippier, A.K. Anjoubault, for Appellant, M. Keller
J.M.J. Dow, for Respondent, Royal Bank of Canada
A.J. Stacey, R.A. McFadyen, for Respondent, Ernst & Young
D.E. Swayze, for Prospective Purchasers, Spud Plains Farms Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency; Property

Headnote

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

Receiver accepted offer from A group over offer of S Ltd. respecting sale of debtor companies' lands, buildings and related irrigation infrastructure — Motion judge approved sale to A group — S Ltd. appealed — Appeal dismissed — Offer by S Ltd. to pay unsecured creditors over time and out of future profits was unrealistic when best possible offer would still result in shortfall to secured creditors — Secured creditors were only parties with material and direct commercial interest in proceeds of sale and it was reasonable for receiver not to take into account portion of offer by S Ltd. that dealt with unsecured creditors — Receiver had authority to deal with all assets and receivables of debtors — Receiver had authority to sell property, and it was entitled to take steps it considered necessary to carry out sale process — It was within receiver's discretion to consider pending litigation with appellant company, along with sale price of land, and conclude that it was better to take higher amount for land offered by A group and pursue outstanding claims against appellant company than to accept proposed settlement offered by appellant company — Motion judge reasonably concluded that receiver canvassed market for land in open, fair and transparent manner.

Table of Authorities

Cases considered by *Freda M. Steel J.A.*:

Business Development Bank of Canada v. Paletta & Co. Hotels Ltd. (2012), 2012 MBCA 115, 2012 CarswellMan 727, 288 Man. R. (2d) 129, 564 W.A.C. 129, 5 C.B.R. (6th) 334 (Man. C.A.) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Shape Foods Inc. (Receiver of), Re (2009), 2009 MBQB 171, 2009 CarswellMan 312, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235 (Man. Q.B.) — referred to
Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to
Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 MBCA 81, 2009 CarswellMan 375, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70, 466 W.A.C. 70 (Man. C.A.) — referred to

APPEAL from *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 2016 MBQB 77, 2016 CarswellMan 346 (Man. Q.B.), by unsecured creditor of approval of sale of debtor companies' lands, buildings and related irrigation infrastructure.

***Freda M. Steel J.A.*:**

1 This is an appeal from the decision of the motion judge approving the request of Ernst & Young Inc. (the Receiver) for the sale of Keller lands, buildings and related irrigation infrastructure equipment (the Keller Lands) to Spud Plains Farms Ltd., A&A Farms Ltd., TA Farms Ltd. and A&M Potato Growers Ltd. (collectively referred to as the Adriaansen Group).

2 Shilo Farms Ltd. (Shilo), an unsecured creditor and unsuccessful bidder, and Marcus Keller, the sole shareholder of the defendant debtor companies, an unsecured creditor, and also the general manager of Shilo, appeal from that decision.

3 Fundamentally, the appellants argue that the sale process was not fair or equitable. They argue that the integrity of the process of bidding was tainted. It is submitted that the Receiver "muddied the waters" by asking Shilo to make an offer that included a settlement offer for outstanding disputed claims.

4 At a later stage in the modified sale and investor solicitation process, the Receiver asked the Adriaansen Group and Shilo to resubmit improved offers. Specifically, the Receiver asked Shilo to make an offer that included an amount related to certain disputed claims between the Receiver and Shilo. The Adriaansen Group made an offer for the land and, as well, advised the Receiver that, if successful, it would be reselling a parcel of the Keller Lands known as Parcel 4. Depending on the amount obtained on the resale, it was possible for the Receiver to obtain further proceeds from that resale.

5 Shilo made an improved offer that included an amount of $700,000 as a settlement of the disputed claims. Shilo also indicated it would make arrangements to repay amounts owing to the defendants' unsecured creditors over time out of future profits. It is this additional amount, submitted by Shilo for settlement of the claims, that was the subject of much of Shilo's submissions opposing the sale in the Court below and in this Court.

6 While the offers were relatively close, the Receiver accepted the offer from the Adriaansen Group, explaining that the amount offered by the Adriaansen Group was higher than the offer of Shilo when the settlement amount was removed from the Shilo offer. The Adriaansen Group offer for the land alone was $300,000 higher than the Shilo offer. The Receiver decided that, upon acceptance of the Adriaansen Group offer, it could then still realize on the claims against Shilo, the claims estimated at $1,100,00 by the Receiver, even though the realization of those claims might very well include litigation and the necessity to incur additional legal fees. The Receiver also noted a potential to further increase the proceeds depending on the subsequent reselling of Parcel 4 of the Keller Lands.

7 Shilo submits that the Receiver's request to Shilo that it include an amount for settlement of the outstanding disputes created an unfair process. In other words, it was a mistake on the Receiver's part to say to Shilo that its bid would be more favourably received by the Receiver if it included an amount to settle outstanding claims by the Receiver against Shilo. As well, it is argued that the Receiver was acting outside of its authority. The Receiver only had the authority to deal with the land itself, not extraneous claims.

8 Keller argues that the Receiver did not consider the interests of all the parties, particularly those of the unsecured creditors, and the offer to pay the unsecured creditors 20 cents on the dollar over time out of future profits.

9 The appeal of Shilo and Keller must, out of necessity, also consider the question as to whether they have standing to appeal. Standing is a pre-requisite to opposing a sale approval motion. See *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 130 O.A.C. 273 (Ont. C.A.); and *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171, 241 Man. R. (2d) 235 (Man. Q.B.). At the motion, because of the exigencies of time, the Court heard from both parties on the merits of their motion and decided the matter on those merits, despite the Court's final decision that neither party had standing.

10 In this Court, the appellants argue that they have standing to challenge the decision of the Receiver and, hence the decision of the motion judge. Shilo argues that it has standing as a result of its status as an unsuccessful bidder for the property, and also as an unsecured creditor. Keller argues that he has standing as an unsecured creditor, as well as a shareholder of the defendant debtor companies.

Standard of Review

11 The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. See *Royal Bank v. Soundair Corp.* (1991), 46 O.A.C. 321 (Ont. C.A.); and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pp 109, 111.

12 The decision of the motion judge was an exercise in judicial discretion and is entitled to deference in this Court. We will intervene only if the motion judge exercising his discretion, erred in law, misapprehended the evidence in a material way or was clearly wrong. See *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.*, 2012 MBCA 115 (Man. C.A.) at para 8, (2012), 288 Man. R. (2d) 129 (Man. C.A.); and *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at para 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.).

Decision

13 We have some sympathy for the appellants' argument as to standing. That is, if unsecured creditors are unable to challenge the process, who will speak on their behalf? While a party must have a material interest that has been affected in order to establish standing, the question of what constitutes a material interest will vary depending on the facts of the case. It may be, as was argued, that the unfairness of the process itself prevented the party from obtaining a material interest in the sale process. In any event, this is not the case to pursue that argument because, even if we disagreed with the motion judge and felt that either or both parties should have standing, we do not see a ground for appellate intervention in the final decision.

14 When reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. See *Soundair Corp.*

15 However, the offer to pay unsecured creditors over time out of future profits is not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing

to the secured creditors, and the amounts that would be generated from the sale of assets, there will inevitably be a significant shortfall in this case. As a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the Receiver not to take into account the portion of the offer dealing with unsecured creditors.

16 There is some dispute as to whether Shilo knew that there would be a shortfall to the secured creditors. Whether or not the company knew this, it also stated in its affidavit that it would not have changed the offer. We do not see how that affected the integrity of the process.

17 Second, with respect to the fairness of the sale process, the motion judge held that since the Receiver was dealing with a prospective purchaser, Shilo, with which it had outstanding claims, this was an efficient way to proceed in wrapping up other aspects of the receivership, and possibly obtaining an increased overall bid. Moreover, the amount that Shilo did offer for the Keller Lands was not as high as the offer put forward by the Adriaansen Group, if the amount proposed for settlement was taken out. The motion judge held that the Receiver was entitled to conclude that taking more money for the land, and taking the risk of suing for the entire amount owing in the disputed claims with Shilo, was a better option than taking less for the land and settling the disputed claims.

18 In addition, the Receiver had the authority to deal with all assets and receivables of Keller & Sons Farming. The Receiver was granted authority to sell property in the order granted by Schulman J on October 8, 2015. That order gave the Receiver the right to sell by negotiating such terms and conditions as it saw fit and to consider, evaluate and, if it deemed appropriate, settle claims relating to the defendants.

> THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
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> . . .
>
> (g) to settle, extend or compromise any indebtedness owing to or by the Defendants;
>
> . . .
>
> (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

19 We believe that Shilo's argument interprets the power of the Receiver too narrowly. The second order (February 8, 2016) allowed the Receiver to take such steps as it considered necessary in carrying out the sale process.

> THIS COURT ORDERS AND DECLARES that the Receiver is authorized and directed to continue to implement the Sales Process, subject to further order of the Court, and to take such steps as it considers necessary or desirable in carrying out the Sales Process, including entering into an auction agreement with Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie") with respect to the equipment of Keller & Sons Farming Ltd.

20 Consequently, it was within the Receiver's discretion to consider pending litigation, along with a sale price of the land, and to ultimately conclude that it was better to take a higher amount for the land and pursue the outstanding claims against Shilo, than to accept the proposed settlement. Whether someone else would have decided differently is irrelevant. It is clearly not an improvident bargain.

21 The motion judge specifically addressed each of the relevant criteria and found on the facts that the Receiver had fully canvassed the market for the Keller Lands in an "open, fair and transparent manner to all potential interested purchasers" (at para 28). That decision was reasonable, given the evidence before him. We see no error in such a conclusion, certainly no error that is clearly wrong.

22 The appeal is dismissed with costs.

Appeal dismissed.

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2019 MBCA 95
Manitoba Court of Appeal

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al

2019 CarswellMan 772, 2019 MBCA 95, [2019] M.J. No. 246, 310 A.C.W.S. (3d) 243

IN THE MATTER OF: A Final Order for the Appointment of MNP Ltd. as Receiver and Manager

CWB MAXIUM FINANCIAL INC. (Applicant / Respondent) and 6934235 MANITOBA LTD. carrying on business as WHITE CROSS PHARMACY WOLSELEY and 7085797 MANITOBA INC. (Respondents / Respondents) and 7451190 MANITOBA LTD. (Respondent / Appellant)

Mainella J.A., In Chambers

Heard: August 6, 2019
Judgment: September 19, 2019
Docket: AI19-30-09213

Counsel: J.L. Sinclair, for Appellant
C.E. Howden, E.N. Blouw, for Respondent, CWB Maxium Financial Inc.
No one for Respondents, 6934235 Manitoba Ltd. c.o.b. as White Cross Pharmacy Wolseley and 7085797 Manitoba Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Receiver/manager was appointed over assets, undertakings and properties of company and other respondents — Company sought to appeal receivership order, seeking leave to appeal if leave was required — Application dismissed — Company maintained that it had automatic right of appeal under s. 193(c) of Bankruptcy and Insolvency Act because value of its property was in excess of $10,000 — Appointment of receiver did not bring into play value of "property involved" for purposes of s. 193(c) of Act — For s. 193(c) of Act to apply, appeal must directly involve property exceeding $10,000 in value, and direct involvement of property occurred when evidentiary record provided basis that order being challenged had some element of final determination of economic interests of claimant in debtor, which was not situation here — Company suffered no loss by appointment of receiver, and no other party had gain — Company's appeal of receivership order was not of right, and it required leave to appeal in accordance with s. 193(e) of Act — Proposed appeal did not raise issue of general importance to practice in bankruptcy/insolvency matters or to administration of justice as whole — Extraordinary nature of receivership order being granted became of less concern in situation, like here, where creditor had contractual right to remedy of private receiver upon default and occurrence of default was unchallenged — Issues raised by company were not of significance to action — Company had not established that there was prima facie merit that judge erred in law or fact or reached unjust result — Uncertainty and delay of proposed appeal would unduly hinder progress of bankruptcy/insolvency proceeding — Considering all circumstances, it was not appropriate for court to exercise its residual discretion to grant company leave to appeal receivership order — Result was not unjust.

Table of Authorities

Cases considered by *Mainella J.A., In Chambers*:

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 ABCA 127, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 W.A.C. 38, 457 A.R. 38 (Alta. C.A.) — referred to

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Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — considered
Downing Street Financial Inc. v. Harmony Village-Sheppard Inc. (2017), 2017 ONCA 611, 2017 CarswellOnt 11087, 49 C.B.R. (6th) 173 (Ont. C.A.) — referred to
Elias v. Hutchison (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 1981 ABCA 31 (Alta. C.A.) — referred to
Enroute Imports Inc., Re (2016), 2016 ONCA 247, 2016 CarswellOnt 5045, 35 C.B.R. (6th) 1 (Ont. C.A.) — considered
Farm Credit Canada v. West-Kana Farms Ltd. (2014), 2014 BCCA 501, 2014 CarswellBC 3863, 68 B.C.L.R. (5th) 333, 365 B.C.A.C. 127, 627 W.A.C. 127 (B.C. C.A.) — referred to
Forjay Management Ltd. v. Peeverconn Properties Inc. (2018), 2018 BCCA 188, 2018 CarswellBC 1878, 61 C.B.R. (6th) 221 (B.C. C.A.) — referred to
HOJ National Leasing Corp., Re (2008), 2008 ONCA 390, 2008 CarswellOnt 2749, 42 C.B.R. (5th) 208, (sub nom. *Ontario (Motor Vehicle Dealers Act, Registrar) v. HOJ National Leasing Corp. (Trustee of))* 293 D.L.R. (4th) 455, 68 C.C.P.B. 172, (sub nom. *HOJ National Leasing Corp. (Bankrupt), Re)* 245 O.A.C. 1 (Ont. C.A.) — referred to
Homestead Properties (Canada) Ltd. v. Sekhri (2007), 2007 MBCA 61, 2007 CarswellMan 162, [2007] 8 W.W.R. 635, 214 Man. R. (2d) 148, 395 W.A.C. 148 (Man. C.A.) — referred to
PricewaterhouseCoopers Inc v. Ramdath (2018), 2018 MBCA 41, 2018 CarswellMan 137, 59 C.B.R. (6th) 173 (Man. C.A.) — referred to
PricewaterhouseCoopers Inc v. Ramdath (2018), 2018 MBCA 71, 2018 CarswellMan 267, [2018] 9 W.W.R. 641 (Man. C.A.) — considered
Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — referred to
United Air Lines Inc., Re (2003), 2003 CarswellOnt 2786, 43 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — considered
Viterra Inc v. McIvor (2019), 2019 MBCA 22, 2019 CarswellMan 180 (Man. C.A.) — referred to
2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONCA 225, 2016 CarswellOnt 4553, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635, 347 O.A.C. 226 (Ont. C.A.) — referred to
7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 28, 2019 CarswellMan 190 (Man. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 187(5) — considered

s. 193 — considered

s. 193(c) — considered

s. 193(e) — considered

s. 195 — considered

s. 243 — considered

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 55 — considered

APPLICATION by company for leave to appeal receivership order.

***Mainella J.A., In Chambers*:**

Introduction

1 7451190 Manitoba Ltd. (the company) seeks to challenge an order made pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the *BIA*) and section 55 of *The Court of Queen's Bench Act*, CCSM c C280, appointing a receiver/manager over the assets, undertakings and properties of it and the other respondents. The receivership order was entered on the same day it was pronounced, December 20, 2018.

2 An appeal of the receivership order was commenced on January 14, 2019. In chambers proceedings before me, the applicant raised several objections with the appeal:

(1) the company did not have an appeal as of right, rather, it requires leave to appeal that should be refused;

(2) the appeal was statute barred as it was not filed within 10 days of the order or decision appealed from; and

(3) the company could not be represented in this Court by its director who is not licenced to practice law in Manitoba.

3 Previously, I decided that the company could not be represented by its director (see *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.)). The company has now retained legal counsel to represent it on the proceedings related to the appeal.

4 The remaining questions for me to decide are:

(1) whether the nature of the company's appeal of the receivership order requires leave or is of right pursuant to section 193 of the *BIA*;

(2) if the company requires leave to appeal, should leave to appeal be granted; and

(3) whether the company should be granted an extension of time to file its notice of appeal and, if leave is required, its application for leave to appeal.

5 For the following reasons, I conclude that the company's appeal of the receivership order is not of right and, given the circumstances, leave to appeal should be denied. Accordingly, it is unnecessary to address the request for an extension of time.

Background

6 In my previous decision, I set out the following relevant background (at paras 5-8):

The applicant is the secured creditor of the company and the two other corporate respondents carrying on business as a Winnipeg pharmacy. Based on a default of various loan agreements by all three of the respondents the applicant made an application in the Court of Queen's Bench for the appointment of MNP Ltd. as receiver and manager, without security, of all of the assets, undertakings and properties of the company and the two other corporate respondents. The total indebtedness claimed by the applicant from the three respondents as of November 2, 2018, was $2,153,863.07.

The receivership application was heard on December 20, 2018. At that time, Daren Lee Jorgenson was the manager of the pharmacy. He is a non-lawyer and was permitted to represent the company on the receivership

> application. His son, Eaton Jorgenson, was the sole officer and director of the company at the time. The other corporate respondents did not appear on the receivership application or otherwise oppose it. The officers and directors of the other corporate respondents are not family members of Mr. D. Jorgenson.
>
> Mr. D. Jorgenson admitted at the hearing of the receivership application that no payments on the loans owed to the applicant had deliberately been made after October 15, 2018, because of a dispute between him and the applicant as to an advance of $206,000 to the company in June 2018. Mr. D. Jorgenson alleges that an officer of the applicant colluded with former directors and shareholders of the company to allow them to misappropriate that advance once the company received it, and therefore it should not form any part of the indebtedness claimed by the applicant. Mr. D. Jorgenson advised that he has reported the alleged theft to police and other authorities. The applicant denies the allegation.
>
> Mr. D. Jorgenson advised the judge that no payments would be made to the applicant from the operation of the pharmacy on the loan agreements until the $206,000 dispute was resolved. He asked for an adjournment of the receivership application. The judge refused the request and granted the receivership order because he was "not persuaded that the adjournment (would) serve any useful end." He stated that it was just and convenient to appoint a receiver to "preserve and protect the property pending a judicial resolution of any issues."

7 Under the loan agreements, the applicant had the contractual right to appoint a private receiver in a case of default. Instead, it sought a court-appointed receiver.

8 At the application for the appointment of a receiver, Mr. D. Jorgenson advised of several reasons to adjourn the application. He said the matter was complicated as there was a possible misappropriation of funds that had only recently been brought to the attention of the police. He said there was no urgency to the application as the pharmacy was still operating and rent and salaries were being paid. In addition, the default on the loans was a technical one based on a disagreement between him and the applicant over the $206,000 advance and not the other loans. Next, the company had only been served two days prior to the hearing and wanted 20 days to file affidavit material in opposition to the application. Finally, the company wanted the assistance of the Court's case management process because it did not have a lawyer to represent it.

9 Mr. D. Jorgenson also advised the Court that the company might be prepared to agree to a court-appointed receiver with limited oversight powers to ensure the pharmacy was being properly operated but nothing more.

10 After the receivership order was granted, the company did not seek a stay of it.

11 The receivership order contained a "comeback clause" which states as follows:

> THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

12 The nature and purpose of a "comeback clause" in an insolvency proceeding was described this way by Farley J in *United Air Lines Inc., Re*, 2003 CarswellOnt 2786 (Ont. S.C.J. [Commercial List]) (at para 3):

> I would note the presence of a comeback clause in the order. That is a safety device to ensure that anyone who is affected by this order and who has not had a meaningful opportunity to make timely representations (if they deem that necessary) are able to re-attend in this Court to ask for relief - with the onus remaining on the applicant United to demonstrate that the original relief obtained by it remains appropriate in the circumstances prevailing. In other words any affected party is not put at any disadvantage. I would note the Ontario Court of Appeal's views in *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) as to the appropriate use of the comeback clause.

13 In addition to the comeback clause, a judge of the Court of Queen's Bench has the following authority under section 187(5) of the *BIA* which states:

> **Court may review, etc.**
>
> **187(5)** Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

See *Elias v. Hutchison*, 1981 ABCA 31 (Alta. C.A.)at paras 30-31; and , *HOJ National Leasing Corp., Re*, 2008 ONCA 390 (Ont. C.A.) at paras 26-30.

14 Since appointed, the receiver has filed two reports with the Court of Queen's Bench, informing of inquiries undertaken and decisions made, and has sought approval of various activities. The company has not filed any motion challenging the actions taken by the receiver.

Discussion and Conclusion

15 The parts of section 193 of the *BIA* relevant to this matter dealing with appeal rights provide as follows:

> **Court of Appeal**
>
> **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> . . .
>
> **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . .
>
> **(e)** in any other case by leave of a judge of the Court of Appeal.

Is Leave to Appeal Required?

16 By necessary implication of the operation of the *BIA*, a judge of this Court sitting in chambers has jurisdiction to decide the threshold question of a party's right of appeal under section 193 of the *BIA* and whether leave to appeal is required (see, *PricewaterhouseCoopers Inc v. Ramdath*, 2018 MBCA 41 (Man. C.A.) at para 20 (Hereinafter *Ramdath #1*)).

17 The company relies on section 193(c) of the *BIA*, arguing that it has an automatic right of appeal because the value of its property is well in excess of $10,000. In my view, this submission must fail.

18 The appointment of a receiver does not bring into play the value of the "property involved" for the purposes of section 193(c) of the *BIA*. As Blair JA explained in , *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (Ont. C.A.), "an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval" (at para 17) (see also, *Farm Credit Canada v. West-Kana Farms Ltd.*, 2014 BCCA 501 (B.C. C.A.) at paras 21-22; and, *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont. C.A.) at para 59).

19 For section 193(c) of the *BIA* to apply, the "appeal must directly involve property exceeding $10,000 in value" (*Enroute Imports Inc., Re*, 2016 ONCA 247 (Ont. C.A.) at para 5). The direct involvement of property occurs when the evidentiary record provides a basis that the order being challenged has "some element of a final determination of the economic interests of a claimant in the debtor" (*2403177 Ontario Inc.* at paras 61-62; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont. C.A.) at paras 23-27; and *Forjay*

Management Ltd. v. Peeverconn Properties Inc., 2018 BCCA 188 (B.C. C.A.) at paras 52-54). That is not the situation here. The company suffered no loss by the appointment of the receiver, nor has any other party had a gain.

20 Accordingly, the company's challenge to the receivership order requires leave to appeal being granted in accordance with section 193(e) of the *BIA*.

Should Leave to Appeal be Granted?

21 The parties agree, as do I, that the test for leave to appeal being granted under section 193(e) of the *BIA* was discussed thoroughly by Cameron JA in *PricewaterhouseCoopers Inc v. Ramdath*, 2018 MBCA 71 (Man. C.A.) at paras 14-24 (Hereinafter *Ramdath #2*). The criteria to consider in deciding whether to grant leave to appeal under section 193(e) of the *BIA* are:

1. The proposed appeal raises an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

2. The issue raised is of significance to the action itself.

3. The proposed appeal is prima facie meritorious.

4. Whether the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding.

22 Notwithstanding these criteria, the Court retains a residual discretion to grant leave to appeal where the refusal to do so would result in an injustice.

23 The company's proposed appeal turns on the issues of the necessity of making the receivership order and doing so on short notice. The company says that the remedy of the appointment of a receiver was unnecessary; the pharmacy is a healthy business. Rather, the applicant triggered the receivership for a tactical purpose simply because it did not want to resolve the dispute over the $206,000 advance with Mr. D. Jorgenson. Further, the judge erred by not giving the company proper time to resist the appointment of a receiver or to use the case management process of the Court.

24 I am not persuaded by the company's arguments in favour of leave to appeal being granted.

25 The proposed appeal does not raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. As was the situation in *Ramdath #2* and, in large part, *Pine Tree Resorts Inc.*, there is no precedential significance to this case that will affect others or the law generally. In his succinct reasons, the judge simply applied well-settled law as to the appointment of a receiver and the granting of an adjournment to the distinct facts of this case.

26 In terms of the second criteria (significance of the issue to the action itself), as was explained in *Pine Tree Resorts Inc.*, this factor often will be of "lesser assistance" (at para 30) in deciding the question of leave. In this case, while the company says the issues it raises are of significance to the action itself, the fact of the matter is that the loan agreements gave the applicant the contractual right to appoint a private receiver once default occurred, which the company admits was deliberate and for reasons other than insolvency. The extraordinary nature of a receivership order being granted becomes of less concern in a situation, such as here, where the creditor has a contractual right to the remedy of a private receiver upon default and the occurrence of a default is unchallenged (see, *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List])) at para 13).

27 If anything, a court-appointed receiver is to the company's benefit, as opposed to a private receiver, as the process is more transparent and a court-appointed receiver is a fiduciary acting as an officer of the court (see *Gidda* at para 16). In my view, the issues raised by the company are of no significance to the action itself.

28 On the question of the arguable merit of the company's proposed appeal, it is important to begin by recognising that the appointment of a receiver is a matter of discretion (see *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (S.C.C.) at para 47). Such a decision will therefore be afforded significant deference on appeal, absent a misdirection in law or fact, or a decision that is so clearly wrong as to amount to an injustice (see, *Homestead Properties (Canada) Ltd. v. Sekhri*, 2007 MBCA 61 (Man. C.A.) at para 13; and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at para 6). Similar deference will be afforded to a decision whether to adjourn a matter (see , *Viterra Inc v. McIvor*, 2019 MBCA 22 (Man. C.A.) at para 4).

29 Promptness and timeliness are considerations on an application for the appointment of a receiver (see *Lemare Lake Logging Ltd.* at paras 45, 75). Appeal courts must be sensitive to the reality that time is a luxury that a judge, considering whether to appoint a receiver, does not typically have.

30 The record before the judge highlighted the importance of his acting quickly. It was undisputed that all of the respondents were in default of the loan agreements and that nothing would be paid to the applicant until the dispute over the $206,000 advance was resolved. That was a conscious choice of Mr. D. Jorgenson; not, as previously mentioned, because of insolvency, but because of his complaint as to the conduct of the applicant and former officers and directors of the company. He was not hiding the fact he was attempting to leverage the total indebtedness to resolve the dispute over the $206,000 advance which was only approximately 10 per cent of what was owed to the applicant.

31 None of the reasons Mr. D. Jorgenson proposed to the judge to delay deciding whether to appoint a receiver bears on the uncontested facts. There is nothing before me that satisfies me that there is prima facie merit that the judge erred in law or fact or reached an unjust result in refusing the adjournment, or that he should not have appointed a receiver to preserve and protect the property when there was, as he put it, clearly a "serious breakdown" in the relationship between the parties.

32 Finally, on the last consideration, it strikes me that the uncertainty and delay of the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding. Insolvency litigation is fluid. It is well recognised that delays can prejudice the ability of the receiver to carry out the realisation process (see *2403177 Ontario Inc.* at para 64). While the dispute over the $206,000 advance has not been resolved, the pharmacy is now operating in accordance with the loan obligations owed to the applicant. The receiver is carrying out its mandate without objection of the parties. If leave to appeal is granted, the receivership process will be halted because of the automatic statutory stay (see section 195 of the *BIA*). The status quo should not be upset in my view, particularly given the weakness of the case the company has put forward in seeking leave to appeal.

33 When I consider the relevant criteria as a whole, taking into account the entire context, I am not satisfied that it is appropriate to grant the company leave to appeal the receivership order.

34 In the circumstances, I do not see that result as an unjust one. The company had a legal, and far more proportional, alternative to challenge the disputed indebtedness than the brinksmanship Mr. D. Jorgenson engaged in. The company could have sued the applicant over the $206,000 advance as opposed to walking away from all of its loan obligations. If it had done so, the receivership would not have occurred and the costs to all of the parties would have been reduced.

35 Also, while, to date, no unfairness has arisen because of the appointment of a receiver, I am mindful of the fact that the termination of any possible appeal by the company of the appointment of the receiver by my order will not leave it without remedies should there be a fundamental change of circumstances going forward. The wording of the comeback clause and the jurisprudence surrounding the applicability of section 187(5) of the *BIA* provide the company with remedies depending on what may occur.

36 In summary, I have not been convinced that there is appropriate reason for me to exercise my residual discretion to grant leave to appeal in a situation that otherwise does not meet the relevant criteria for granting leave under section 193(e) of the *BIA*.

Disposition

37 The company requires leave to appeal the receivership order pronounced and entered on December 20, 2018.

38 Leave to appeal is denied, with costs.

Application dismissed.

2015 ONCA 916
Ontario Court of Appeal

8527504 Canada Inc. v. Sun Pac Foods Ltd.

2015 CarswellOnt 19752, 2015 ONCA 916, 261 A.C.W.S. (3d) 986, 344 O.A.C. 115

8527504 Canada Inc. (Responding Party / Applicant) and Sun Pac Foods Limited (Respondent)

Application under Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C. 43

8527504 Canada Inc. (Responding Party / Applicant) and Liquibrands Inc. (Respondent)

K. van Rensburg J.A., In Chambers

Heard: December 1, 2015
Judgment: December 23, 2015
Docket: CA M45642, M45643

Proceedings: refusing leave to appeal *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 16770, 2015 ONSC 6853, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 14887, 2015 ONSC 5912, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: David E. Wires, Krista Bulmer, for Moving party, Csaba Reider
Harvey Chaiton, for Responding party, 8527504 Canada Inc.
Anthony J. O'Brien, for Responding party, BDO Canada Limited, court-appointed receiver of Sun Pac Foods Limited and Liquibrands Inc.

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

Headnote

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Persons subject to — Miscellaneous

Related debtor companies brought action under forbearance agreement against two secured creditors — Companies went into receivership — Judge case-managing receivership issued orders, directing process for sale of such action which could include creditor offering credit bid — Company's motion for leave to appeal orders was dismissed — Receiver's motion to approve sale of action to secured creditor was granted and motion by principal of companies for order allowing him as director of companies to control and advance action was dismissed — Costs were awarded to receiver and creditor — Principal brought motion for leave to appeal — Motion dismissed — Main issue as to receiver's entitlement to market and sell court action was already determined by earlier orders — Fact that challenge was now made by principal rather than by companies themselves, raising new arguments as to why action did not form part of lenders' security, was immaterial — Principal was privy to receivership proceedings throughout and was bound by earlier determination that receiver was empowered to deal with, market, and sell action — To extent that principal raised any new issue not decided, he had not met test for leave to appeal — In order to advance appeal of issue respecting residual authority of director to pursue action by company in receivership, principal would have to overcome conclusion that receiver's right to sell action was res judicata — As he could not do so, there was no prima facie merit in proposed appeal — Principal's actions amounted to attempt to relitigate what was already decided — Principal was fully involved in proceedings and had opportunity to challenge receiver's right to sell action on whatever basis he saw fit to advance, including this new argument.

2015 ONCA 916, 2015 CarswellOnt 19752, 261 A.C.W.S. (3d) 986, 344 O.A.C. 115

Civil practice and procedure --- Practice on appeal — Leave to appeal — Application — Grounds
Related debtor companies brought action under forbearance agreement against two secured creditors — Companies went into receivership — Judge case-managing receivership issued orders, directing process for sale of such action which could include creditor offering credit bid — Company's motion for leave to appeal orders was dismissed — Receiver's motion to approve sale of action to secured creditor was granted and motion by principal of companies for order allowing him as director of companies to control and advance action was dismissed — Costs were awarded to receiver and creditor — Principal brought motion for leave to appeal — Motion dismissed — Principal was privy to receivership proceedings throughout and was bound by earlier determination that receiver was empowered to deal with, market, and sell action — To extent that principal raised any new issue not decided, he had not met test for leave to appeal — Proposed issue, as raised in this case, of whether receiver could sell debtor's action to defendant by way of credit, had no prima facie merit — Principal offered no principled reason why motions judge erred — Principal simply reiterated his earlier objections to receiver dealing with and selling action — As leave to appeal orders was refused, there was no need to address request for leave to appeal costs order.

MOTION by principal of debtor companies for leave to appeal from judgments reported at *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 ONSC 5912, 2015 CarswellOnt 14887 (Ont. S.C.J. [Commercial List]) and *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 ONSC 6853, 2015 CarswellOnt 16770 (Ont. S.C.J. [Commercial List]), granting receiver's motion to approve sale of companies' action to defendant creditor and awarding costs.

***K. van Rensburg J.A., In Chambers*:**

A. Overview

1 This is a motion for leave to appeal two orders of Newbould J. (the "motions judge") dated September 28, 2015 ("the September 2015 Orders") in two related receiverships — of Sun Pac Foods Limited ("Sun Pac") and of Liquibrands Inc. ("Liquibrands"). The applicant, Csaba Reider, also seeks leave to appeal the costs order of November 5, 2015, if leave is granted in respect of the September 2015 Orders.

2 The motion is brought under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Leave to appeal is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider (a) the general importance of the issues for appeal to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) whether the proposed appeal is *prima facie* meritorious; and (c) whether proceeding with the proposed appeal would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

3 For the reasons that follow, the motion for leave to appeal the September 2015 Orders is dismissed.

4 Essentially, I have concluded that the main issue that the moving party Csaba Reider wishes to put before this court — whether the receiver was entitled to market and sell a court action commenced by Sun Pac and Liquibrands prior to their receiverships (the "Action") — was already determined by an earlier order of Newbould J., the judge case managing the receiverships. This court previously denied leave to appeal that earlier order.

5 The fact that the challenge is now made by Mr. Reider, as the director of Liquibrands and former director of Sun Pac, and not by Liquibrands itself, raising new arguments as to why the Action does not form part of the lenders' security and cannot be sold by the receiver, is immaterial. Mr. Reider was privy to the receivership proceedings throughout and is bound by the earlier determination that the receiver was empowered to deal with, and to market and sell, the Action.

6 To the extent that Mr. Reider raises a new issue that was not decided by the earlier orders — whether the credit sale of the Action to a defendant to that action ought to have been approved by the court — he has not met the test for leave to appeal that decision to this court.

B. The Companies, The Action and The Receiverships

7 Sun Pac was a manufacturer of beverages, croutons and breadcrumbs. In November 2011, Sun Pac was acquired by Liquibrands Inc. ("Liquibrands"), a company owned by Mr. Reider.

8 8527504 Canada Inc. ("852") is Sun Pac's senior secured lender and was owed approximately $4 million when the Sun Pac receivership proceedings were commenced.

9 Sun Pac's debt to 852 was guaranteed up to the amount of $1 million by Liquibrands. Liquibrands is also a secured creditor of Sun Pac, and is owed approximately $2.6 million.

10 On 852's application, which was not opposed, BDO Canada Limited ("BDO") was appointed receiver of Sun Pac on November 12, 2013.

11 Earlier on the day that the order appointing the receiver was granted, Sun Pac and Liquibrands commenced the Action in the Superior Court of Justice, against 852 and Bridging Capital Inc. (together, the "Lender Defendants").

12 The Action alleges, essentially, that the Lender Defendants were in breach of their obligations to Sun Pac and Liquibrands under a forbearance agreement, and caused the failure of Sun Pac and its inability to pay the Lender Defendants and other creditors. The Action claims more than $100 million in damages.

C. The December 2014 Orders

13 On December 4, 2014, Newbould J. made three orders (the "December 2014 Orders"). The orders:

- approved the reports of BDO as receiver of Sun Pac, and permitted the receiver to pay the amount realized on the assets of Sun Pac to 852, on account of its first ranking security interest, rejecting the argument by Liquibrands that the funds should be paid into court pending the determination by trial of the issues raised in the Action;

- appointed BDO as receiver of all of the property, assets and undertaking of Liquibrands following its default on the $1 million guarantee of Sun Pac's debt to 852, rejecting Liquibrands' argument that no receiver should be appointed pending the outcome of the Action; and

- refused the request by Liquibrands that a different receiver be appointed over the "remaining assets" of Sun Pac for the purpose of advancing the Action.

14 Pursuant to the motions judge's December 4th endorsement, the receiver was to propose a marketing process for the sale of the Action that would be settled by the court absent agreement. Counsel for 852, the receiver and Liquibrands negotiated and agreed to the terms for the marketing process which were included in an order in the Sun Pac receivership as well as the order appointing BDO as receiver of Liquibrands. The terms included the following:

> (d) the Action is being offered for sale subject to the terms and conditions set out in the [Asset Purchase Agreement prepared by BDO]...;
>
> (e) [852] may be an offeror and may make its offer by way of credit bid or otherwise without prejudice to any party to oppose the right of [852] to make an offer or to oppose any offer made;

. . .

(g) the sale of the Action shall be conditional upon [court] approval of same...

D. The First Motion for Leave to Appeal

15 Liquibrands' motion for leave to appeal the December 2014 Orders was dismissed on April 2, 2015.

16 In its motion for leave, Liquibrands asserted, among other things, that the motions judge erred "in finding that the Action was collateral [under 852's security] and "in ordering BDO to conduct a marketing process for the sale of the Action".

17 Feldman J.A., sitting in chambers, noted in her endorsement that the issue of importance asserted for appeal was "whether the lender should be entitled to profit from its breach of the forbearance agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it". She noted that Liquibrands wanted to see the Action continued and concluded before the rights of the parties to the proceeds of the receivership were finally determined.

18 Feldman J.A. concluded that to proceed as proposed by Liquibrands would turn the process inside out, allowing the debtors, through a funded receiver, to use the funds realized in the receivership to fund their action rather than to pay 852. She found that the December 2014 Orders were grounded in law and reason, and were based on the facts and the documents presented. She concluded that the orders were owed deference.

19 After noting that Liquibrands was not objecting to the procedure for marketing the Action in the event that its request that a separate receiver be appointed to pursue the lawsuit was rejected, Feldman J.A. observed, at para. 15:

> ...I raised some issues in oral argument regarding the propriety of [the marketing] procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

E. The Sale Process

20 The receiver then marketed the Action, following the process set out in the December 2014 Orders. The deadline for receipt of offers was May 15, 2015. Two offers were received: a cash offer for $100 from "Liquid Brands Inc.", signed by Mr. Reider as president, and a credit bid from 852 for $1 million. The receiver accepted 852's offer, subject to court approval.

F. The Next Set of Motions

21 After making his offer, but before the bids were opened, Mr. Reider served a notice of motion seeking an order permitting him to advance the Action under the "residual authority" of the directors of the companies. He proposed to pledge the assets of Liquibrands not covered under the receivership order as security for costs of the Action. In the alternative, he sought an order prohibiting 852 from bidding to purchase the Action.

22 Mr. Reider argued that it would be a conflict of interest for a receiver of a debtor to be involved and in control of litigation by the debtor against the secured creditor that caused the receivership, and that such litigation can be pursued under a director's residual powers: see *Maple Leaf Foods Inc. v. Markland Seafoods Limited*, 2007 NLCA 7, 279 D.L.R. (4th) 682, and *Re Inyx Canada Inc.* (2007), 36 C.B.R. (5th) 154, [2007] O.J. No. 3846 (S.C.).

23 The receiver moved for court approval of the sale of the Action to 852, and the motions were argued together on June 22, 2015.

G. The September 2015 Decision and Orders

24 In the September 2015 Orders, the motions judge dismissed Mr. Reider's motion, and approved the sale of the Action to 852.

25 The motions judge held that the order sought by Mr. Reider was directly contrary to the December 2014 Orders which authorized the receiver to conduct a sale process for the Action, and in respect of which leave to appeal was denied. Having been involved in the proceedings as an active participant and as a privy to both Liquibrands and Sun Pac, Mr. Reider was bound by the earlier orders.

26 The motions judge also dismissed Mr. Reider's argument that he was not bound because the December 2014 Order directing a sale process for the Action was not a head of relief sought by 852 in its motion material leading to that order. The receiver's right to sell the Action had been raised in 852's supplementary factum and thoroughly argued before the motions judge and in the earlier leave to appeal motion. Nothing in the decision refusing leave to appeal preserved any right to challenge the sale process that had been agreed on, and approved by the court.

27 The motions judge then considered Mr. Reider's objection to 852 as a purchaser. He referred to various cases recognizing the power of a trustee in bankruptcy to sell to a defendant an action commenced by the bankrupt against that defendant, even where it meant that the sale would end the litigation: see *Re Almadi Enterprises*, 2014 ONSC 1020, 12 C.B.R. (6th) 162; *Re Katz* (1991), 6 C.B.R. (3d) 211, [1991] O.J. No. 1369 (Ont. Gen. Div.), *Watt v. Beallor Beallor Burns Inc.* (2004), 1 C.B.R. (5th) 141, [2004] O.J. No. 450 (Ont. S.C.) He saw no reason not to apply the principles from these bankruptcy cases to a receivership, concluding that the duty of a receiver to maximize the assets for the benefit of all interested stakeholders is no different from the duty of a trustee in bankruptcy to maximize the assets for the benefit of all creditors.

28 The motions judge approved the sale of the Action to 852 by credit bid. It could not be said that the credit bid by 852 deterred potentially interested parties from submitting a bid. The person most knowledgeable about the Action, Mr. Reider, bid only a nominal amount, and it could not be expected that unconnected and unrelated third parties would be interested in bidding on the litigation since they would need the full cooperation and participation of the principals of the company to pursue it successfully. The agreed sale process that provided for notice to be given just to parties on the service list was a reflection of that reality. The credit bid was acceptable, as whether 852 bid cash or credit, it would sustain a shortfall in the receivership.

29 After receiving written submissions, the motions judge awarded costs against Mr. Reider and in favour of 852 in the amount of $27,500, and in favour of the receiver in the sum of $6,000, plus HST. He rejected Mr. Reider's argument that costs should not be awarded against him personally but against Liquibrands, for whose benefit he claimed to be acting in bringing his motion and opposing the receiver's motion.

H. Analysis

30 The applicant acknowledges that the motions judge's orders made in the course of the receiverships are entitled to deference. The applicant asserts that the proposed appeal raises important legal questions, and is *prima facie* meritorious. I note that in this case, the third part of the *Pine Tree Resorts* test is not at issue, as there is no question of delaying the progress of the substantially completed receiverships.

31 The applicant asserts that the proposed appeal raises two important issues of interest to insolvency practitioners and the administration of justice in general. The first concerns a director's "residual right" to pursue

an action that belongs to a company in receivership. The second is whether a court-appointed receiver can sell an action by the company in receivership to a defendant to that action.

(1) The First Issue

32 In order to advance an appeal on the issue respecting the residual authority of a director to pursue an action by a company in receiver, the applicant must overcome the conclusion that the receiver's right to sell the Action was *res judicata*, as the December 2014 Orders were binding on him. That he cannot do. As such, there is no *prima facie* merit in Mr. Reider's proposed appeal on this issue.

33 The receiver's right to sell the Action was determined by the December 2014 Orders, and provided for a specific and agreed upon sale process. The only issue left open was court approval of any sale, including the right to challenge 852 as a bidder and purchaser of the Action.

34 There is no merit to Mr. Reider's argument that the December 2014 Orders are not binding because the receiver never moved before the court for authority to sell the Action.

35 That argument, as well as several other points advanced by Mr. Reider, were addressed in the earlier motion for leave to appeal, including: that the Action could not be collateral or property used in the business of Sun Pac for the purposes of the receivership, that an action by a debtor against a lender does not form part of the lender's security, and whether the court erred in directing BDO to sell the Action.

36 Further, I agree with the motions judge's rejection of Mr. Reider's argument based on the passage noted above from the decision refusing leave to appeal from the December 2014 Orders. Feldman J.A. noted that the parties (including Liquibrands) had *agreed* to the sale process, and that the dismissal of leave to appeal should not be interpreted as the court's *endorsement* of all aspects of the sale process. Her order refused leave to appeal the orders authorizing the receiver to deal with and to sell the Action. What was left open was not a further challenge to the entire sale process, but, a challenge to court approval of the sale (as per the terms agreed between the parties), including 852 as a bidder or purchaser.

37 Mr. Reider relies on provisions in the receivership orders that permit "any interested party" to apply to the court to vary or amend the orders, as well as the general ability of the court to review, rescind or vary any order under its bankruptcy jurisdiction, pursuant to s. 187(5) of the BIA.

38 What Mr. Reider is seeking goes far beyond the variation of an order, and amounts to an attempt to relitigate what was already decided. Mr. Reider is bound by the December 2014 Orders. He was fully involved in the receivership proceedings and had notice of everything that occurred. He had the opportunity to challenge the receiver's right to sell the Action on whatever basis he saw fit to advance. As the company's only director, he was the deponent of the affidavits filed by Liquibrands in the earlier motions. Whatever the potential merits of Mr. Reider's new argument respecting his rights as a director in relation to an action commenced by a company in receivership, he lost the opportunity to make such arguments when the motions judge ordered the sale of the Action, and approved a sale process agreed to between the parties.

(2) The Second Issue

39 The second proposed issue for appeal is whether a receiver can sell the debtor's action to a defendant to that action, and whether the sale can be by way of credit.

40 The issue, as raised in this case, has no *prima facie* merit.

41 First, once the motions judge determined that the receiver had the right to sell the Action, the parties agreed to the sale process — essentially, they agreed that the Action would be auctioned after notice to the companies' creditors. Mr. Reider does not object to the process, but only to the approval of a sale to 852.

42 The motions judge relied on case law that authorizes a court officer to sell a cause of action by a debtor against a creditor to such creditor, whether by credit bid or otherwise. Mr. Reider offers no principled reason why the motions judge erred in applying bankruptcy cases to the sale in a receivership of a court action to a defendant.

43 In this case, the sale process was agreed upon and approved in the December 2014 Order. The question then was whether the court should approve the sale. No issue is taken by Mr. Reider to the motions judge's consideration of the sale under the governing principles articulated in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). The motions judge supported the receiver's recommendation as a proper business decision. He considered the potential effect of 852 being a bidder, and the net benefit to the receivership resulting from a credit bid.

44 Further, Mr. Reider did not demonstrate any real interest in pursuing the Action. As early as April 2014, the receiver had inquired whether Liquibrands or Mr. Reider was interested in purchasing Sun Pac's interest in the Action, and had received no response. Likewise, for more than a year after the Action was commenced, and before BDO was appointed receiver of Liquibrands, Mr. Reider had done nothing to advance the Action. As such, there was nothing to suggest that Mr. Reider's bid for $100 was anything other than a reflection of his presumed value of the Action. For any different result, the court would have to be satisfied that there was some value to the Action beyond what 852 was owed.

45 In any event, the bulk of the arguments Mr. Reider raises in objecting to 852's purchase of the Action simply reiterate the earlier objections to the receiver dealing with and selling the Action. No other reasons are advanced for why a sale to 852 should not be approved.

I. Disposition

46 For these reasons, the motion for leave to appeal the September 2015 Orders is dismissed.

47 As leave to appeal the September 2015 Orders is refused, there is no need to address Mr. Reider's request for leave to appeal the costs order dated November 5, 2015. This too is dismissed.

48 The moving party, Mr. Reider, shall pay 852 its costs fixed at $15,000, and BDO's costs fixed at $10,000, both amounts inclusive of disbursements and applicable taxes.

Motion dismissed.

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1983 CarswellBC 556
British Columbia Court of Appeal

Plaza Mining Corp., Re

1983 CarswellBC 556, [1983] B.C.J. No. 1179, [1984] B.C.W.L.D. 94, 22 A.C.W.S. (2d) 22, 48 C.B.R. (N.S.) 225, 49 B.C.L.R. 199

Re PLAZA MINING CORPORATION; BANK OF MONTREAL v. PLAZA MINING CORPORATION and VANTREIGHT

Macdonald J.A. [in Chambers]

Judgment: August 26, 1983
Docket: Vancouver Nos. CA001112, CA815321, 97812, 228/82

Counsel: *J.G. Fitzpatrick*, for appellants John and Jones.
R.P. Sloman, for Troutline Creek Golds Limited.
D.J. Mullan, and *D.K. Fitzpatrick*, for Ernst & Whinney Inc., trustee in bankruptcy.
R. McRae, for Erickson Gold Mining Corporation.
N. Kornfeld, and *G. Cutler*, for receiver-manager Thorne Riddell Inc.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Headnote

Bankruptcy --- Administration of estate — Sale of assets — Power of inspectors to approve — General

Bankruptcy --- Administration of estate — Sale of assets

Administration of estate — Sale of assets — Power to sell — Application to stay sale pending appeal of order approving sale — Order being supported by evidence and law — Chances of appeal succeeding not high — Stay prejudicing sale and thus creditors — Stay refused.

Inspectors — Power and duties — Application to stay sale of assets approved by inspectors pending appeal of order approving sale — Inspectors being governing authority unless exceeding power, or acting fraudulent or not in good faith — Stay refused.

The shareholders and directors of a bankrupt mining company brought an application for an order staying the sale of substantially all the assets of the company pursuant to an order obtained by the trustee in bankruptcy which was under appeal. A financing proposal from the applicants had been considered by the inspectors of the bankrupt estate along with three offers for the assets, but they approved acceptance by the trustee of the sale later approved by the court.

Held:

Application dismissed.

The order approving the sale had much support from the evidence and the law, including the resolution of the inspectors which should be given great weight. In the practical administration of an estate, the governing authority is the inspectors and not the court, unless they have exceeded their power, or have acted fraudulently, or not in good faith. The sale could be lost if the stay were granted, thus prejudicing the creditors. Although the applicants were acting bona fide, and refusing the application would frustrate their appeal, the court was entitled to consider the chances of the appeal succeeding, which were not high.

Table of Authorities

Cases considered:

Indust. Dev. Bank v. Douglas Plywood Log Sales Ltd.; Indust. Dev. Bank v. Can. Plywood Corp., [1972] 4 W.W.R. 114, leave to appeal to S.C.C. refused [1972] 4 W.W.R. 115n (B.C.C.A.) — *applied*

Montreal Trust Co. v. McDonell Metal Mfg. Co. Ltd., B.C.C.A., 20th December 1967 (unreported) — *applied*

Niagara Crushed Stone Ltd., Re (1961), 2 C.B.R. (N.S.) 271 (Ont. S.C.) — *followed*
Pachal's Beverages Ltd., Re (1969), 13 C.B.R. (N.S.) 160, 70 W.W.R. 70, 7 D.L.R. (3d) 113 (Sask. C.A.) — *followed*
Petersen (Eric) Const. Ltd., Re (1966), 9 C.B.R. (N.S.) 158 (B.C.S.C.) — *applied*

Application for stay of proceedings pending hearing of appeal from order approving sale of assets of bankrupt company.

Macdonald J.A. **(orally):**

1 This is an application for an order granting a stay of proceedings and in particular an order that the assets of Plaza Mining Corporation not be sold pending the outcome of the appeal. The appeal is from an order of Lander J. made 17th August 1983 approving a sale of assets of Plaza; it was approval of a sale to Erickson Gold Mining Corporation.

2 Plaza owned a gold mining operation in northern British Columbia. It consisted of mineral claims which were being mined, an ore pile of broken ore piled up and ready for smelting, and a mill on the site. The main asset was certain mineral claims known as the Wildcat claims held under option from Troutline Creek Golds Limited. Troutline's consent is required to any assignment or disposition of those claims.

3 On 29th December 1981 Thorne Riddell Inc. was appointed receiver-manager of Plaza, firstly pursuant to a debenture given to the Bank of Montreal and then, on this date, by order of the court. Plaza made a proposal under the Bankruptcy Act, R.S.C. 1970, c. B-3, on 11th March 1982 with the aim of repaying all creditors in full. The claims of the unsecured creditors total in excess of $5,000,000. On 2nd May 1983 Troutline commenced action against Plaza, alleging default under the option agreement. On 20th May the court annulled the proposal of Plaza by reason of its default under the proposal and Plaza is now bankrupt. Thorne Riddell as receiver-manager has since January 1983 been attempting to sell the assets of Plaza by way of tender. That firm received an offer from Sable Resources Ltd.; however, Troutline refused to consent to Sable acquiring the claims. A sale to Sable was approved by a judge in the Supreme Court 25th March 1983 on condition that Troutline's consent be obtained, and the right of any party to discharge the Bank of Montreal debenture and thereby terminate the Sable offer. Troutline refused consent. Proceedings were taken before another judge in the Supreme Court to obtain an order dispensing with Troutline's consent on the ground that it was being unreasonably withheld. There was a three-day hearing and that application was dismissed.

4 On 10th August at a hearing before van der Hoop L.J.S.C., sitting as a local judge, offers were submitted by the receiver-manager but the judge was told that other parties had shown an interest in purchasing Plaza's assets. In the upshot the judge ordered that all interested parties submit offers, not to the receiver-manager, but to the trustee in bankruptcy on or before 12:00 noon 15th August for the consideration of the inspectors. The trustee received three offers. One was from Sable for all assets of Plaza which were offered in a tender package by the receiver-manager for the price of $3,056,000. It was conditional upon the trustee obtaining the consent of Troutline to transfer of the claims. Then, there was an offer from June Resources Inc. for substantially all of the assets of Plaza offered in the tender package by the receiver-manager. The price was $3,050,000, again conditional upon the trustee obtaining the consent of Troutline. Then there was an offer from Erickson Gold Mining Corporation for substantially all of the assets of Plaza including the shares of Plaza Resources Corporation, a wholly owned subsidiary, but excluding certain mineral claims and equipment. The offer was for $4,055,000, but did not require the consent of Troutline because that had already been obtained.

5 The offers were taken before Lander J. at a hearing on 17th August. At that hearing Sable raised its offer to $4,056,000. June raised its offer to approximately $4,200,000. The trustee had also received a refinancing proposal from the shareholder-directors, Mr. John and Mr. Jones, who are the appellants in this court. The day before the hearing before Lander J. the inspectors met to consider the offers and the refinancing proposal and resolved to

accept the Erickson offer. The Erickson offer was as I have already indicated approved by Lander J. The judge had before him a document entitled "Refinancing Proposal", executed 15th August 1983 by Mr. John for and on behalf of the former directors of Plaza, and counsel for the directors told the judge that a trust account had been set up with First Guaranty Limited of Newport Beach, California to which a total of $3,500,000 had been committed which would be available to the creditors of Plaza within 60 days. The proposal also provided for the eventual repayment of all Plaza creditors.

6 One of the assets of Plaza, as I have already indicated, is a stockpile of broken ore requiring processing. The material shows that if the stockpile should freeze, it will have to remain in place over the winter months. Lander J. on 17th August, had material indicating the detail of efforts of the shareholders and directors since the beginning of 1982 to refinance the company.

7 The notice of appeal puts forward two grounds: the first, that the learned chamber judge erred in refusing adjournment applications for the purpose of allowing the parties to prepare appropriate officers; the second, alternatively, that he erred in accepting the Erickson offer as the best offer available under the circumstances. In argument, counsel for the appellants focused it this way: that the judge erred in refusing adjournment applications for the purposes of allowing the parties to prepare appropriate offers and for the purpose of giving directions so that the best possible price could be obtained for the assets.

8 The affidavit of Mr. John describes what happened with respect to the application for adjournment. In paras. 12 and 13 of one of his affidavits he says this:

> Mr. Hardy, counsel for June, requested an adjournment to make a better offer. He provided to the Court the Affidavit of Mr. Bruce H. Campbell, filed the date of the hearing August 17, 1983. A copy of the Affidavit is attached hereto and marked Exhibit 'A' to this my Affidavit.

That affidavit states that more time is needed to gather information and allow June to put forward its best offer to the trustee. Then, in para. 13, Mr. John continues:

> Mr. Jones and myself, through counsel, supported an adjournment on two bases: (a) the bids were virtually increasing in the Courtroom and it was in the best interests of the creditors to get the best possible value. In line with this, we, through counsel, represented that there were various items in the offer which indicated that the values of the items to be sold may be substantially different than the evidence before the Court and we further offered to pay half the cost of a proper valuation which we estimate could be $5,000 to $10,000 in total; (b) our offer was not given fair consideration because of aspersions cast on our past financing efforts and we wished to confirm to the Court the availability of financing under our proposal.

It is to be noted that the appellants in this court are Mr. John and Mr. Jones. June is not appealing.

9 The application for a stay which is made to me is opposed by the receiver-manager, the trustee in bankruptcy, Erickson, and Troutline. Lander J.'s reasons were oral and there has not been time to transcribe them. What he had to say appears from the affidavit of Paul Cameron Wilson, barrister, who was present at the hearing, and I will paraphrase the account he gives in a number of paragraphs of his affidavit. After describing the nature of the application and what had happened before van der Hoop L.J.S.C., Lander J. said that he had reviewed two things in his decision, the affidavits of Mr. McMullen, the trustee — two affidavits — and all of the steps taken by the directors as early as March 1983, and other actions before that. The judge noted that counsel for the directors told him there were sufficient funds in a trust account in Newport Beach, California to refinance Plaza, but he said there was no affidavit material to support the contention, and Mr. McMullen's affidavits (Mr. McMullen is a member of the trustee's firm responsible for the matter) said that his affidavits said that similar assurances had been given by the directors at other times; further, that he noted that the escrow agreement with respect to the funds provided for a lot of conditions and collateral before any funds would be released from the account. He therefore said that he

would give no weight to Mr. McMullen's affidavits, and he was of the opinion that the refinancing by the directors was not even possible at that time. The judge rejected counsel for the directors' adjournment application on the basis that they had attempted in the past to raise moneys and were unsuccessful and there was no indication in the materials that they were going to have any more success now. He dealt with the other offers and said that the two best were from Erickson and Sable. He said that he had looked at the steps taken by the trustee in approving the Erickson offer, including a resolution of the inspectors, and he was of the opinion that he had to give great weight to that resolution for the considerations stated by Smily J. in the Ontario case *Re Niagara Crushed Stone Ltd.* (1961), 2 C.B.R. (N.S.) 271 (S.C.). He also considered the position taken by Troutline, the position that they would consent to a transfer of the claims to Erickson, but not to other bidders. The judge noted that Troutline's reason was that they had considered Erickson's track record in the mining industry; and the judge said he had also considered Erickson's track record and that, definitely, royalties would flow to Troutline if the Erickson offer were approved. He went on to say that if he were to accept an offer other than Erickson's, and Troutline continued to take its present position, refusing consent, it would be necessary to have another trial to determine whether the withholding of the consent was reasonable. He stressed that it was a bankruptcy, and a decision should be made now, that all parties had been involved for some time, and the proceedings had gone on long enough. The judge noted the argument of counsel for June that his clients had been unintentionally misled by the trustee with regard to the shares of Plaza Resources Corporation. But, he said counsel candidly admitted that his clients in fact were not misled and he said anyway that the amount involved would not be sufficient to justify any delay in arriving at a conclusion. The judge found that the trustee had a duty to act prudently and follow a cautious course; and he said, on the materials before him, it would seem that the trustee had done this and that he should follow the trustee and inspectors' decision. He said the trustee is an officer of the court and his decision should be weighed heavily as long as he is acting properly and there was no indication that he was not.

10 The judge then said that Erickson had put up a $1,000,000 irrevocable letter of credit and had given the trustee a certified deposit cheque of $200,000, those actions showed good faith, that they meant business, and were able to carry through on the offer.

11 I come now to a summary of the submissions the appellant makes to me. Firstly, with respect to the nature of the proceedings before Lander J., Mr. Fitzpatrick said that what was before the judge was an application by the receiver-manager for the approval of the sale of assets. He said that no argument was advanced to the judge as to whether that was the nature of the application or whether it was the trustee taking a proceeding in bankruptcy. Counsel said that van der Hoop L.J.S.C. expressly said he was not deciding that matter. As to what it was in fact, Mr. Fitzpatrick said it was not a bankruptcy proceeding, but Lander J. incorrectly assumed that it was. In the result counsel said there was an arguable case that the judge applied the wrong test. He went on to say that even if it was a proceeding in bankruptcy, the bankruptcy test had not been met. Counsel invoked the judgment of Tysoe J.A. (as he then was) in chambers in *Montreal Trust Co. v. McDonell Metal Mfg. Co. Ltd.* B.C.C.A., 20th December 1967 (unreported), which was an application for a stay of proceedings, and counsel said that the principles that should govern me emerged from what Tysoe J.A. said on p. 2 of his reasons as follows:

> The principal matters impelling me are the following. Though the appeal may of course fail, I am satisfied the appellant has an arguable case. If the appeal should succeed and in the meantime the sale authorized and which has been tentatively arranged is completed the appellant's victory may turn out to be a barren one. Against this there is the possibility that the proposed transaction of sale will fall through unless it is completed very shortly. I have weighed these considerations and others, including the equitable rights of the appellant as mortgagor, and feel that the balance of convenience is in favor of preserving the status quo for the time being.

As to the function of the court when the receiver-manager is seeking an order, Mr. Fitzpatrick cited the judgment of this court in *Indust. Dev. Bank v. Douglas Plywood Log Sales Ltd.; Indust. Dev. Bank v. Can. Plywood Corp.*, [1972] 4 W.W.R. 114, leave to appeal to S.C.C. refused [1972] 4 W.W.R. 115n (B.C.C.A.), when, in the course of the judgment given for the court, McFarlane J.A. said this at p. 116:

> I feel no doubt that the function of the Court in advising and giving directions to its officer, the Receiver, whom it appointed, is, so far as can reasonably be done, to obtain for the assets of the mortgagor company the best price which can be obtained for the benefit of all of the creditors.

12 Counsel put to me that before Lander J., in effect, a bidding war was going on and that the proper handling of matters would likely produce better bids. He pointed out that the bids had doubled in the period through which the appellants were trying to refinance. Then counsel said that even if the correct test is the bankruptcy test applied by the judge there was the factor that the inspectors adopted their resolution on 16th August in ignorance of the developments of the hearing the following day, the developments being the significant raising of the offers of Sable and June. Then, counsel said further there was confusion in the bidding as to whether shares of the subsidiary company were included and, if so, their value.

13 It is my opinion that Lander J. had a significant foundation for dealing with this proceeding as one in bankruptcy, that is to say, an application by the trustee in bankruptcy for approval of a sale. On 10th August, before van der Hoop L.J.S.C., an offer was brought in by the receiver-manager. But, as I have said, the judge terminated the proceedings before him by directing that bids be submitted by noon, 15th August, not to the receiver-manager but to the trustee, and for the consideration of the inspectors. And, of course, it was a matter that greatly concerned the creditors. The trustee had the right to redeem the Bank of Montreal security, a right given by the Bankruptcy Act, s. 99(3). The offers indicated a substantial surplus after redemption. The Erickson offer would produce for the unsecured creditors approximately 40 cents on the dollar. Then, before Lander J. there was a notice of motion by the trustee for approval of the Erickson bid; and the receiver-manager through its counsel asked for an adjournment of its motion. Counsel for the receiver-manager informed me without challenge from other counsel here that Lander J. repeatedly indicated during the hearing that he regarded the matter as one in bankruptcy. Now if it was a proceeding of that nature, on that basis, the judge had, I think, much support from the evidence and law for his approval of the Erickson offer. The resolution of the inspectors is significant and I have read it. This is a resolution of 16th August:

> Having carefully considered all of the information available with respect to the offers of Erickson Gold Mining Corp. ... Sable Resources Ltd. ... and June Resources Inc ... as well as the refinancing proposal of the directors of Plaza Mining Corporation, and having had counsel's comments regarding the number of times in the past that the directors' assurances on refinancing have not been fulfilled, and noting that the refinancing proposal as presented August 15, 1983 provides no cash, no guarantees and no security; and further being mindful of the problems which may be encountered in achieving a satisfactory sale of the assets, if there should be further delay particularly in view of the oncoming deterioration of weather, the inspectors have resolves to support the acceptance of the Erickson offer for the following reasons:
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> 1. The Erickson offer contains provision for the delivery of consent from Troutline Creek Golds Ltd. ... necessary to assign the wildcat claims, which provision is not in the offers of either Sable or June;
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> 2. The Erickson offer provides for the dismissal of the action of Troutline against Plaza and others which provision is not in the Sable or June offers or in the Refinancing Proposal;
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> 3. The Erickson offer is competitive with the Sable and June offers as to final price;
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> 4. The Erickson offer provides for a favourable means of adjustment with respect to a multitude of items covered under 'Parcel E';
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> 5. Under the Erickson offer there are certain assets left behind for subsequent disposal by the Trustee with the inspectors' approval;

6. The Erickson offer provides a $1,000,000.00 (One Million Dollars) irrevocable Letter of Credit which matures on December 30, 1983;

7. The Erickson offer is accompanied by $200,000.00 cash deposit which is to be forfeited in the event that Erickson does not complete;

8. The Erickson offer provides for participation to a maximum of $1,000,000.00 in future profits derived from ore mined from claims acquired.

14 Then, as to the law, there is the decision of the Saskatchewan Court of Appeal in *Re Pachal's Beverages Ltd.* (1969), 13 C.B.R. (N.S.) 160, 70 W.W.R. 70, 7 D.L.R. (3d) 113. In the judgment as it was given by Culliton C.J.S. (as he then was), and starting at p. 164 he said [quoting from Duncan and Honsberger, Bankruptcy in Canada, 3rd ed. (1961), p. 563] in reference to the Bankruptcy Act:

> The scheme of the Act is that in practical administration of the estate the governing authority is to be the inspectors and not the Court, and, unless it is shown that they have exceeded their powers ... or have acted fraudulently or not in good faith, the administration is to be governed according to their directions...

Culliton C.J.S. then referred to the expression of the same view in two Ontario cases, one being *Re Niagara Crushed Stone Ltd.*, to which I referred earlier.

15 Counsel for the appellants is quite correct in saying that the inspectors could not have been aware when they passed the resolution of the bid increases the next day by June and Sable. They did not see, I am told, the appellants' escrow loan committal document. However, that document was before Lander J. who noted the conditional nature of the commitment. The inspectors were not aware of the Telex from Munroe Limited Escrow Limited to the solicitors for the appellants saying:

> This is to verify that Escrow 0HJ-1-8075 has been established this 18 day of August for Harold Jones in amount of 2,853,650 U.S. Dollars. We are awaiting further instructions.

16 Then counsel is right in saying that there is some confusion with respect to the Plaza Resources Ltd. shares, that is, the subsidiary I mentioned. The material indicates varying opinions as to the value of those shares. Those shares were included in the Erickson offer but the material indicates that Erickson has signified its willingness to amend the offer simply to exclude them.

17 I think it is noteworthy that it is not the creditors who are seeking this stay, but two shareholder-directors, the two who are applying to refinance. With respect to their efforts I would not conclude, as I was urged to by counsel for the trustee, that they were simply attempting to frustrate and delay the administration of the estate. I think their efforts were bona fide, but there were several efforts and all were unsuccessful, and if a stay is granted the present attempt may still be unsuccessful.

18 In dealing with this application I think statements in the affidavit of Mr. Ross, the president of Erickson, are significant. In paras. 2-5 he says:

> 2. That the Plaza Corporation Mind, Mill and Mineral Claims, are located approximately forty miles south of the British Columbia-Yukon border near Cassiar, B.C. The mineral claims from which ore has been mined to date are all situated on Table Mountain over 4500 feet above sea level. The mine site is subject to snow and freezing from September to May of each winter. The first snowfall of this winter season was on August 17.
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> 3. That one of the principal assets of Plaza is a large mass of broken ore that is stockpiled at the Minesite. That Stockpile will freeze solidly by mid-October of 1983. Once that has occurred, it will not be economically feasible to mill the stockpiled ore until the Stockpile thaws in approximately mid-May of 1984.

> 4. That Erickson's offer to purchase the Assets of Plaza is dependant on its ability to mill the Stockpile before the winter weather makes it economically impossible to do so. That is why paragraph 22 of the Offer leaves it open for acceptance only on or before September 1, 1983. Erickson's present offer and terms of payment might have to be withdrawn if these proceedings delay the milling of the Stockpile until the Spring of 1984.
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> 5. That Erickson's offer is based on the current world Gold prices. If the price of Gold should fall, future offers on Plaza's assets would be correspondingly lower.

Of course, the price of gold may increase. Nevertheless, speaking of the Erickson offer, this is one that may very well be lost if a stay is granted. The trustee in his affidavit expresses his concern that it will be lost and he refers to a letter from the solicitors for Erickson which I think gives him a basis for his concern.

19 I think another factor of weight is the happy situation of Erickson with respect to Troutline. Who can say whether other bidders will obtain consent to assignment of the claims?

20 With respect, I am of the opinion that Lander J. was correct in having regard to the need for a timely decision in this matter. The consideration of expedition was before Nemetz J., now Chief Justice of British Columbia many years ago in a case *Re Eric Petersen Const. Ltd.* (1969), 9 C.B.R. (N.S.) 158 (B.C.S.C.) and at p. 162 he said:

> There is no doubt in my mind that it is the duty of the trustee to liquidate the assets of the estate in an expeditious manner and in a manner consonant with the best interests of all of the creditors. Carrying on now would in my view cause unnecessary expense for an unlimited time with the prospect of a continually worsening situation.

Those words are apposite here.

21 Now I have to attempt to do justice between the parties, that is, not prevent an appellant from prosecuting his appeal while at the same time not causing prejudice to the respondents. Here, the refusal of a stay will effectively frustrate the appeal, but in deciding the matter I am entitled to look at the merits of the appeal; and when I do that, I do not assess as very high its chances of succeeding. Granting a stay will likely prejudice the creditors in the various ways described by the trustees' Mr. McMullen in his affidavit, and I do not know of appropriate terms that could be imposed that would eliminate or significantly reduce the prejudice if I should grant a stay.

22 The application is dismissed.

Application dismissed.

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